

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

In the Matter of the Teaching License of:)	FINAL ORDER
)	
GERALD LEROY SPEES)	Hearing Officer Panel Case
)	No. 20012876

On March 28, 2002, Administrative Law Judge Ella D. Johnson issued a Proposed Order in this case. On April 10, 2002, Gerald Leroy Spees submitted exceptions to the proposed order through his attorney, Aruna A. Masih. Ms. Masih subsequently presented oral argument to the Commission.

After having considered the Proposed Order and the entire record in this case, the Teacher Standards and Practices Commission adopts the attached Proposed Order dated March 28, 2002 and incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Order, except as modified herein.

Conclusion of Law concerning Mr. Spees' interaction with Student MP

The Commission modifies the language appearing on pages 18 and 19 of the Proposed Order as follows:

With respect to the incident which occurred on October 23, 2000, the Commission finds that Spees' yelling and bumping and violating of the personal space of MP did violate OAR 584-020-0040(4)(d), 584-020-0040(4)(n) and 584-020-0030(2)(b). The physical force was not authorized by school policy and was unreasonable under the circumstances. In addition, Mr. Spees' intimidating verbal behavior violated the requirement under OAR 584-020-0030(2)(b) that a teacher use skill in communicating with students, staff and patrons of the district. MP did not testify at the hearing due to a death in the family. However, the eyewitness testimony of Donna Henry (Henry) establishes that the physical force used by Spees in bumping his chest against MP and screaming and violating the student's personal space in an intimidating manner was willful, unjustified and unauthorized. Moreover, Spees' actions were clearly inappropriate even though MP may have feigned swings at him. Spees did not testify or argue that he was defending himself. He testified that he yelled and poked his finger at MP to make sure the student knew he was serious.

Consequently, the Commission concludes that Spees' conduct in this regard violated OAR 584-020-0040(4)(d) and 584-020-0030(2)(b). Because Spees' verbal interaction with the student was a substantial deviation from

professional standards, it also constitutes gross neglect of duty under OAR 584-020-0040(4)(n).

At the outset of the hearing, the Commission was permitted to amend the allegations in the Notice of Opportunity for Hearing to provide that Mr. Spees' conduct with respect to MP constituted both unreasonable physical force under OAR 584-020-0040(4)(d) and a substantial failure to use skill in communicating with students under OAR 584-020-0030(2)(b). The hearing officer's findings support a conclusion that Spees violated OAR 584-020-0030(2)(b).

There was conflicting testimony as to whether Mr. Spees bumped this student. The Commission concludes by a preponderance of the evidence that that Mr. Spees caused some physical contact with the student; even if physical contact had not occurred, Mr. Spees' behavior was inappropriate and amounted to gross neglect of duty.

Mr. Spees requested the opportunity to present additional evidence because of the failure of MP to appear at the hearing. The hearing record is now closed, and no request for a continuance was made at the time of the hearing. In light of this fact and in light of the Commission's conclusions on this issue, the request to present additional evidence is denied.

Conclusion of Law concerning Statements to SR and RB

The Commission modifies the language appearing on page 20 of the Proposed Order by deleting the conclusion that Mr. Spees' statements to these students constituted a violation of Commission standards at the time this conduct occurred.

Mr. Spees made these statements in January 1988. At that time, the Commission had not adopted standards concerning inappropriate verbal conduct of a sexual nature when directed toward a student or students. The Commission's rules prohibited "sexual contact" with a student, but Mr. Spees did not violate this provision.

The Commission nonetheless finds that the sanction contained in the Proposed Order is fully warranted based on Mr. Spees' other violations of professional standards.

ORDER

Based on the foregoing, the Commission adopts the Proposed Order, except as set forth above, and orders that the Oregon Teaching License of Gerald Leroy Spees is suspended for a period of 90 days from the date of the Order.

Dated this 17th day of May, 2002.

TEACHER STANDARDS AND PRACTICES COMMISSION

By: 
David V. Myton, Executive Director

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 service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

On September 11, 2001, the Commission referred this matter to the Hearing Officer Panel for hearing. On March 11, 12 and 13, 2002, Administrative Law Judge Ella D. Johnson conducted a hearing in Salem, Oregon. The record closed on March 18, 2002 following receipt of the Commission's submission of the 1993 version OAR Chapter 584, division 20 which was in effect during the alleged violation. Assistant Attorney General Joe Gordon McKeever represented the Commission. Testifying on behalf of the Commission were: Russell "Buz" Tautfest, David Myton, Michelle Gaines, Donna Henry, Melissa Ivey, Kathleen Shelly, Kathleen Long, Jim Wilson, JV, MS, SJ, LI, TH, DW, and BP.³ Attorney Aruna A. Masih represented Respondent. Testifying on behalf of Respondent were: Joyce Parmeter, Karen Murray, Mike Gaines, Dan Halter, Greg Hile, Pam Morris, JG and Gerald Spees.

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

ISSUES

- 1) Whether Spees violated OAR 584-020-0040(4)(n) relating to Gross Neglect of Duty in seven alleged instances as set forth below and in the Notice.
- 2) Whether the incident which occurred on or about April 2, 1986 wherein Spees allegedly held CP, a male middle school student, in a manner that caused him physical pain, violated OAR 584-020-0040(4)(d).
- 3) Whether the incident which occurred on or about January 21, 1988 wherein Spees allegedly grabbed SR, a female middle school student, by the arm and twisted it behind her back, violated OAR 584-020-0040(4)(d).
- 4) Whether the incident which occurred on or about January 21, 1988 wherein Spees allegedly made suggestive remarks to SR, a female middle school student, and RB, a male middle school student insinuating that they were attracted to each other, violated OAR 584-020-0040(4)(f).
- 5) Whether the incident which occurred on or about April 14, 1989 wherein Spees allegedly grabbed DW, a male middle school student, by the neck and tore his shirt, violated OAR 584-020-0040(4)(d).
- 6) Whether the incident which occurred on or about October 4, 1993 wherein Spees allegedly told a male middle school student in his geography class "If you don't want any more kids, leave your gun in your holster," violated OAR 584-020-0005(5).
- 7) Whether the incident which occurred on or about October 23, 2000 wherein Spees allegedly

³ Students who are or were minors at the time of the incidents are identified by initials.

violated the personal space of MP, a male middle school student, screamed and yelled and bumped him with his chest, violated OAR 584-020-0040(4)(d).

- 8) Whether the incident which occurred on or about December 6, 2000 wherein Spees allegedly grabbed JV, a male middle school student, by the arm, shook him and grabbed him by the chin and head, violated OAR 584-020-0040(4)(d).
- 9) If so, whether Respondent's violations warrant a suspension of 90 to 120 days.

EVIDENTIARY RULING

The Commission's Exhibits 1 through 8, 10 through 16 and 18 through 22 were admitted into the record without objection.⁴ The Respondent's Exhibits A through N and P through V were admitted into the record without objection.⁵

The Commission objected to Respondent's Exhibit O, which is an incident report authored by a teacher named Boyson concerning the behavior of one of the students involved in the allegations against Respondent. The Commission argued that Respondent had not provided a foundation for the exhibit. I delayed ruling on the Commission's objection until the evidence had been heard. Following my review of the record, I find that Exhibit O is admissible, inasmuch as all documents, including hearsay, are admissible in administrative hearings if they are relevant, without regard to whether they violate the Oregon Evidence Code (OEC), with the exception of the privileges authorized by law. ORS 183.450(1); OAR 137-003-0610.

Respondent objected to the Commission's Exhibits 9, and 17 (Spees' deposition). Respondent argued that these exhibits were not relevant in that they involved incidents that were not charged and their admission would be unduly prejudicial. In support of his objection, Respondent cited ORS 342.177(1), which states in pertinent part:

The person against who the charge is made shall have the right to be represented by counsel and to present evidence and argument. The evidence must be confined to the charges.

With respect to Exhibit 9, the Commission argued that it was relevant as to whether Spees engaged in a pattern of misconduct, which implicates the level of sanction. I find that the document is relevant under OAR 584-020-0045⁶ to the sanction imposed. I also find that Respondent was not unduly prejudiced in that he was on notice that the Commission intended to

⁴ The Commission's Exhibits 22 and 23 were improperly marked and I have renumbered them as Exhibits 21 and 22.

⁵ The Commission objected to Respondent's Exhibits M and N but withdrew its objection provided that it was able to cross-examine witnesses concerning the documents. Respondent called the authors of those documents. Consequently Exhibits M and N are also admitted into the record without objection.

⁶ See *infra* at page 21.

raise these prior incidents at the deposition and when he received a copy of the Commission's Exhibits and witness list prior to the hearing.

With respect to Respondent's argument that ORS 342.177(1) prohibits admission of the proffered evidence concerning uncharged prior incidents, the Commission argued that this evidence was offered for the purpose of establishing a pattern of conduct that implicates the sanction warranted. Respondent's objection requires me to determine whether the language of ORS 342.177(1) is ambiguous. If the language of the statute is unambiguous, I apply *Springfield Education Assn v. School Dist*, 290 Or 217 (1980) to determine the analysis applied. Here, I find that the statute is unambiguous and apply *Springfield*. In *Springfield*, the Court determined that statutes could be divided into three classes: "exact" terms, where the terms have an exact meaning which require only fact-finding; "inexact" terms where the terms have a less precise meaning and require interpretation by the agency; and "delegative" terms, where the terms express "non-completed legislation in which the agency is given delegative authority to complete." *Id.* at 227-29.

ORS 342.177(1) states in relevant part that, in hearings under ORS 342.176, "[t]he evidence must be confined to the charges." I find this statute contains exact terms. The Commission has applied this statute to find that it is allowed to offer evidence of instances not charged to establish a pattern of conduct for the purpose of determining the sanction. I conclude that the agency's application of the statute to the facts of this case are reasonable in that this evidence is not being offered as proof of other charges. Accordingly, I overrule Respondent's objection to Exhibit 9.

With respect to Exhibit 17, Respondent objected to page 38 line 12 through page 42 line 14 and page 70 line 3 through page 73 line 11. Respondent argued these portions of the deposition were not admissible because they relate to incidents that have not been formally charged. The Commission argued that those portions of the deposition were relevant to show that Respondent had been put on notice concerning his behavior and to establish a pattern of conduct relevant to determining the sanction. I find that page 38 line 12 through page 42 line 14 and page 70 line 3 through page 73 line 11 are relevant in that regard and the Commission's application of ORS 342.177(1) to the facts here is correct. Consequently, I deny Respondent's objection in this regard as well.

Respondent also objected to pages 91 through 100 of Exhibit 17, arguing that it violated the psychotherapist-patient privilege. I deferred ruling on Respondent's objection. ORS 183.450(1) requires agencies and those who conduct administrative hearings "to give effect to the rules of privilege recognized by law." ORS 40.230 (OEC 504) recognizes the psychotherapist-patient privilege. OEC 504(3) states that the privilege to refuse to disclose and prevent others from disclosing confidential communications may be claimed by the patient, which in this case is Respondent. A privilege may be voluntarily waived by the holder of the privilege. ORS 40.280 (OEC 511). Following review of page 91 line 25 through page 100 line of the deposition, I find that Respondent voluntarily waived the privilege by answering the Commission's questions despite his counsel's warnings. Moreover, even if he did not waive the privilege, I find that the information contained in the deposition did not implicate any privileged communication. Consequently, I overrule Respondent's objection based on privilege and admit

page 91 line 25 through page 100 line 17 of Exhibit 17 into the record.

FINDINGS OF FACT

- 1) Spees has spent 25 years of his life teaching middle school students. He grew up in the Philomath area and graduated from Philomath High School. He attended Oregon State University (OSU) from 1967 to 1970. After serving in the US Army for 18 months, Spees returned to OSU, completed a BS degree, and obtained a teaching license in 1976. His teaching certificate allowed him to teach part-time language arts and part-time social studies. Following graduation from OSU, he and his wife moved to Willamina, Oregon and he became employed by the Willamina School District No. 30J (the district). He taught seventh and eighth grade social studies, math, and science at the Willamina Elementary School.⁷ Spees was a "catch-all" teacher for the first 17 or 18 years of teaching, meaning he was assigned to teach any subject area that needed a teacher. He also coached girls' and boys' sports. (Exs. 17-4 through 17-14; Spees' testimony)
- 2) Spees is over six feet tall and weighs approximately 245 pounds. He was routinely assigned to hall, bus, cafeteria, detention, and gym duty where he monitored the students' behavior and intervened in disciplinary problems. Most of the teachers were not assigned to these duties. By routinely assigning him these duties, the school district placed him in the position of being the primary disciplinarian. (Spees' testimony).
- 3) Following his first year of teaching, Spees was rated as an effective teacher and an asset to the elementary school staff by Principal Ted Busselle. (Ex. E).
- 4) During the 1979-80 school year, Spees was employed in the Willamina Junior High School⁸ as a social studies teacher. In Spees' performance evaluation for the school year, WJHS Principal Gene Metzzer noted his concern that Spees needed to modify his classroom disciplinary techniques and that he would expect "a more personalized, private mode of disciplinary control techniques" in the next school year. (Ex. 1).
- 5) In 1982, the district adopted a Student Discipline policy. The policy stated that student discipline was based upon a guidance-counseling philosophy designed to produce behavioral changes with three major objectives centered on teaching the fundamental concepts for living, including "[u]nderstanding and respect for the rights, dignity and safety of all individuals." The policy was revised in 1989. (Ex. C).
- 6) In Spees' performance evaluation for the 1982-83 school year, the WJHS principal noted he needed to avoid making inappropriate statements or remarks in the classroom. (Exs. 2, E).

⁷ The elementary school subsequently burned down. In approximately 1982, the middle school moved into its own side of a building it shared with the elementary school. (Exs. 17-8, 17-13).

⁸ The Willamina Junior High School subsequently became the Willamina Middle School.

- 7) During the 1984-85 school year, Spees taught language arts and social studies. In his performance evaluation response, Spees stated that his view on the use of physical force differed from that of the principal's and noted that neither method fit all students but that he would do as instructed. (Exs. 3, E).
- 8) In 1984, Dr. Kathleen Shelly, became principal of Willamina Middle School (WMS). In 2000, Dr. Kathleen Long became the principal at WMS. (Exs. 17-32, E; testimony of Dr. Shelly and Dr. Long).
- 9) During the period of time that Dr. Long served as principal, John Wilson served as the "TOSA" or teacher on special assignment. As the TOSA, he was responsible for scheduling. Several parents objected to their children being placed in Spees' class. Up until Dr. Long became principal, the complaints were handled by moving the objecting parent's children to another class. (Ex. U; testimony of Dr. Long).
- 10) Some parents had Spees as a teacher when they attended school in Willamina and they were concerned about him telling dirty jokes, making sexual innuendoes, and making inappropriate racial comments. One parent reported that he had thrown a stapler in class. Other parents thought Spees was a very good teacher who provided their children with the skills they needed to be successful in high school. (Testimony of Dr. Long, Karen Murray).
- 11) On January 9, 1989, the district adopted a policy on Hazing/Sexual Harassment. (Ex. A). The policy defined sexual harassment as "unwelcome conduct, either sexual or non-sexual, that is directed toward a person because of that person's gender." The policy stated that prohibited sexual harassment occurs when "unwelcome sexual or other gender based conduct interferes with a student's performance or creates an intimidating, hostile or offensive school environment," and noted that the conduct could be by a teacher, student, administrator or school staff. The policy also stated that sexual harassment included "[m]aking sexually suggestive remarks, gestures, or jokes, or remarks of a sexual nature about the victim's appearance." A formal complaint process was part of the policy. The policy was revised in 1993. (Ex. B).
- 12) The district adopted a Corporal Punishment policy in 1990, which was defined as "willful infliction of, or willfully causing the infliction of, physical pain." The policy prohibited all corporal punishment and the use of physical force to discipline or punish a student but authorized staff members to use physical force "when, in his or her professional judgment, the physical force is necessary to prevent a student from harming self, others or doing harm to school district property." (Ex. D).
- 13) WMS had a discipline/detention system in place during the period when Dr. Long was principal. If students received a certain number of detention slips, they were placed on a behavior contract, which had three levels with different consequences. A student could be placed in the ABLE class⁹ for a period of time, receive in-school suspension, home

⁹ The ABLE class was a class for students with academic and/or behavioral problems.

suspension or expulsion. (Ex. S; testimony of Dr. Long).

- 14) In 1990, Willamina School District Superintendent Gerry Elstun investigated a complaint by a parent that Spees used excessive force and choked FS as he broke up a fight between FS and another middle school student. The superintendent concluded that the facts as reported by the students were inconsistent and that disciplinary action was, therefore, not warranted. The superintendent cautioned Spees that his history and reputation made him more susceptible to these allegations than other staff and that Spees must be more cognizant of why, when, where and how he touched students. (Ex. 9).
- 15) In Spees' teacher evaluation for 1990, Dr. Shelly noted that she appreciated "his efforts to maintain discipline during lunch while allowing students to enjoy this time together. He and the other noon supervisors are to be commended for doing a difficult job well." (Ex. E).
- 16) In Spees' 1994 teacher evaluation, Principal Russell "Buz" Tautfest stated that "Jerry needs to work [on] using good professional judgment when talking about controversial issues. He needs not to give his own personal views on subjects that may offend others, [i]f it is not appropriate to the age of the students." (Ex. E).
- 17) Close to the date of the prom in 2000, LI was in Spees social studies class. Spees made inappropriate comments about "how to get girls drunk." He called LI and some other female students "beautiful." She complained to her mother. LI asked Spees to stop calling her "beautiful." He continued to do so. Spees later told the class about his testicular cancer condition when they were discussing diseases. She complained to her mom again and her mom talked to the interim principal. She later talked to Dr. Long about Spees inappropriate comments. (Testimony of LI and Melissa Ivey).
- 18) In June 1996 and June 2001, Spees received Distinguished Service awards from the school district. (Ex. F).
- 19) Spees used a disciplinary system, which was developed by the entire staff wherein he would write a student's name on the board for disruptive behavior as notice to the student that the behavior needed to be discontinued. Thereafter, Spees would place a check mark next to the student's name if the student continued to disrupt class and directed the student to write a sentence apologizing for the behavior. A second check next to the student's name resulted in an automatic detention slip, which was to be signed by the student. WMS's disciplinary system assigned a number of points to each type of misbehavior. After the student was given a certain number of points within a specified period, the student was placed on a behavior contract with possible placement in the ABLE class. WMS also used a Discipline Matrix governing suspension, restitution, and possible police contact for a variety of offenses based on the number of referrals. (Exs. 17-24, 19, 20; testimony of Spees and Pam Morris).
- 20) Despite complaints about Spees' disciplinary style, WMS continued to assign him to duties, such as monitoring the hall, cafeteria, and gym for disciplinary problems. He was also assigned to oversee students sent to detention for disciplinary problems during the lunch hour. At some point, Spees requested not to be assigned to these duties and was not assigned

that school year. The next school year, the school continued to assign him to those duties. (Exs. 17-28 through 17-32, 17-57, 17-92 , 17-93; testimony of Spees and Pam Morris).

April 2, 1986 Incident with CP

- 21) On April 2, 1986 during his fifth period class, CP was noisy and Spees put CP's name on the board. CP then received a check mark for talking. CP stated that he would not accept the resulting detention and refused to sign the detention slip. Spees place another check by CP's name. At the end of the class, CP walked out of class leaving the detention slip and a book at his desk. Spees put his hand on CP's shoulder to "reassure" him and guided him back to the classroom. CP refused to pick up his detention slip and book. Spees moved his hand from CP's shoulder to the nape of CP's neck and raised his voice, directing CP to pick the items up. CP ducked under Spees hand. CP yelled to the incoming sixth period class that they were witnesses to Spees choking him. CP later told his father that Spees had choked him. CP failed to show up for detention and Spees wrote a referral form to the office with a description of the incident. Spees did not choke CP and cause CP physical pain. (Exs. 6, 17-26 through 17-32; testimony of Spees and Dr. Shelly).
- 22) The OEA contract required the administration to hear the teachers' side of the story before taking action on any complaint. Dr. Shelly refused to talk to Spees about the incident before taking disciplinary action. Spees did not file a grievance against Dr. Shelly for her refusal to meet with him.¹⁰ (Exs. 5, 17-35 through 17-40; testimony of Spees, Pam Morris and BP).
- 23) On April 7, 1986, Spees received a letter of reprimand from Dr. Shelly concerning the incident involving CP. The letter stated that Spees had caused physical pain to the student when the student refused to comply with Spees' directions. The letter also referenced their discussion about a prior incident involving BP, a male middle school student, which occurred on February 25, 1986. BP was teasing JD. JD was very tall at five feet eight inches. BP jumped up like he was going to hit JD and Spees held BP's arms in a bear hug below the rib cage and got between BP and JD. While Spees was holding his arms, JD slapped BP. (*Id.*)
- 24) Dr. Shelly stated in her letter of reprimand that "[p]hysical and/or mental mistreatment of any student by you will not be tolerated in the future. * * * In the future, you are to refrain from touching any student except to protect yourself or another person from physical harm." Spees refused to sign that he had received the reprimand. (Exs. 5; testimony of Spees and Dr. Shelly).
- 25) On April 8, 1986, Spees wrote a letter in response to the letter of reprimand denying that he had caused CP physical pain. He complained that, prior to writing the letter, Dr. Shelly interviewed students but did not meet with him to hear his side of the story. Spees stated that he had only put his hand on CP's shoulder reassuringly and then moved it up to the nape of

¹⁰ Pam Morris, the OEA representative for the school, stated that it was up to the teacher whether to pursue a grievance and that Spees had six or more grievances against the district but decided not to grieve the letter of reprimand. (Pam Morris' testimony).

the neck when CP ducked from under his hand. Spees also stated that CP had rubbed and twisted his own neck to make it look red. He complained that Dr. Shelly did not support him when parents voiced concerns about their children being in his class. (Exs. 6, H; Spees' testimony).

January 21, 1988 incidents with SB and RB

26) On January 21, 1988, in Spees' fourth period geography class, two students, SB, a female seventh grade middle school student, and RB, a male seventh grade middle school student, were teasing each other. RB, who had a history of disruptive behavior both at school and on the school bus, already had his name on the board with one check mark. To avoid a second check mark which would have possibly resulted in a three-day suspension, RB begged Spees to allow him to do push-ups instead. Spees at first declined to allow him to do push ups because it was his understanding that push-ups were no longer allowed as a disciplinary sanction. RB then asked if he could just assume the push up position and hold it. Spees agreed. While RB was holding the push up position, his face became red and another student asked why his face was so red. Spees jokingly said that it was because SB liked RB. SB was a student who had severe mood changes and was easily frustrated. SB kicked Spees and when she tried to kick him a second time, he blocked her kick. When SB tried to hit Spees, he grabbed her wrist. He did not twist her arm behind her back. He told her to stop and she ran out of the classroom. (Exs. 7, 17-43 through 17-51, K; testimony of Spees and Pam Morris).

27) Spees later explained in a meeting with Dr. Shelly, OEA representative Pam Morris and Willamina School District Superintendent Mike Wsiaki that he had merely grabbed her arm. Spees also explained that he sometimes made comments about the students' relationships to test the seriousness of the conflict and to possibly defuse a tense situation when two students were squabbling. (Exs. 7, 17-52).

28) In a letter of reprimand dated January 25, 1988, Dr. Shelly concluded that Spees' comments were inappropriate coming from a teacher because middle school students were very sensitive to personal comments. Dr. Shelly further concluded that, although it was inappropriate for SB to kick him, his remarks contributed to SB's inappropriate behavior. Dr. Shelly noted that Spees was "unnecessarily rough" in responding to SB's actions. She warned him that in the future, if he made inappropriate personal comments to students, used inappropriate physical force with them or required them to do push ups or "burpees"¹¹ as a form of discipline, he would be subject to disciplinary action which could include termination of his employment as a teacher at WMS. She later clarified that she did not feel that it would be a problem for him to compliment students on their appearance or on appropriate behaviors. Spees signed the reprimand letter¹². (Exs. 7, J; testimony of Spees and

¹¹ Pam Morris, the OEA representative for the school, credibly testified that other teachers were not notified of the change in policy and continued to use push ups as a form of discipline.

¹² Spees testified that he signed the letter of reprimand because he had learned that a refusal to do so constituted insubordination, which could result in his immediate dismissal. By signing the letter, he acknowledged that he received the letter, not that he agreed with it.

Dr. Shelly).

29) By letter dated January 26, 1988, Spees responded to Dr. Shelly's reprimand. He denied that he had twisted SB's arm behind her back. He stated that he only defended himself by restraining her from striking him. He stated his belief was that he was authorized to use physical force to protect other students and himself. (Ex. I).

April 14, 1989 incident with DW

30) On April 14, 1989, Spees was on duty in the gym during the lunch hour when DW, a male seventh grade middle school student, attempted to make a basket in a basketball game he was playing with other students. DW was just a little over five feet tall and weighed about 120 pounds. As he came down from his lay up, DW fell into Spees who was in the out-of bound area approximately five feet behind the basket. Spees saw something coming at him out from the corner of his eye. DW's arm was raised in what looked like a karate position. Spees defended himself by deflecting DW's body away from him and DW's weight and motion carried him off to the side. As a result of the impact, DW's neck was scratched above the collar and below the chin and Spees' hand accidentally caught DW's shirt, ripped it and a button popped off. Spees thought DW had intentionally run into him and ordered him out of the gym. DW told Spees that he would "get him for this." DW and TH, another middle school student, subsequently reported the incident to Dr. Shelly, claiming that Spees had choked DW. (Exs. 8, 17-56 through 17-62; testimony of Spees, DW and TH).

31) Spees was very familiar with DW. DW had a history of doing fake punches and karate-like moves to intimidate teachers and other students. DW wanted to be the center of attention. Karen Murray who ran the ABLE class for student's with academic and/or behavioral problems found DW to be a challenging student who became loud and combative when he did not get his own way. (Ex. 17-59; testimony of Spees and Karen Murray).

32) After the incident, Spees lectured DW's language arts class, which he taught, about the students' responsibility to control the atmosphere of the school in the context of a discussion of the book "Call of the Wild." Spees related the topic to the incident with DW. (Ex. 17-61; Spees' testimony).

33) Willamina High School (WHS) Principal Yates investigated the incident because Principal Shelly was away from the building. Upon investigation of the incident, TH confirmed DW's story that Spees grabbed DW by the neck and tore his shirt and that Spees looked angry. JP, another middle school student, confirmed Spees story that DW made aggressive moves toward Spees but did not think that DW was going to hit him. Thereafter, Spees met with WHS principal Yates and DW's grandmother. DW's grandmother seemed satisfied with Spees explanation, but asked that DW and his brother be removed from Spees' class. Yates told DW that the incident could not have happened the way he described and that Spees did not engage in improper conduct but that he had "overreacted." (Ex. 8; testimony of Spees and Pam Morris).

- 34) Dan Halter (Halter), a physical education (PE) teacher at WMS, provided information to the administration that following the April 4, 1989 incident, DW and another student were in the lunch room rubbing and pinching DW's neck to make it look worse. Halter also observed DW in his PE class over the next two days and recorded the number of times DW initiated physical contact with him and other students. In the two 39 minute periods, DW initiated physical contact nine times with other students and twice with Halter. Halter characterized DW as "very aggressive." (Ex. M; Halter's testimony).
- 35) Greg Hile (Hile), also a teacher at WMS and DW's neighbor, reported to Dr. Shelly that on many occasions, DW had made aggressive and threatening gestures at him which included partially swinging his closed fist at Hile or intentionally running into him. On several occasions, DW had also knocked Hile off his balance and into others. Hile had warned DW that, if he continued to behave in that manner, Hile did have the right to defend himself. Hile further reported that DW always threatened retaliation from his parents when confronted with his own misbehavior. Hile opined that, given DW's behavior in the April 4, 1989 incident, Spees acted in a reasonable manner. (Ex. N; Hile's testimony).
- 36) Another teacher reported an incident with DW and TH on April 6, 1989, where the students intentionally obstructed the crosswalk by stopping in the middle of the crosswalk to tie their shoes and then took baby steps through the crosswalk. This was the second time DW and TH had done this while the teacher was pulling out of the staff parking lot. The teacher raised the concern that the students' actions were harassing and reflected an attitude of intentionally trying to irritate or bait the teacher. (Ex. O).
- 37) In a memorandum dated April 12, 1989 from Dr. Shelly to Spees, Dr. Shelly noted that another teacher had subsequently seen DW and other students in the lunchroom rubbing DW's neck to make it look worse. She acknowledged that DW did make an aggressive feinting move toward Spees and had not been completely honest in describing the incident. However, she concluded that Spees had "overreacted" and directed Spees to use physical restraint only in a situation where physical harm or damage to school property may otherwise occur. Where physical restraint was needed, she directed him to avoid touching the student in the area of the student's head or neck. Dr. Shelley warned Spees that failure to follow this directive would result in disciplinary action, including termination of his employment. (Ex. 8).

October 4, 1993 incident

- 38) On October 4, 1993, Spees was discussing the overpopulation of India and the economics of having a large family in his geography class.¹³ A student asked how can you prevent having more children. Spees responded, "leave your gun in the holster." His comment was not directed to any one student. (Exs. 10, 17-63 through 17-66; testimony of Spees and Russell

¹³ Russell "Buz" Tatufest (Tatufest), who was the principal at that time, testified that Spees made the comment in his "social studies class" but that and Tatufest could not remember what the context of the comment was.

"Buz" Tatufeast).

- 39) WMS principal Russell "Buz" Tatufeast overheard a male middle school student who was offended complaining about the comment. When he caught Spees in the hall, he asked about the comment. Spees did not deny making the comment but later acknowledged that there was a better way to promote abstinence. The principal had also received complaints about other inappropriate comments by Spees about the students' appearance and his own philosophy about life. Compared to other teachers, more parents asked for their children not to be assigned to Spees' class. (*Id.*).
- 40) On November 19, 1993, the principal issued a written reprimand to Spees for his poor judgment in making the comment to his geography class. The principal noted that middle students often took things too literally and often believe a general comment is directed to them. In this case, the principal stated that Spees' comment was interpreted as offensive by this particular male student, whose brother was a senior in high school with a new baby. The principal cautioned Spees that further incidents of a similar nature should not occur and if they did, further disciplinary action may be taken. (Ex. 10).

October 23, 2000 incident with MP

- 41) On October 23, 2000 during the high school's homecoming noise parade which the middle school and elementary students were permitted to watch, the middle school students were unusually rowdy and ill behaved. Spees had just addressed a rock-throwing incident when MP, a male middle school student, approached Spees and asked him if he wanted to fight. MP took a couple of swings at Spees. Spees continued walking and told him to "knock it off." Spees thought that MP was trying to annoy him. The student took a third swing at Spees and almost hit him. Spees was red faced and pointed his finger in the student's face in an angry manner. He stood inches away from MP, "chewed" him out, and bumped him with his chest while MP was trying to back away. Because of the noise created by the noise parade and Spees' desire to make sure that MP knew he was serious,¹⁴ Spees was yelling at the student. Because of the noise, the other teachers observing the incident could not hear what was said. (Exs. 11, 17-75 through 17-81; testimony of Spees, Donna Henry, Dr. Long).
- 42) The incident was witnessed by special education teacher Nancy Hayden and school counselor Donna Henry. They were 15 feet away from Spees and MP when the incident occurred and nothing was blocking their view. They reported the incident to WMS principal Kathleen Long.¹⁵ Dr. Long talked to MP one week later and he indicated that the incident was not "a big deal." Nonetheless, Dr. Long told Spees that it was inappropriate for him to lose his temper and shout at a student in that manner. Spees cited personal problems and she offered him counseling. Dr. Long cautioned him not to compromise his professional demeanor by

¹⁴ Spees also testified that he had learned in the army as a military policeman that his voice was his best "weapon."

¹⁵ Spees had previously spoken to Dr. Long about Hayden after Dr. Long suggested that he meet with her about his special education students. He told Dr. Long that he did not trust her because she had previously filed a complaint against another teacher. (Spees' testimony).

shouting or advancing on a student. (Ex. 11; testimony of Spees, Donna Henry and Dr. Long).

December 6, 2000 incident with JV

43) On December 6, 2000, several students had been excused early by the sixth grade teacher and were in the hall when Spees was leaving his classroom, including JV, a male sixth grade student at WMS, and MS, a female sixth grade middle school student. The last period of the day was ending. There were three female students standing in the open door of the sixth grade class. Spees asked JV and MS why they were in the hall because the bell dismissing them from class had not rung. He also asked them whether they had a hall pass. Spees decided to stay in the area to ensure that there were no problems.¹⁶ When MS asked JV who Spees was, he replied that Spees was a teacher and that he was okay because they were just talking about Jay Leno's chin. MS and JV started making fun of each other. Spees saw a behavior problem in the making and said "you don't say that" and grabbed JV's chin and head and bent his head back. LI who was observing the incident from 10 to 12 feet away, thought Spees appeared to be angry. JV grabbed Spees' finger that was holding his chin and pulled it back because Spees was hurting him. This caused Spees intense pain. Spees yelled at JV to stop and tried to extricate his finger by holding JV in a bear hug and pulling his finger away. After Spees extricated his finger, he let go of JV and JV ran away. JV's mother picked him up from school right after the incident. JV was upset and she could see red marks on his face. He told her that Spees had grabbed his chin. (Exs. 15, 17-81 through 91; testimony of JV, MS, SJ, Michelle Gaines, Spees and Dr. Long).

44) JV had a history of being disruptive in the classroom and had been placed in the ABLE class for students with academic and/or behavioral problems. He was also placed on three behavior contracts during the year due to excessive detention slips. A study done by Jim Wilson indicated that five to seven percent of the students were responsible for 87 percent of the detentions. JV was in the five to seven percent group. JV had never lied or made false accusations against teachers and took responsibility for his own behavior. In January 2001, JV successfully completed the school's four-week course in anger management taught by Donna Henry. (Testimony of LI, Karen Murray, Michelle Gaines Joyce Parmeter and Donna Henry).

45) Spees did not file a disciplinary referral concerning JV's conduct. JV's mother filed a complaint against Spees. Dr. Long talked to JV and he demonstrated how Spees had grabbed his chin. Without meeting with Spees to hear his side of the story, Dr. Long filed a child abuse report¹⁷ with the Yamhill County Sheriff's Office at the direction of the superintendent. Three female middle school students, LI, SJ and MS, were named as witnesses in the investigation by the sheriff's office. Spees also asked Dr. Long to talk to

¹⁶ Spees testified that he was also covering for Mr. Sears, a new sixth grade teacher. Spees understood from Dr. Long that after the first month, sixth grade students were not to be let out early to go to their lockers. (Spees' testimony).

¹⁷ The charge was actually for "harassment." (Ex. 15).

another student, JG, but JG told Dr. Long that he did not remember the incident.¹⁸ Dr. Long thought Spees was evasive. (Exs. 12, 13, 15, 17-85; testimony of Michelle Gaines, Spees and Dr. Long).

- 46) Spees told Dr. Long that he had "chucked" JV under his chin and otherwise did not touch him but that JV had grabbed Spees' finger and bent it back.¹⁹ Spees stated that he had used only enough force to free himself. On December 8, 2000, Spees was placed on paid administrative leave while the matter was investigated. He was referred to counseling. Spees was allowed to return to his teaching position on January 8, 2001. (Exs. 12, 13, 14, O).
- 47) On January 10, 2001, Dr. Long issued a written reprimand to Spees for his conduct on December 6, 2000 and warned him that further incidents of this kind would result in disciplinary action, including dismissal. Dr. Long directed Spees to refrain from initiating physical contact with students in responding to student misbehavior, to follow established discipline procedures, to participate in a series of counseling sessions addressing anger management, and to refrain from discussing this incident with students. Spees appealed the reprimand and the matter is still pending. Spees subsequently talked to other teachers in the lunchroom about the incident. When Dr. Long found out, she "chewed" Spees out. (Ex. 12; testimony of Spees' and Mike Gaines).
- 48) The Yamhill District Attorney (DA) declined to prosecute Spees or JV for the incident because of the conflicting evidence, which would have made it impossible to get a conviction for child abuse or harassment. The DA noted JV had a strong self-defense claim. Despite the district attorney's decision, Dr. Long told Spees that she thought he was still "guilty." Dr. Long did not read his file until late in the process. (Ex. R; testimony of Mike Gaines and Dr. Long).
- 49) Spees completed all five counseling sessions. In March 2001, Spees took sick leave for his high blood pressure on the advice of his doctor and has not returned to work since then. (Ex. 17-21; Spees' testimony).
- 50) After the incident with JV, Joyce Parmeter talked to Dr. Long and asked her if teachers should refrain from touching students. Dr. Long said teachers should continue to touch students because "they need it." (Joyce Parmeter's testimony).

¹⁸ JG testified that no one talked to him after the incident. However, I do not find JG to be an accurate historian. Moreover, even if I did, I would not find his testimony persuasive. He testified that JV initiated the physical contact and that he did not see Spees' hands on JV during the incident. However, his testimony indicates that he was present only for the last part of the incident after the bell rang. Additionally, I find his testimony is not credible based on his demeanor at hearing and because he offered to help Spees only after he saw Spees "down in the dumps" and Spees told him that it was his last day at work due to the incident with JV. (JG's testimony).

¹⁹ This is contrary to Spees' testimony at hearing that he only lightly touched JV's chin. I do not find Spees' testimony persuasive because it is contrary to Dr. Long's credible testimony concerning Spees' statements to her and the eye witness testimony of JV, MS, SJ.

CONCLUSIONS OF LAW

- 1) Spees violated OAR 584-0020-0040(4)(n) relating to Gross Neglect of Duty in three of the instances set forth in the Notice.
- 2) During the incident which occurred on or about April 2, 1986, Spees put his hand on the shoulder of CP, a male middle school student, and moved it up to the nape of his neck but did not cause physical pain, which did not violate OAR 584-020-0040(4)(d).
- 3) During the incident which occurred on or about January 21, 1988, Spees acted in self-defense when he restrained the arm of SR, a female middle school student, from hitting him, which did not violate OAR 584-020-0040(4)(d).
- 4) During the incident which occurred on or about January 21, 1988, Spees made inappropriate remarks to SR, a female middle school student, and RB, a male middle school student, stating that SR was attracted to RB, violating OAR 584-020-0040(4)(f).
- 5) During the incident which occurred on or about April 14, 1989, Spees acted in self-defense when he deflected DW, a male middle school student, from falling into him while he was on gym duty and accidentally scratched DW's neck and tore his shirt, which did not violate OAR 584-020-0040(4)(d).
- 6) During the incident, which occurred on or about October 4, 1993, Spees inappropriately made the offensive comment in his geography class that the way to avoid having more children was to "leave your gun in your holster," which did not violate OAR 584-020-0005(5).
- 7) During the incident that occurred on or about October 23, 2000, Spees violated the personal space of MP, screamed and bumped him with his chest, violating OAR 584-020-0040(4)(d).
- 8) During the incident that occurred on or about December 6, 2000, Spees grabbed JV, a male middle school student, by the chin and head, violating OAR 584-020-0040(4)(d).
- 9) Spees' violations warrant a suspension of 90 days.

OPINION

Respondent challenges both his alleged violations of OAR 584-0020-0040(4)(n), 584-020-0040(4)(d), 584-020-0040(4)(f), and 584-020-0005(5) and the proposed suspension of 90 to 120 days. 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).

Alleged violations of OAR 584-020-0040(4)(n)

OAR 584-020-0040(4)(n) 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:

* * * *

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

As set forth below, I find that Spees violated the professional standards in three instances.

Alleged violations of 584-020-0040(4)(d).

OAR 584-020-0040(4)(d) 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:

* * * *

(d) Unreasonable physical force against students, fellow employees, or visitors to the school, except as permitted under ORS 339.250[.] (Emphasis added).

ORS 339.250 states in relevant part that:

(2) Pursuant to the written policies of a district school board, an individual who is a teacher, administrator, school employee or school volunteer may use reasonable physical force upon a student when and to the extent the individual reasonably believes it necessary to maintain order in the school or classroom or at a school activity or event, whether or not it is held on school property. The district school board shall adopt written policies to implement this subsection and shall inform such individuals of the existence and content of these policies. (Emphasis added).

In accordance with ORS 339.250, the district adopted a written policy on corporal punishment to implement the statute. The policy defined "corporal punishment" to include "willful infliction of, or willfully causing the infliction of,

physical pain." The policy prohibited all corporal punishment and the use of physical force to discipline or punish a student but authorized staff members to use physical force "when, in his or her professional judgment, the physical force is necessary to prevent a student from harming self, others or doing harm to school district property." Reading and interpreting the statute, rule and district policy together, I find that teachers are prohibited from using physical force which willfully inflicts or willfully causes physical pain, and is not necessary to maintain order in the school or classroom, prevent a student from harming self, others or doing harm to school district property.

With respect to the incident which occurred on or about April 2, 1986, I find that TSPC failed to meet its burden of proving that Spees violated OAR 584-020-0040(4)(d) because there is no credible evidence that Spees willfully caused CP physical pain. CP did not testify at the hearing and the only testimony other than the testimony of Spees concerning the incident was that of Dr. Shelly, who was not present during the incident. Dr. Shelly testified that when she was the principal, Spees mishandled a student disciplinary problem because he caused physical pain in order to force a student to follow his directions. She stated that standard operating procedure was to talk to the student and teacher before issuing a written reprimand, However, she did not have a specific recollection about talking to Spees in this regard but thought she remembered that Spees stated that his actions were justified.

I do not find Dr. Shelly's testimony in that regard to be persuasive because Dr. Shelly's investigation of the incident was incomplete in that she refused to speak to Spees about what had occurred. Pam Morris, the OEA representative, corroborated Spees' testimony that Dr. Shelly refused to meet with them. Moreover, even though the written reprimand stated that Spees caused physical pain to CP, there was no evidence that Spees intentionally used physical force or inflicted or caused pain to CP. Neither Dr. Shelly nor any other witness testified that Dr. Shelly had spoken to CP or his parents or how she knew that Spees intentionally caused CP physical pain. Additionally, it also appears that Dr. Shelly formed her conclusion of what occurred in the incident with CP based in part on a prior incident involving BP where Spees held BP's arms while JD slapped him, because she cited that incident in her letter.

On the other hand, Spees credibly testified that he called CP back to pick up his detention slip and book as CP was walking out the door of the classroom and that he put his hand on CP's shoulder to reassure him and guided him back to the classroom. After CP refused to pick up his detention slip and book, Spees moved his hand from CP's shoulder to the nape of his neck and raised his voice, directing CP to pick the items up. CP ducked under Spees hand and ran away after accusing Spees of choking him. Consequently, I conclude that this allegation is not supported by the evidence.

With respect to the incident which occurred on or about January 21, 1988 involving SR, I also find that TSPC failed to meet its burden of proving that Spees grabbed SR by the arm and twisted her arm behind her back, violating OAR 584-020-0040(4)(d). Neither SR nor RB or any other student present during the incident testified. The only testimony TSPC offered concerning the incident came from Dr. Shelly who was not present during the incident. Dr. Shelly testified that SR was an "average kid" not prone to mood swings. However, the documentary evidence

clearly establishes that SR was a special education student who was prone to severe mood swings and anger. Additionally, Dr. Shelly testified that at a staff meeting she told all of the teachers that push ups and "burpees" were no longer to be used as a form of discipline when the record establishes that the other teachers were not told and continued to use them as forms of discipline. Because of these inaccuracies in her testimony, I do not find Dr. Shelly's testimony persuasive because they demonstrate that she is not an accurate historian.

Furthermore, Spees credibly testified that SR tried to hit him and that he restrained SR's arm in self-defense. In addition, Spees consistently stated after the incident and at hearing that he only grabbed her arm and did not twist it behind her back. I find that Spees did not twist SR's arm behind her back because he would have no logical reason for doing so. Consequently, I conclude that Spees' use of physical force to restrain SR from hitting him was not an unreasonable or prohibited use of force because he did so in self-defense to prevent harm to himself.

I likewise find Spees' acted in self-defense on April 14, 1989 by deflecting DW from falling into him while on gym duty. I further find that the resulting scratched neck and torn shirt were unintentional and accidental. TSPC called both DW and TH as witnesses at the hearing. DW testified that as he was going down from his lay up, Spees grabbed him by the neck and shirt and "flung" him to the side. DW admitted the incident happened very quickly. He denied making an aggressive move toward Spees. He also denied that he had a history of making physical contact with teachers and other students as reported by his PE teacher. He further denied the incident involving Hile wherein DW used threatening and intimidating gestures and feigned hitting Mr. Hile. DW could not recall the incident where he and TH harassed another teacher, Mr. Boyson. He also could not recall he and TH rubbing the scratches on his neck to make them look worse. Additionally, TH, who was present in the gym, also testified that Spees grabbed DW across the neck and flung him to the side. However, TH conceded that when DW came down from his lay up, DW had his arm up and someone could have interpreted it as a karate move. I do not find the testimony of DW to be persuasive. WHS principal Yates who investigated the incident, discounted DW's statements because he found that DW's version of the incident could not have happened the way he stated. Even Dr. Shelly acknowledged that DW did make an aggressive move toward Spees and had not been completely honest in describing the incident.

The evidence establishes that DW was physically aggressive and had a history of doing fake punches and karate-like moves to intimidate and irritate other students and teachers. When DW came down from his lay up after attempting to make a basket, Spees credibly testified that he saw something coming at him out from the corner of his eye. Spees defended himself by deflecting DW's body away from him and DW's weight and motion carried him off to the side. As a result of the impact, DW's neck was accidentally scratched above the collar and below the chin and Spees' hand accidentally caught DW's shirt, ripped it and a button popped off. I find that while Spees may have overreacted to some degree, he was entitled to defend himself under the district's policy. Consequently, I conclude that TSPC has failed to meet its burden with respect to this allegation.

With respect to the incident which occurred on or about October 23, 2000, I find that

Spees' yelling and bumping and violating of the personal space of MP did violated OAR 584-020-0040(4)(d) because the physical force used was not authorized by the district's policy. MP did not testify at hearing due to a death in his family. However, the eyewitness testimony of Nancy Hayden (Hayden) and Donna Henry (Henry) establish that the physical force used by Spees in bumping his chest against MP and screaming and violating the student's personal space in an intimidating manner was willful, unjustified and unauthorized. Moreover, Spees' actions were clearly inappropriate even through MP may have taken feigned swings at him. Spees did not testify or argue that he was defending himself. He testified that he yelled and poked his finger at MP to make sure that the student knew he was serious.

Consequently, I conclude TSPC met its burden of proving that Spees' conduct in this regard violated OAR 584- 020-0040(4)(d).

Finally, with respect to the incident which occurred on or about December 6, 2000, I also find that TSPC has met its burden of establishing that Spees violated OAR 584-020-0040(4)(d) by grabbing JV by the chin and head and causing physical pain. TSPC offered the testimony of JV, MS, SJ, Michelle Gaines, and Dr. Long. Respondent offered the testimony of Spees and JG. JV testified that he was talking to MS when Spees grabbed his chin and bent his head back without warning or provocation. In response, JV bent Spees's finger back on the hand that was holding his chin because Spees was hurting him. When Spees let go, JV ran to meet his mother who was picking him up from school. JV testified that he was scared and angry. His mother, Michelle Gaines, confirmed in her testimony that JV was upset and frightened and had red marks on his face. JV told her that Spees had grabbed his chin and that he did not provoke Spees. Although the testimony of MS differs slightly from that of JV in that she stated that Spees said "you don't say that" before he grabbed JV's chin and head, her testimony corroborated JV's testimony that JV did not touch Spees or say anything to him before Spees grabbed his chin and head. SJ who was also in the hall when the incident occurred, testified that Spees grabbed JV's chin and had his other hand on JV's head. She stated that Spees looked angry. SJ also testified that they were talking about Jay Leno's chin and Spees said "don't make fun of people" and then grabbed JV's chin. Spees testified that he barely brushed JV's chin when he was trying to demonstrate how long Jay Leno's chin was and then JV grabbed his finger and bent it back. Dr. Long testified that Spees told her that he had "chucked" JV's chin. JG testified that he was in the hall after the bell rang and saw JV grab Spees finger and bend it back but that he did not see Spees grab JV's chin and head.

I find the eyewitness testimony of JV, MS and SJ, as corroborated by Michelle Gaines and Dr. Long, more persuasive. Although the testimony of JV, MS and SJ all differ slightly from one another, I find the differences insignificant. In addition, they all agree that Spees was the aggressor in grabbing JV's chin and head. I do not find the testimony of JG, the only other eyewitness besides Spees to testify that JV was the aggressor, to be helpful inasmuch it is clear from his testimony that he did not see the beginning of the incident because he arrived only after the bell rang. In addition, I do not find Spees's testimony that he barely touched JV's chin to be credible. That testimony is contrary to the eyewitness testimony of JV, MS and SJ and contrary to the physical evidence that JV had red marks on his face. It also conflicts with Spees' prior statement to Dr. Long that he had "chucked" JV under his chin. I also note that, even though the DA declined to prosecute Spees or JV for the incident, the DA found that JV had a good claim

for self-defense. Consequently, I conclude that Spees violated the district's policy on using physical force during the incident with JV. Accordingly, TSPC has met its burden of establishing that Spees violated OAR 584-020-0040(4)(d) in two of the four incidents alleged.

Alleged violation of OAR 584-020-0040(4)(f)

There is no dispute that on or about January 21, 1988 Spees commented to SR and RB that SR was attracted to RB. Spees testified that he said it jokingly. Nonetheless, the question is whether Spees' comment constituted "sexual conduct" which violated OAR 584-020-0040(4)(f).

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

Gross neglect of duty is any serious and material inattention to or breach of professional responsibility. 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. (Emphasis added).

TSPC has interpreted its own rule to include the type of comment made by Spees. 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). I am authorized to overrule an agency's interpretation of a rule if an agency has "erroneously interpreted a provision of law." *Id.* However, here the "provision of law" is the rule itself.

Where, as here, the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which * * * assert that the rule has been interpreted "erroneously." It follows that, in circumstances like those presented here * * * [I] cannot overrule * * * an agency's interpretation of its own rule. *Don't' Waste Oregon*, 320 Or at 143.

Consequently, I conclude that Spees violated OAR 584-020-0040(4)(f) in making the comment to these two middle school students. I note that the comment when made to older students or adults would appear to be innocent and non-sexual. However, as Dr. Shelly stated in her letter of reprimand, Spees' comment was inappropriate coming from a teacher because middle school students are very sensitive to personal comments.

Alleged violation of OAR 584-020-0005(5)

The 1993 version of the applicable rule, OAR 584-020-0005(5), provides in pertinent part

that:

“Sexual Contact” includes:

* * * *

(c) Sexual advances and verbal or physical conduct of a sexual nature directed toward a student. (Emphasis added).

Furthermore, the district has adopted a policy on Hazing/Sexual Harassment, which defined sexual harassment as “unwelcome conduct, either sexual or non-sexual, that is directed toward a person because of that person’s gender.” (Emphasis added). The policy stated that prohibited sexual harassment occurs when “unwelcome sexual or other gender based conduct interferes with a student’s performance or creates an intimidating, hostile or offensive school environment,” and noted that the conduct could be by a teacher, student, administrator or school staff. The policy also stated that sexual harassment included “[m]aking sexually suggestive remarks, gestures, or jokes, or remarks of a sexual nature about the victim’s appearance.” A formal complaint process was part of the policy. The policy was revised in 1993.

I find that during the incident that occurred on or about October 4, 1993, Spees made an offensive comment to students in his geography class but that the comment did not violate OAR 584-020-0005(5). Spees told students that the way to avoid having more children was to “leave your gun in your holster.” OAR 584-020-0005(5) prohibits verbal conduct of a sexual nature directed toward a student. Spees argued that he did not violate OAR 584-020-0005(5) because his comment was in keeping with the classroom discussion concerning the overpopulation of India and the economics of having a large family. He also testified that the comment was not directed to any one student.

I find that the comment was crude and inappropriate even in light of the topic discussed by the class. Spees himself acknowledged that there was a better way to promote abstinence. Additionally, by the way Spees phrased the comment it was clearly directed to the male members of the class. Given the age of the students and their tendency to personalize comments, it was certainly foreseeable that a male student whose brother was a senior in high school with a new baby would be offended by the comment. However, the rule requires that such comments be directed toward a student. I am persuaded that the comment was not specifically directed toward that student. Consequently, I conclude that TSPC has failed to meet its burden of proving that Spees’ comment violated OAR 584-020-0005(5).

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 Spees' conduct in three of these instances violated OAR 584-020-0040 and constituted gross neglect of duty. The Commission has proposed a suspension of 90 to 120 days. 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.

Applying the factors set forth above, I conclude that a suspension for a period of 90 days is warranted. In reaching this conclusion, I particularly note that Spees was repeatedly warned by his supervising principals that unreasonable and improper physical force except to protect himself or another person from physical harm and inappropriate personal comments to students would not be tolerated in the future. He was also specifically instructed not to touch students in the area of the head or neck. I also note that I find his conduct in this regard was not an isolated incident but rather a continuing pattern of similar behavior over a decade of employment with

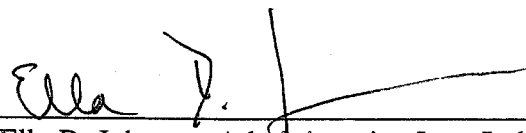
the district, that this conduct is likely to reoccur without the further reinforcement of this sanction, and that his conduct was open and notorious causing problems between the school and the parents, thus affecting the public image of the school. Finally, I note that there is some danger, given his behavior with JV and MP, that his conduct in this regard could escalate and pose a danger to students and a student may be seriously injured. It could also have an adverse consequence for the district should a student bring a lawsuit against the district. At a minimum, I find that there is a danger that these impressionable young male middle school students will imitate Spees' behavior in dealing with conflict situations. The only extenuating circumstances I note is that Spees underwent counseling and completed the counseling to the district's satisfaction. This may impact whether his conduct is likely to reoccur. However, this was not the first time he was asked to seek help.

Respondent contended at hearing that he should receive a reprimand instead of a suspension. In support of his contention he argues that a suspension would effectively end his career as a teacher because the district would not retain him and no other district in Oregon would hire him in light of the suspension. However, there is no evidence supporting Respondent's contention. Moreover, inasmuch as Spees has received numerous reprimands without changing his behavior, I find a suspension is needed to reinforce the prohibition against improper comments and the use of excessive force.

PROPOSED ORDER

I propose that the Commission issue the following order: The teaching license of Gerald Spees is suspended for 90 days for violations of OAR 584-0020-0040(4)(d), (f), and (n).

Dated this 28th day of March 2002 at Salem, Oregon.


Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel

APPEAL PROCEDURE

NOTICE: Under the current procedures, the Commission reviews the record and proposed order in contested cases and issues a final order. Pursuant to OAR 137-003-0650, you are entitled to file written exceptions to this proposed order within 30 days of the date this proposed order is mailed. The exceptions should explain all of the reasons why you believe that the proposed order is incorrect. Mail exceptions to:

Teachers Standards and Practices Commission
Public Service Building
255 Capitol Street NE
Salem, OR 97310-1332

CERTIFICATE OF SERVICE

**RE: Gerald Spees
CASE NO.: TSPC 20012876**

I HEREBY CERTIFY that I have made service of copies of the foregoing **PROPOSED ORDER** upon the following parties by causing to be mailed in the United States Post Office at Salem, Oregon, on the 28th day of March 2002 by mail, a certified true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

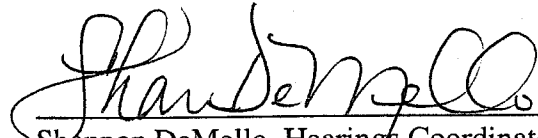
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