

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

In the Matter of the)
Teaching License of) FINAL ORDER
ROBERT CARL FLATHERS)
) Case No. 700273

On June 6, 2008, Senior Administrative Law Judge (ALJ) Monica A. Whitaker issued a Proposed Order in this case. Mr. Flathers filed exceptions to the Proposed Order on June 20, 2008.

On July 2, 2008, the Commission considered Mr. Flathers' written exceptions to the proposed order. The Commission has fully considered the written exceptions and is now fully advised.

After considering the record and the exceptions filed, the Commission now adopts the Proposed Order as the Final Order, but the Commission has modified Conclusion of Law 3 as explained below:

The ALJ's Conclusion of Law 3 read as follows:

"3. Flathers substantially deviated from the professional standards of competency by singling out Catholic and Episcopalian students and lecturing them on Lent."

The Commission has modified the Conclusion of Law 3 as follows:

"3. Flathers substantially deviated from the professional standards of competency by singling out Catholic and Episcopalian students and making them explain to other students the meaning of Lent."

The Commission's modification is a more accurate description of the evidence in the record as the ALJ reasoned. The ALJ's original Conclusion of Law suggested that Licensee personally lectured to the students. The evidence in the record showed that Licensee singled out students based on their religion and had them explain the meaning of Lent to other students, embarrassing the singled-out students. This modification does not alter the Commission's analysis in the case. Licensee used students as part of a lecture based on the students' religious background. This conduct under the circumstances was a lack of professional judgment and gross neglect of duty.

ORDER

The Commission adopts the Proposed Order and imposes a Public Reprimand upon Robert Carl Flathers for violating OAR 584-020-0040(4)(n).

Dated this 14th day of May 2010.

TEACHER STANDARDS AND PRACTICES COMMISSION

By: 
Victoria Chamberlain, Executive Director

NOTICE: You are entitled to judicial review of this Final Order pursuant to the provisions of ORS 183.480. Judicial review may be obtained by filing a petition in the Oregon Court of Appeals. The petition must be filed within 60 days from the date of service of this Final Order.

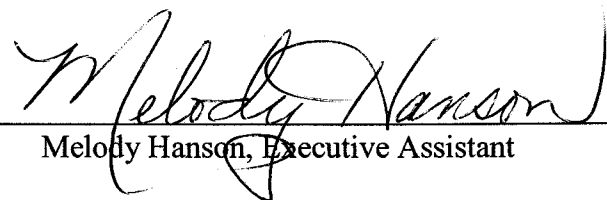
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order by mailing a true copy thereof certified by me as such by U.S. First Class Mail to the Attorney of record for Robert Carl Flathers:

Thomas K. Doyle
Attorney at Law
Bennett, Hartman, Morris & Kaplan, LLP
111 SW Fifth Avenue, Suite 1650
Portland OR 97204-3627

Dated this 7th day of June 2010.

By:


Melody Hanson, Executive Assistant

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Teacher Standards &
Practices Commission

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION**

IN THE MATTER OF:) **PROPOSED ORDER**
)
ROBERT CARL FLATHERS,) OAH Case No.: 700273
Licensee)

HISTORY OF THE CASE

On September 27, 2007, the Teacher Standards and Practices Commission (TSPC or Commission) issued a Notice of Opportunity for Hearing charging Robert Carl Flathers with misconduct, specifically gross neglect of duty in violation of OAR 584-020-0040(4). On October 10, 2007, Flathers timely requested a hearing.

TSPC referred the hearing request to the Office of Administrative Hearings (OAH) on October 17, 2007. Administrative Law Judge (ALJ) Monica A. Whitaker was assigned to preside at hearing. A prehearing conference convened on December 12, 2007. Assistant Attorney General (AAG) Jeff Dover represented TSPC. Thomas Doyle, Attorney at Law, represented Flathers.

A hearing was held on April 21 and 22, 2008, in Tualatin, Oregon. Licensee appeared with counsel and testified at the hearing. AAG Dover represented TSPC. Testifying on behalf of TSPC were: JS¹; Cameron Lane, TSPC investigator; George Finch, TSPC Coordinator of Professional Practices; Catherine Baltzor, Principal, Hines Middles School; and David Courtney, Superintendent, Burns-Hines School District. Testifying on Flathers' behalf were: Anne Choate; Sandy Vollee; Linda Dobson; and Mardy Stewart. The record closed at the conclusion of the April 22, 2008 hearing.

ISSUES

1. Whether Flathers used unreasonable physical force against students JS and SF, in violation of OAR 584-020-0040(4)(d) and (n).
2. Whether Flathers substantially deviated from professional standards of competency by slapping student SF and hitting student JS, in violation of ORS 584-020-0040(4)(d).

¹ JS is a student and his identity will not be revealed in this Proposed Order. TSPC agreed not to disclose JS' identity in its Final Order.

3. Whether Flathers substantially deviated from professional standards of competency by singling out Catholic and Episcopalian students and lecturing them on Lent, in violation of ORS 584-020-0040(4)(n).

4. Whether Flathers substantially deviated from the professional standards of competency by failing to recognize the worth and dignity of students, in violation of OAR 584-020-0040(4)(n).

5. If Flathers conduct violated OAR 584-020-0040(4), what is the appropriate sanction?

EVIDENTIARY RULING

Exhibits A1 through A8, offered by TSPC, were admitted into the record. Licensee's counsel objected to the authenticity of Exhibit A1. That objection was overruled, as the author of Exhibit A1 testified at the hearing and authenticated the document. Licensee's counsel also raised a standing hearsay objection to many of the exhibits and testimony TSPC offered. The ALJ overruled the hearsay objection, explaining that hearsay is admissible in administrative hearings.

Exhibit R1, offered by Licensee, was admitted into the record. Exhibits R2 and R3 were not admitted into the record.

FINDINGS OF FACT

1. Licensee Robert Carl Flathers began his teaching career in the fall of 1987. At all times pertinent to this case, Flathers was licensed as an educator by TSPC and was employed by the Burns-Hines School District. During the 2005-2006 school year, Flathers taught Physical Education (PE) at Hines Middle School. (Test. of Flathers.)

2. During the 2005-2006 school year, Flathers routinely served breakfast to students before school started. (Test. of Flathers.) During the week of Lent, some students had black marks on their foreheads to signify Ash Wednesday, which prompted a student to ask Flathers about the meaning of Lent. Flathers asked the Catholic and Episcopalian students who were present in the classroom to stand-up and explain the meaning of Lent to the other students. (*Id.*) Several of the Catholic and Episcopalian students felt uncomfortable and embarrassed by Flathers' request. (Test. of Baltzor.) Flathers thereafter dismissed all but the Catholic and Episcopalian students, whom he asked to stay behind. Flathers told the Catholic and Episcopalian students that he was sorry if he made any of them feel uncomfortable. (Test. of Flathers.) Several parents contacted Catherine Baltzor, the school principal, to report the incident. (Test. of Baltzor.)

3. During a 2005-2006 spring semester PE class, student ME commented to Flathers that some of the baseball team pitchers were being "pussies" about practices. Flathers responded by telling ME that he was no "wuss." ME believed that Flathers had called him a "puss" or "pussy" and became upset. ME did not share his belief with Flathers. ME reported the incident to his father, Joe. Approximately two weeks after the incident, Joe contacted Flathers, at which time

the two spoke and agreed that ME had misinterpreted the situation. (Test. of Flathers.) Joe informed Baltzor that he believed the situation had been resolved. (Test. of Baltzor.)

4. On or about March 2, 2006, Flathers gathered his PE students on the bleachers inside the school gymnasium. Flathers started the class by lecturing his students about the US Constitution and First Amendment rights. (Test. of Flathers.) While Flathers was lecturing, student JS turned around to talk with another student. On at least two occasions, Flathers instructed JS to turn around and to stop talking. (Test. of Flathers and Dobson.) After JS again turned around to talk to another student, Flathers stepped towards JS and tapped him on the side of the head to gain JS' attention. (Test. of Flathers, Dobson, and Choate.) Although Flathers meant only to touch JS to gain his attention, the momentum from Flathers' steps caused him to tap JS on the side of his head. (Ex. A8.)

5. JS did not see Flathers step towards him and only felt the contact that Flathers' fingers made on his head. (Test. of JS.) JS' head did not move when Flathers tapped JS. JS did not have red marks as a result of the tapping. Flathers did not hit or strike JS. (Test. of Dobson and Choate.) JS reported the incident to his parents, who in turn contacted the police and the school. (Test. of Baltzor.)

6. On March 3, 2006, student SF was lying on a bottom bleacher with his head in a female student's lap. After twice instructing SF to sit up, Flathers tapped SF on his left side to get his attention. (Test. of Flathers.)

7. On March 3, 2006, Baltzor and David Courtney, the School District's Superintendent, interviewed Flathers. During the interview, Flathers admitted that he had asked Catholic and Episcopalian students to stand-up in class to explain the meaning of Lent to the other students. Flathers also admitted that he could understand that the students felt singled-out by this incident. (Ex. A1 at 1.)

8. Baltzor prepared typed notes from the March 3, 2006 interview. (Ex. A1.) Baltzor also prepared notes from her conversations with various students and parents concerning Flathers. (*Id.*) In her notes, Baltzor wrote that ME's father was upset because Flathers belittled his son and called him a "pussy." (*Id.* at 10.) Baltzor's notes also contain a statement that a parent reported that her daughter said that Flathers used terms like "feeling bitchy" during class. (*Id.* at 7.)

9. On March 7, 2006, Officer Brian Needham of the Harney County Sheriff's Office, interviewed Flathers about the JS and SF incidents. During the interview, Flathers stated that he tapped JS, with his fingers spread open, on the side of the head to get JS' attention and to make JS stop turning around to talk to other students during a class lecture.² (Test. of Flathers; ex. A8.) JS reported to Officer Needham that Flathers had slapped him on the side of the head with an open hand, between his cheek bone and ear. (Ex. A2 at 5.) SF reported to Officer Needham that Flathers had struck him on the side of the head, near his temple, with an open hand. (*Id.* at 6.)

² In his narrative report, Officer Needham wrote that Flathers said he "smacked" JS on the back of the head with an open hand. (Ex. A2 at 7.)

10. Officer Needham also interviewed two educational aides, Linda Dobson and Anne Choate, about the JS incident. (Ex. A2 at 6 and 7.) Neither Dobson nor Choate saw Flathers hit JS. Both Dobson and Choate believed that Flathers had tapped or "popped" JS on the side of the head to gain his attention.³ (Test. of Dobson and Choate.)

11. After reviewing Officer Needham's report, the Grant County District Attorney determined that Flathers should not be charged for hitting or slapping JS or SF. (Test. of Flathers.)

CONCLUSIONS OF LAW

1. Flathers did not use unreasonable physical force against students SF and JS.
2. TSPC did not prove that Flathers slapped student SF and hit student JS; therefore, Flathers did not substantially deviate from professional standards of competency.
3. Flathers substantially deviated from the professional standards of competency by singling out Catholic and Episcopalian students and lecturing them on Lent.
4. TSPC did not prove that Flathers failed to recognize the worth and dignity of students; therefore, Flathers did not substantially deviate from the professional standards of competency.

OPINION

Under ORS 342.175(1)(b), TSPC is authorized to discipline educators licensed in the State of Oregon for "gross neglect of duty." OAR 584-020-0040(4) describes "gross neglect of duty" as "any serious and material inattention to or breach of professional responsibilities." More specifically, under this rule, evidence of neglect of duty may include the following:

- (d) Unreasonable physical force against students, fellow employees, or visitors to the school, except as permitted under ORS 339.250;
* * * * *
- (n) Substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030[.]

OAR 584-020-0010 sets forth that a "competent educator" demonstrates a commitment to:

- (5) Use professional judgment[.]

In this case, TSPC alleges that the following acts by Flathers constitute gross neglect of duty, as defined in OAR 584-020-0040(4): (1) hitting a student, JS, on the side of the head with an open hand; (2) slapping a student, SF, in the face; (3) singling out Catholic and Episcopalian

³ Officer Needham's narrative report stated that Choate told Needham that Flathers "slapped" JS in the head. (Ex. A2 at 7.)

students and lecturing them on the meaning of Lent; and (4) calling female students "bitchy" and male students "puss" or "pussy."

TSPC bears the burden of proving the allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on 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). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.* 303 Or 390 (1987). Each allegation is addressed in turn.

A. Hitting Allegation

TSPC alleges that on March 2, 2006, Flathers hit student JS on the side of the head with an open hand to gain his attention. TSPC asserts that this conduct constitutes a gross neglect of duty as defined by OAR 584-020-0040(4)(d) and (n) (unreasonable physical force against students and substantial deviation from professional standards of competency for failing to use professional judgment).

At hearing, witnesses offered conflicting testimony about whether Flathers hit or tapped student JS to gain his attention. TSPC offered Officer Needham's written narrative report to support its assertion that Flathers hit JS on the side of the head with an open hand. In his report, Officer Needham wrote that Flathers admitted to "smacking" JS. However, upon reviewing the tape recorded interview that Officer Needham conducted with Flathers, Flathers did not admit to or characterize the incident with JS as reported by Officer Needham. In the taped interview, Flathers admitted to "tapping" JS, but did not admit to hitting, smacking, or striking JS. Flathers told Needham that he had intended to touch JS to gain JS' attention, but the momentum from stepping towards JS caused Flathers to tap JS on the side of the head.

In his written report, Officer Needham stated that Choate said that Flathers slapped JS on the side of the head. Officer Needham also wrote that Dobson told him that Flathers "popped" JS in the head to gain his attention. At hearing, Choate and Dobson offered persuasive first-hand testimony that Flathers tapped JS on the side of the head to gain his attention, but never struck or hit JS. Officer Needham did not record his interviews with either Choate or Dobson. Therefore, those interviews cannot be reviewed and compared to Officer Needham's typed narrative report. Given that Officer Needham mischaracterized Flathers' statements, I find that the report is less reliable and than the testimony Choate and Dobson offered at hearing.

The evidence shows that Flathers tapped JS on the side of the head to gain his attention. TSPC failed to establish that Flathers exercised unreasonable force by hitting JS on the side of the head with an open hand or that Flathers failed to use professional judgment and substantially deviated from professional standards of competency.

B. Slapping Allegation

TSPC contends that Flathers slapped student SF in the face on or about March 3, 2006. TSPC offered Officer Needham's narrative report about his interview with SF. In the report, SF allegedly made statements that Flathers hit him on the side of the head with an open hand.

Officer Needham's interview with SF was not recorded and could not be reviewed for accuracy. Given Officer Needham's mischaracterization of Flathers' statements during the interview, Needham's report is not reliable. As such, the report cannot be relied upon as the sole basis for a finding that Flathers slapped SF. Flathers explained he simply tapped SF on the left side to gain his attention. TSPC failed to show, by a preponderance of the evidence, that Flathers slapped SF in the face on March 3, 2006. Consequently, TSPC failed to establish that Flathers failed to use professional judgment and substantially deviated from professional standards of competency.

C. Singling-out Catholic and Episcopalian Students Allegation

Flathers admitted that during the 2005-2006 school year, he asked Catholic and Episcopalian students to stand up in front of other students and explain the meaning of Lent. By doing so, Flathers singled-out these students based on their religion and caused the students to be embarrassed and uncomfortable.

When interviewed about the incident, Flathers explained that he believed the moment was a "teachable" one and that he never intended to impose religious beliefs on the students. However, Flathers also admitted that he could understand why the students would have felt the way they did. Given Flathers' experience as a teacher, Flathers should have known that singling out students because of their religion would cause feelings of discomfort and embarrassment. By singling out the Catholic and Episcopalian students, Flathers failed to use professional judgment and substantially deviated from professional standards of competency.

D. Name Calling Allegation

TSPC alleges that Flathers called female students "bitchy" during the 2005-2006 spring semester, which Flathers denies. TSPC offered typed notes that Baltzor prepared to support its allegation. Baltzor's notes state that a parent reported that her daughter said Flathers used terms such as "feeling bitchy" with his students. This typed statement does not establish by a preponderance of the evidence that Flathers called female students "bitchy."

TSPC further alleges that Flathers called male students "puss" or "pussy." TSPC contends that Flathers called student ME a "puss" or "pussy," which Flathers denies. TSPC offered Baltzor's typed notes from a conversation with ME's father to support its position. The notes contain multiple levels of hearsay, including statements that ME told his father that Flathers called him a "puss" and that ME's father reported the incident to Baltzor. At hearing, Flathers offered persuasive first-hand testimony that during his conversation with ME, he told ME that ME was no "wuss" and that ME misheard Flathers' statement.

TSPC failed to show, by a preponderance of the evidence, that Flathers called female students "bitchy" and male students "pussy" or "puss." Consequently, TSPC failed to establish that Flathers failed to recognize the worth and dignity of all persons.

E. Sanction

At hearing, TSPC proposed to revoke Flathers' teaching license. In considering disciplinary action against a teacher, TSPC may consider any of the following factors set out in OAR 584-020-0045 in its determination:

- (1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series or incidents.
- (2) The likelihood of a recurrence of the misconduct or violation.
- (3) The educator's past performance.
- (4) The extent, severity and imminence of any danger to student, 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.

In its Notice of Opportunity for Hearing, TSPC does not state the sanction it seeks against Flathers' teaching license. Rather, the Notice states that TSPC may "suspend or revoke your Oregon teaching license or impose other discipline under ORS 342.177." It was not until pressed by the ALJ at the hearing that counsel for TSPC stated that TSPC sought revocation of Flathers' teaching license.

Revocation of Flathers' teaching license is not warranted. TSPC failed to prove three of its four allegations against Flathers. The only allegation TSPC proved by a preponderance of the evidence was Flathers' act of singling out Catholic and Episcopalian students and lecturing them on the meaning of Lent. That incident was isolated and Flathers acknowledged that he could understand how his conduct embarrassed students and made them feel uncomfortable. Considering the factors listed above in light of the circumstances in this case, I find that a Public Reprimand is an appropriate sanction for the one violation of OAR 584-020-0040(4).

ORDER

I propose the Teacher Standards and Practices Commission impose a Public Reprimand on Licensee Robert Carl Flathers for violating OAR 584-020-0040(4)(n) on one occasion.

Monica A. Whitaker

Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 6, 2008

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this proposed order, you may file written objections, called "exceptions," to the proposed order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the proposed order** with the:

Teacher Standards and Practices Commission
465 Commercial Street, NE
Salem, Oregon 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the 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.

**APPENDIX A
LIST OF EXHIBITS CITED**

- Ex. A1: District's Investigative Report
- Ex. A2: Harney County Sheriff's Narrative Report
- Ex. A8: Taped Police Interview of Robert Carl Flathers

CERTIFICATE OF MAILING

On June 6, 2008, I mailed the foregoing Proposed Order in OAH Case No. 700273.

By: First Class and Certified Mail

Certified Mail Receipt #7006 0100 0002 2811 1863

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