

**IN THE MATTER OF THE TERMINATION
OF JOHN FRESHWATER**

Mount Vernon City School)	
District Board of Education,)	
)	R. LEE SHEPHERD, REFEREE
Employer)	
)	
vs.)	
)	REPLY BRIEF FOR MOUNT
John Freshwater,)	VERNON CITY SCHOOL
)	DISTRICT
Employee.)	
)	
)	
)	
)	

Mr. Freshwater’s one hundred and sixty six page brief is long on scurrilous personal attacks and short on supporting facts and law. Much of his brief contains arguments and statements that are irrelevant to the issues before this Referee. Therefore, this reply will attempt to address only those misrepresentations, mischaracterizations and misapplications that are germane to the termination of his teaching contract.

I. MR. FRESHWATER MISCHARACTERIZES THE APPLICABLE LAW

Mr. Freshwater spends up to twenty pages attempting to flesh out outdated provisions of the law and to manufacture a heightened burden of proof. (Freshwater Brief (“FB”), p. 6-26). Each of these arguments is easily dispelled by looking to the text of the statute itself and to the applicable case law.

A. The Statute, as Amended in 2009

In 2009 the Ohio legislature modified the statute, *eliminating* the delineated categories of: (1) gross inefficiency or immorality, (2) willful and persistent violations of reasonable regulations of the board of education, or (3) other good and just cause. The statute now permits termination simply for “good and just cause.” O.R.C. 3316.19. As any decision on Mr.

Freshwater's contract termination will occur after the effective date of the amendment to O.R.C. 3319.16, the amended version of the law is applicable in this case.

B. The Burden of Proof is a Preponderance of the Evidence

Contrary to Mr. Freshwater's assertion that no case law sets forth the burden of proof in teacher contract termination cases, the burden of proof is defined by the civil nature of the case and has been established by the courts as a preponderance of the evidence. See, R.C. 3319.16; *Weinstein v. Canton City Bd. of Educ.*, 1980 Ohio App. LEXIS 13927 (preponderance of evidence is the appropriate standard) (Attachment 1); *Aldridge v. Huntington Local Sch. Dist. Bd. of Educ.*, 38 Ohio St. 3d 154; *Brownfield v. Warren Local School Dist. Bd. of Educ.*, 1990 Ohio App. LEXIS 3878 (Attachment 2); see also R.C. 2506.04 (prescribing the standard of review used by common pleas court on appeal). Any attempt to assert a standard of clear and convincing evidence is hostile to the law which is binding on these proceedings.

II. MR. FRESHWATER'S FOCUS ON THE HR ON CALL REPORT IS NOT RELEVANT

On Mr. Freshwater's road to "exoneration," he engages in a series of violent character assassinations. His first victims are Tom and Julia Herlevi, two independent investigators and co-owners of HR On Call, Incorporated ("HR On Call"). Tom and Julia Herlevi are experts in the field of human resources with seventy years of experience between them and reputations that are beyond reproach. Their report ("HR Report") is the subject of voluminous criticism in Mr. Freshwater's brief. (FB, pp. 27-36).

A. The Misguided Character Assassination of Tom and Julia Herlevi

Tom Herlevi, a co-owner of HR On Call began his career in human resources in 1968, where he served for twenty year in the Human Resources department at General Electric. (T. 1050-1051). In November 1988, Mr. Herlevi left GE to serve as the vice president of human

resources for Duramax. (T. Herlevi, T. 1051). In 1999, Mr. Herlevi left Duramax and established HR On Call, where he has provided human resource services for the past 11 years. Julia Herlevi also began her career at General Electric, where she rose to manager of the human resources department. After eighteen years at GE, Ms. Herlevi left to serve as the head of human resources for Snavelly Development Company before becoming a co-owner of HR On Call. (J. Herlevi, T. 2672-2673). Both Herlevies have substantial experience involving investigations into alleged employee misconduct. (T. Herlevi, T. 1051; J. Herlevi, T. 2672).

In contrast to the spotless reputations of these two experts, Mr. Freshwater levels the following unsubstantiated and meritless allegation:

HR on Call, Inc.’s ‘investigative’ report can politely be deemed inaccurate but in the harsh reality of this matter is an outright deliberate biased, sloppily compiled defamatory document replete with hearsay which is untrue.

(FB, p. 34). This statement stands in stark contrast to the findings in the HR Report which have been borne out by the evidence adduced at the hearing. Moreover, there is no evidence which substantiates Mr. Freshwater’s allegation of misconduct by either Tom or Julia Herlevi.¹

¹ Mr. Freshwater asserts he prepared 15 affidavits between May 15, 2008 and May 25, 2008 as a “comprehensive written statement” under Collective Bargaining Agreement, Section 402. Among the information contained in these affidavits is a list of prospective witnesses allegedly created prior to the HR Report. Does it make any sense that Mr. Freshwater planned to provide a list of witnesses after all of the witnesses had already been interviewed? Mr. Freshwater **never offered or identified** any of the affidavits on May 27, 2008 when he learned that he would not receive a second interview with HR On Call. (EE 12). Mr. Freshwater also **never offered or identified** any of the affidavits on August 4, 2008 when he delivered a detailed speech to the Board of Education or on October 28, 2008 when he first testified at the administrative hearing. In fact, Mr. Freshwater NEVER offered or identified any of the affidavits until **December 2009** when he suddenly was able to hand deliver the affidavits to each individual board member.

It is curious why Mr. Freshwater would have waited *nineteen months* after he created the affidavits and after the HR Report was released, to provide a list of requested witnesses and comprehensive written statement for the investigators consideration. Mr. Freshwater never created these affidavits in May 2008; rather, they were created after the onset of the administrative hearing and served simply to script Mr. Freshwater’s later testimony to reflect his evolving defensive strategy. This is supported by Mr. Freshwater’s inability to provide any of the metadata associated with his creation of these affidavits, or any evidence that would substantiate their creation in May 2008. (BX 101). Also noteworthy is the fact that Mr. Freshwater’s affidavit (EE 128, dated May 25, 2008) describes Mr. Freshwater’s burning of Justin Newland, a fact that was not known by the Board of Education or by the Independent Investigators in May 2008. Since Mr. Freshwater’s “comprehensive written statement” was created in responses to questions posed by Tom and Julia Herlevi, it is curious how Mr. Freshwater may reconcile the fact that HR On Call

As investigators, the Herlevi's were required to weigh the evidence before them and make an informed conclusion. When the Herlevi's felt that they had insufficient evidence to substantiate an allegation, this fact was so indicated in their report. When the Herlevi's found sufficient evidence to support the allegations against Mr. Freshwater, they indicated as much in their report. (See BX 6). That Mr. Freshwater does not like or agree with the outcome of the investigation does not render the HR Report "inaccurate", "deliberately biased," "sloppily compiled," or "defamatory." (FB, p. 34).

B. The HR On Call Report is Rendered Moot by Mr. Freshwater's Due Process Hearing and is not Used to Consider his Termination

The HR Report was submitted to the Board for consideration and provided much of the basis for the Board's decision to adopt a resolution to *consider the termination of John Freshwater*. (Hughes, T. 5903). It has not, and will never be the basis for Mr. Freshwater's contract termination. Under the express terms of O.R.C. 3319.16, Mr. Freshwater has been afforded a due process hearing within which he had the opportunity to fully challenge any and all allegations contained in the Board resolution. (O.R.C. 3319.16). Thirty eight evidentiary hearing days later, Mr. Freshwater is still focused on a report which has become moot in light of the evidence and testimony offered. This is absurd in light of the fact that Mr. Freshwater has been provided *ample* opportunity to plead his case as demonstrated by the 87 witnesses²; the 350 combined exhibits; and the 6000+ plus pages of hearing testimony.

Any further discussion of the HR report has nothing to do with Mr. Freshwater's

never asked a single question pertaining to Justin Newland during Mr. Freshwater's interview. (EE 148). Additionally, it was admitted the affidavits were erroneously attested to as being signed in Franklin County when the claim is they were signed in Knox County. (Freshwater, T. 4747, 4749, 4965, EX 126, 128, 141, 143, 149-159). Might the attestation as to the date signed also be in error?

² This number excludes the testimony of Carl Heck who was prevented from testifying on behalf of his son, Corbin Heck. (Carl Heck, T. 2159-2169).

summary of the administrative hearing; rather, it serves only as the onset of a calculated smear campaign which lashes out³ at every person who has held Mr. Freshwater accountable for his actions.

III. MR. FRESHWATER'S CONDUCT IS, BY DEFINITION, INSUBORDINATE

Mr. Freshwater's four justifications for his insubordinate conduct are fundamentally flawed. They include: (1) John Freshwater received "arbitrary and confusing directives;" (2) John Freshwater was appealing "what he perceived to be a violation of the Free Exercise Clause;" (3) John Freshwater was the victim of disparate treatment; and (4) John Freshwater was "framed" for insubordination because administrators didn't make sure John Freshwater corrected his deliberate misconduct. (FB, p. 149-151). Nothing in his defense justifies Mr. Freshwater's contravention of the Establishment Clause. Mr. Freshwater's decision not to remove his Bible from his desk or all items of his religious display from his classroom is, by definition, insubordinate and "good and just cause" for termination of his contract.

A. Mr. Freshwater's "Confusion" is Contradicted by his own Testimony and Conduct

Mr. Freshwater attempts to mingle alleged confusion regarding what he was prohibited from displaying in his classroom with a manufactured "policy, practice and custom." (FB, pp. 150-152). Mr. Freshwater's own testimony and conduct contradicts his alleged confusion. In addition, Mr. Freshwater fails to present any evidence to substantiate his claim a policy, practice or

³ In a strange contrast to Mr. Freshwater's "inflammatory" treatment of Board witnesses, his brief makes numerous pleas to this Referee to use "careful language" in crafting a decision and suggests that the "ramifications of the decision made by the Referee" will "permanently and conclusively affect the remainder of John Freshwater's life and career." Both of these repetitive themes are disingenuous and inappropriate. First, the effect of Mr. Freshwater's actions in his classroom are of his own making and will permeate the "remainder" of his life, no matter what the decision of this governing body. Second, these statements represent the complete absence of a legal or factual argument for Mr. Freshwater's behavior and denote an inability to appreciate the effect of these proceedings on the students involved, their families, the Board of Education and the Mount Vernon community at large. (See e.g., FB, p. 40).

custom ever existed at Mount Vernon Middle School. Mr. Freshwater asserts that “eighteen other school personnel were identified as having a Bible or other religious item[s] in their classrooms⁴.” (FB p. 151). Because of the unique nature of a public school classroom, such a “policy, practice and custom” would be a *per se* violation of the Establishment Clause⁵. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Washegesic v. Bloomington Public Schools*, 33 F.3d 679 (6th Cir. 1994); *Stone v. Graham*, 449 U.S. 39 (1980).

The Board’s Brief sets forth that Mr. Freshwater understood exactly what was to be removed and need not be repeated here. No amount of tap dancing will permit Mr. Freshwater to escape the natural consequences of his decision. No attempt to shirk his responsibilities under the Establishment Clause will permit him to blame the administration for his own conduct. Plain and simple, Mr. Freshwater engaged in insubordination when he repeatedly failed to adhere to the directives of his supervisors. As such, Mr. Freshwater may be lawfully terminated based upon “good and just cause.”

1. Mr. Freshwater’s Conduct Shows That His Actions Were Calculated, Not Confused

Mr. Freshwater’s brief spends multiple pages attempting to tactfully contradict his own testimony and conduct. The arguments presented by Mr. Freshwater fail to articulate any credible reason for his confusion.

⁴ The diagram presented in Mr. Freshwater’s brief contains multiple mischaracterizations. In attempting to liken Mr. Freshwater’s conduct to 18 other individuals at Mount Vernon; the diagram fails to account for the fact Mr. Freshwater did not only display the Presidential Prayer Poster, or his personal bible in his classroom; rather, Mr. Freshwater displayed a variety of religious materials in his classroom and he uniquely refused to remove his entire religious display. In addition, Mr. Freshwater is the only teacher at Mount Vernon that received specific complaints regarding his inappropriate use of the Bible, during classroom instruction. Mr. Freshwater’s own conduct distinguished him from the other teachers, not the Board of Education. (FB, Diagram between pp. 151, 152).

⁵ A policy, practice or custom which permits teachers to maintain religious displays, completely divorced from the established curriculum, would violate the express tenants of the Establishment Clause. In addition, courts have consistently found that a deliberate use of religious symbols in the classroom is impermissible because it provides even a “hint” of government endorsement of religion. See *Peck v. Baldwinville Central School Dist.*, 426 F.3d 617 (2d. Cir. 2005).

None of Mount Vernon's policies, bylaws or administrative guidelines conflict with the express directives of the Establishment Clause. Any assertion the administrators failed to meet their obligations under Board Policy 9130 is superseded by their obligation to address violations of Constitutional rights.

Mr. Freshwater attempts to isolate the directives he received, in order to manufacture confusion. First, he admits that on April 7, 2008 he "received verbal and written directives from Principal White to remove 'religious materials.'" (FB, p. 151; BX 12). He carefully omits that the only items discussed during the April 7, 2008 meeting, were his personal bible and the Ten Commandments collage. (BX. 12). These two items are the extent of the "religious materials" identified by Mr. White. Neither is ambiguous, nor may either be described as "undefined language." (FB, p. 152).

Absent from Mr. Freshwater's brief is the April 9, 2008 meeting between himself, Principal White, Superintendent Short and fellow teacher Lori Miller, his representative. During this meeting, the box of FCA bibles openly stored in Mr. Freshwater's classroom was discussed for the first time. (Short, T. 72-74).

Over the weekend, Principal White and Vice-Principal Ritchey visited Mr. Freshwater's classroom, discovering that the requested items had not been removed and that multiple other religious items were on display. (White, T. 513-514; Ritchey, T. 5946-5950; BX 25-29, BX 106-108). Accordingly, on Monday April 14, 2008, Principal White was forced to provide John Freshwater with another verbal and written directive.

By April 16, 2008, Mr. Freshwater had conclusively decided not to remove his personal Bible and to add to his lab table the bright red Oxford Bible and the text Jesus of Nazareth. Mr. Freshwater also choose not to remove the Presidential Prayer poster, even though he had

received a clear directive to that effect from Principal Bill White. (White, T. 513). In addition, Mr. Freshwater decided to make a public declaration of his refusal and provided a written refusal to the administration. (Freshwater, T. 5850-53; BX 14, BX 105).

Mr. Freshwater's assertion that he was confused over the "plural in [White's] description of a Bible," or whether the Presidential Prayer Poster was religious, does not even find merit when divorced from the context of events that transpired from April 7, 2008 through April 16, 2008. (FB, p.155). Mr. Freshwater's conduct speaks volumes about his understanding. His calculated defiance establishes nothing short of insubordinate conduct. The Board explanation as to why Mr. Freshwater was not "confused" is delineated in the Board's Post Hearing Brief ("BB") at pp. 50-57.

2. Mr. Freshwater Attempts to Manufactures a Policy, Practice or Custom

Simply asserting that a policy, practice or custom exists, does not make it true. At no point does Mr. Freshwater provide any factual or legal basis for his conclusory statement. In fact, the only citation he offers is to Wes Elifritz's testimony on page 2828 of the transcript, and a diagram in his brief. (FB, p. 151). Neither of these citations lends credibility to his manufactured claim.

In the cited portion of the transcript, Mr. Elifritz describes items displayed in his classroom, in 2007-2008. At no time during the cited testimony is any policy, practice or custom identified or discussed. (T. 2828). Mr. Elifritz did not begin his employment at Mount Vernon Middle School until Spring 2006. (T. 2820). Prior to the 2007-2008 school year, his classroom consisted of an old bookstore/library with an office adjoining the room. Mr. Elifritz testified all religious items identified were maintained in the office, "where students would never really come in." (Elifritz, T. 2829). It is hard to imagine what type of policy, practice or custom is established by

a teacher who was asked to remove religious items from sight within the first year of their display. (Elifritz, T. 2819-20, 2835-36).

Mr. Freshwater’s also makes the assertion that “eighteen other school personnel were identified as having a Bible or other religious item[s] in their classrooms.” This diagram is inaccurate, incomplete and misleading. Mr. Freshwater is the only one who refused to remove items, when directed. Mr. Freshwater is the only one who received complaints about his religious display. Mr. Freshwater is the only one who had complaints he was using his bible while teaching. The misleading nature of the chart in Mr. Freshwater’s brief is more fully documented in the chart below.

ADMINISTRATORS/TEACHERS/STAFF ALLEGED TO HAVE: A BIBLE ON THEIR DESK OR OTHER “RELIGIOUS” ITEMS IN THEIR ROOMS				
NAME	BIBLE ON DESK	RELIGIOUS ITEMS	RESPONSE	COMPARABLE TO FRESHWATER
D. D’Ettore	NO In his desk or file cabinet (T. 1763)	NO (T. 1763)	Took poster down several years ago (T. 1786) He knows what he did was improper in a public school. (T. 1794)	NO
L. Miller	Bibles (T. 2364)	Books/Devotionals/Rocks (T. 2368, 2375)	Told to remove religious items and she agreed (T. 2380, 2397, 2427)	NO
D. Carter	NO	NO (T. 2129)	Not asked to remove because had removed Bible verse on Bush/Powell poster	NO
S. Dapprich	NO Bible in office (T. 2145-46)	Two bible verses (T. 2140-2)	K. Kasler took them down (T. 2140-42)	NO
H Dean	NO	S. Dapprich testified that had kids drawings with bible verses (T. 2147)	Did Not Testify	NO
B. Gustin	Bible in or on desk (T. 2076)	Plaque-not on wall (T. 2076)	Took down poster (T. 2072) Guesses no more than 2 people saw plaque-it is on the floor next to him (T. 2079-80)	NO

NAME	BIBLE ON DESK	RELIGIOUS ITEMS	RESPONSE	COMPARABLE TO FRESHWATER
Smith	NO	S. Dapprich says she has bible verse on her cart (T. 2147)	Did Not testify	NO
T. Henry	Bible on her desk (T. 1972)	NO (T. 1993)	Put it in her desk (T. 1990)	NO
W. Elifritz	Bible (T. 2823)	Psalms, Ten Commandments, poem (T. 2808)	Removed Ten Commandments from wall to where students cannot see them and then he put them in his desk (T. 2833; EX 55). When he was asked to remove items he did (T. 2861-62)	NO
J. Marth	NO	NO	None	NO
S. Malone	Bible which she periodically has out (T. 2050)	NO	None	NO
S. Short	NO	Painting son made-bible verse (T. 300)	Put it away. (T. 300)	NO
B. Sanders	NO	Poster in office-Bush/Powell-Bible verse showing; Cross on desk (T. 2094, 2098)	Was asked to remove cross and did at beginning of year (T. 2098) same with poster (T. 2099)	NO
A. Thompson	Bible (T. 2871-72)	NO	No order. (T. 2872)	NO
T. Keib	Bible (T. 3631)	NO	Left Mt. Vernon after 2006-07 school year.	NO
S. Jenkins	T. Keib testified Bible was on her desk (T. 3632)	NO	Keib left Mt. Vernon after 2006-07 school year. She did not testify.	NO
L. Small	T. Keib testified about Bible (T. 3632-3)	NO	Keib left Mt. Vernon after 2006-07 school year. She did not testify.	NO

B. Mr. Freshwater's Allegation of Disparate Treatment Rings Hollow

Mr. Freshwater asserts he has been discriminated against because other teachers were not

required to remove their personal Bible or other singular religious articles, from their classrooms. (FB, Diagram between pp. 151-152). Superintendent Short has made it clear why Mr. Freshwater was directed to remove his Bible in the presence of students: “I received complaints about Mr. Freshwater referring to the Bible in the classroom...I did not receive complaints on the other teachers referring to their Bible when they’re teaching in the classroom...” (Short, T. 6260). That fact alone makes Mr. Freshwater different and eliminates any claim of discrimination.

With respect to religious displays, Mr. Short indicated when the administration has learned a teacher has a religious display; the teacher has been directed to remove the display, and, other than Mr. Freshwater, no teacher has refused to remove the items. (Short, T. 6261).

Mr. Freshwater asserts he was specifically treated differently than Lori Miller, Wes Elifritz and Andrew Thompson. (FB, p. 48-53). Each of these three teachers and all other teachers at Mount Vernon Middle School are easily distinguished from Mr. Freshwater.

Ms. Miller testified she has maintained a personal Bible on her desk since 1991. (Miller, T. 2364). While the Bible has been placed on the corner of her desk, it has also been in the back of her classroom, on a bookshelf. (Miller, T. 2364). In 2008, “Mr White and Mr. Ritchey had gone into my room and saw that I had religious materials displayed and that I would need to take them down.” (Miller, T. 2368). These items included: a collection of devotionals on her desk and a few items placed on the bulletin board of her classroom. Ms. Miller was told to “remove any type of religious material” from her bulletin board, to which she promptly complied. (Miller, T. 2366). These materials included notes from her husband, which contained bible verses and a cross which had the word faith on it. (Miller, T. 2366). In addition, Superintendent Short asked Miller to remove a poster on her doorway which said “I am.” (Miller, T. 2366-67; 2397). Again, she complied. Ms. Miller testified that she was not told to remove the Bible from her desk

(Miller, T. 2369) and that she was not told to remove a “little rock” which had a biblical verse on it, which was permitted as long as the verse did not face the students and if it was maintained in her “personal space.” (Miller, T. 2374) Ms. Miller describes her understanding of “personal space,” as: “I guess I assume that my desk was my personal space, that if it wasn’t a display that other kids would see.” (Miller, T. 2375). Superintendent Short explained why Mr. Freshwater was directed to remove his bible, when Ms. Miller was not:

The difference is there was the complaint and there was the complaint that he [Freshwater] had used it [his bible] and referred to it in the classroom. It was –also, we were trying to determine and – to determine if the establishment clause had been broken. That directive was given because of making sure that we were following the law, doing the things we were supposed to do in the classroom. When you look around the room and you see all the different pieces and different things that were in there, the totality of the room, the totality of the different objects that were there, trying to make sure that the establishment clause had not been violated, that’s why the request was made to remove the Bible from the top of the desk. (Short, T. 6336).

In addition to Lori Miller, Mr. Freshwater testified he was treated differently than Health teacher, Wes Elifritz. (FB, p. 51-52). The items contained in Wes Elifritz’s room includes: a verse from Psalms, the Ten Commandments, a poem by Maya Angelou entitled “Christians,” and song lyrics typed up and put on bulletin board. (EE 29, 31-33). However, Wes Elifritz had only been in that classroom for a single year. (Elifritz, T. 2828). Prior to that year, “these items were hanging in the adjoining room, but it wasn’t necessarily part of the classroom.” (Elifritz, T. 2829).

When Wes Elifritz was told to remove his religious display, he testified he “immediately e-mailed Bill and said that [he] would comply with his requests....” (Elifritz, T. 2830). No complaints had been received regarding Elifritz’s use of his personal bible during classroom instruction or of his use of religious advocacy in his classroom.

Finally, Mr. Freshwater makes mention of fellow teacher Andrew Thompson’s retention

of his personal Bible on his desktop. There were no other religious materials displayed in Thompson's room. Similar to Lori Miller and Wes Elifritz, Andrew Thompson has never received a complaint regarding inappropriate use of his personal bible. In addition, at no time has it ever been asserted that Andrew Thompson engaged in classroom proselytization.

C. Mr. Freshwater's Assertion He Was Protesting an Unlawful Request is Unsubstantiated by the Facts, his Testimony or the Law

The Mount Vernon Middle School Administration lawfully requested Mr. Freshwater remove his personal bible from sight, while students were in the classroom. In addition, the Administration lawfully requested Mr. Freshwater remove the religious display from his classroom. Each of these requests are not only permissible, they are required under the express terms of the U.S. Constitution.

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards v. Aguillard et al., 482 U.S. 578, 584 (1987).

The U.S. Supreme Court has specifically prohibited a teacher from displaying religious texts which serve no educational purpose and which transmit basic and fundamental values to our youth. *Stone v. Graham*, 449 U.S. 39 (1980). "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." *Brandon v. Board of Ed. v. Guilderland Cent. School District*, 635 F.2d 971, 978 (2d Cir. 1980). Superintendent Short highlights the problem in Mr. Freshwater's room: "When you look around the room and you see all the different pieces and different things that were in there, the totality of the room, the totality of the different objects that were there." (Short, T. 6336).

D. Plain and Simple, Mr. Freshwater was Insubordinate

Mr. Freshwater was given a clear directive; remove your personal bible from sight when students are in the classroom and remove all religious displays from your classroom. (Short, T. 71-76; White, T. 505-507; BX 12; BX 13). Mr. Freshwater failed to comply with these directives. As of the last day of school, Mr. Freshwater maintained his personal bible on his desk and a bright red oxford bible and a text entitled Jesus of Nazareth on his lab table. (Freshwater, T. 127-128; BX 83). Mr. Freshwater also refused to remove a presidential prayer poster from his classroom wall, because he deemed it patriotic. (Freshwater, T. 4419). This conduct is, by definition, insubordinate. None of the excuses provided by Mr. Freshwater have offered any credible justification for his conduct. As such, Mr. Freshwater's insubordination provides ample "good and just cause" for the termination of his teaching contract.

IV. MR. FRESHWATER IMPERMISSIBLY TAUGHT CREATIONISM, INTELLIGENT DESIGN, AND HIS OWN PERSONAL BELIEFS TO HIS STUDENTS

Mr. Freshwater defends his religious proselytizing by providing three conflicting explanations for his conduct. Mr. Freshwater asserts: (1) he never taught Creationism or Intelligent Design during his entire teaching career⁶; (2) he only used Intelligent Design based materials until his 2003 proposal was rejected and never after the current science Academic Content Standards became effective⁷; and (3) he has a right to discuss his personal religious views with his students under the theory of Academic Freedom⁸. His arguments are legally and factually inaccurate and two of the defenses provide a clear admission to Mr. Freshwater's deliberate violation of the Establishment Clause. As no Board policy may supersede the Establishment Clause, Mr. Freshwater is unable to find refuge under any of Board policies cited

⁶ Freshwater, T. 375-77, 398.

⁷ Freshwater, T. 467, 4517, 4592.

⁸ Freshwater Brief, p. 124-125.

in his brief or under the Academic Content Standards; rather, Mr. Freshwater's promotion of religion in the classroom represents sufficient "good and just cause". (FB, p. 79).

A. Mr. Freshwater Denies He EVER Taught Creationism/Intelligent Design

Mr. Freshwater made two impassioned speeches in which he emphatically denied *ever* teaching Creationism or Intelligent Design ("ID"). (BX 19; BX 20). He confirmed both of these statements in his October 2008 testimony, indicating he had never taught ID or Creationism throughout his entire career as a teacher. (Freshwater, T. 375-77, 398). While this is contrary to his later statements about using ID derived materials in his classroom, it is also directly contradicted by Mr. Freshwater's former students. (K. Button, T. 1009-1015; Barone, T. 1332-1335).⁹

Kathryn Button was a student in Mr. Freshwater's classroom during the 2002-2003 school year. Ms Button documented Mr. Freshwater conduct in a letter of concern, clarifying Mr. Freshwater gave students "packet after packet, about the dinosaurs and all of the unquestionable proof that they were indeed alive at the same time as man"¹⁰. The main proof that he [Mr.

⁹ The reference is simply to pre-2004-05 students as other student testimony is discussed later in this section of the brief.

¹⁰ Creationists argue that fossil records are incomplete. Specifically, one argument of Creationists suggests that fossils exist which place dinosaurs and humans on earth at the same time. This "evidence" is used to suggest the age of the earth must be younger than previously thought and that humans and dinosaurs must have evolved together. Science, Evolution and Creationism, National Academy of Sciences Institute of Medicine, (2008), p. 38. (Attachment 3).

Dr. Princehouse testified that: "These are very standard creationist materials. They use very well known attacks on science to cast doubt on the scientifically accepted geological time scale and the evolutionary origin of dinosaurs. It does students, in my opinion, a gross disservice, damaging their ability to understand what constitutes science. This is not how science is done. Here's a passage from the -- of the Dinosaur Fossils -Age Old Debate handout. It says, Radiometric dating to prove dinosaurs to be ancient. Though they cannot date the dinosaur remains themselves, they can date rocks buried near the dinosaur remains. This is not accepted by many authorities as valid, as radiometric dating is based upon controversial assumptions held to be erroneous by many scholars as indicated by empirical research. Dinosaurs are assumed to be millions of years old. These statements are simply wrong. They do not reflect the scientific consensus, the content of the peer review scientific literature in any way." (T. 1532-33).

"I found these articles posted on various creationist websites, in particular one called allaboutcreation.org, dragonhistoryanddinosaurextinction.com. These are evidently subsidiaries and heavily interlinked with the All About God Ministries main website... "(T.1535)

Freshwater] provided was that the earth was only five thousand years old and that every society around the world had legends about dragons, since before trade between distant lands was possible.” (BX 15). Ms Button also noted that Mr. Freshwater “taught us that the Theory of Evolution is ‘just a theory.’ (BX 15).

Former student Joseph Barone confirmed Ms. Button’s experiences. Mr. Barone was in Mr. Freshwater’s classroom during the 2001-2002 school year. He testified not only about Mr. Freshwater’s use of the woodpecker, angler fish and “Survival of the Fakest” handouts, but also that Mr. Freshwater had a debate on the validity of Creationism/ID vs. Evolution. (Barone T. 1331, 1332-1335). Mr. Barone testified that Mr. Freshwater’s religious viewpoints were so pervasive in the classroom that he felt mocked and mistreated because he opposed the Creationist point of view that was promoted by Mr. Freshwater. (Barone, T. 1339).

In 1994 Mr. Freshwater distributed information about and encouraged his eighth grade students to attend a seminar sponsored by Answers in Genesis. Mr. Freshwater even allowed his students to earn extra credit for their attendance. (BX 23, BX 84); Mr. Freshwater acknowledges handing out “Survival of the Fakest” to students in 2003¹¹. (Freshwater, T. 469-470). While Mr. Freshwater denies ever using an ID experiment with Lego’s¹² and claims it was only done by a

¹¹ Dr. Princehouse testified that “Survival of the Fakest” is an article which provides an overview of Reverend Wells’ more extensive book entitled Icons of Evolution. (Princehouse, T. 1548).

¹² Mr. Freshwater described the Lego’s experiment on Dr. Johnston’s radio broadcast in the following manner: “Students showed me many years ago and [I] used it up to 2003. These Lego’s, he actually did it for a senior paper, he showed it to me and it’s a very simple demonstration, [he] gather[ed] up a bunch of Lego’s and he made what he demonstrated, he made an airplane or a car out of Lego’s and he had a bunch of other ones, same pieces, and he scattered them on the floor, put them in a box, through then on the floor and he asked the kids to watch them there and then we watched them for awhile and he says, now if we watched these things for a day, will they form this car or this plane? The kids said no. If we watched them for five, ten years, would they turn into this airplane? No. Or anything like this airplane? What’s the chance of this becoming like this airplane or automobile and the kids all agreed it won’t happen.” Mr. Freshwater went on to compare his other classroom lessons to the Lego’s experiment: “And then we compare the eyeball. What is the complexity of the eyeball compared to the very simplicity and Lego’s coming together forming a car-like structure and we all know just a simple cell or groups of cells forming a eyeball is so complex and it’s DNA molecules and that chances of that happening is slim and none.” (BX 89).

student in his classroom, his testimony conflicts with statements he made in a radio interview with Dr. Johnston. (BX 89). In that interview, Mr. Freshwater says a student first showed him the exercise but that **he** stopped using it in his classroom in 2003. (BX 89 at 21:50).

These few incidents together with activities pointed out in the Board’s post-hearing brief, and those actions set forth in “B” below; establish Mr. Freshwater used materials obtained from ID think tanks, promoted a Christian apologetics event, and taught ID and Creationism. This directly contradicts his statement he **never** taught Creationism or ID. Though a carefully crafted denial, it is both factually and legally incorrect.

B. Mr. Freshwater Next Claims He Never Used ID Related Materials *After* His 2003 Proposal

Mr. Freshwater has admitted to teaching the Creation of the Universe, the Big Bang Theory and the Periodic Table, as recently as the 2007-2008 school year; however, he attempts to disguise why he chose these sources of material outside the eighth grade science standards. Each concept has been repeatedly established as a platform for Creationist or ID challenges to the validity of evolution. Among the myriad of other topics that would have arguably been more relevant to Mr. Freshwater’s eighth grade science curriculum, he chose to teach:

Thermodynamics	Periodic Table/ Radiometric Dating	Origin of the Universe/ Big Bang Theory
While Mr. Freshwater had not admitted to teaching Thermodynamics, many of his former students cite Thermodynamics as one of the most interesting or engaging lessons they remember from his class. (BX 32).	Mr. Freshwater has acknowledged during his testimony and in his post-hearing brief he frequently taught the periodic table and radiometric dating. (Freshwater, T. 470, 4460-61, BX 30, 32; Freshwater Brief, p. 102).	Mr. Freshwater has acknowledged during his testimony and in this post-hearing brief that he taught about the origin of the universe and the big bang theory. (Freshwater, T. 456; BX 30, 32; Freshwater Brief, p. 103-104).
Thermodynamics is often a topic used by Creationists to promote the theory of ID. A common argument made by	The Young Earth Theory is promoted by the introduction of the Periodic Table and	The Big Bang Theory is often challenged by Young Earth Creationist (“YEC”), who

<p>supporters of Creationism is that evolution contradicts the first and second law of thermodynamics. The first law says that matter/energy cannot come from nothing. Therefore, the universe itself could not have formed naturally. The second law states that everything tends toward disorder, making evolutionary development impossible.</p>	<p>Radiometric Dating. The argument states radiometric dating gives unreliable results. This is often used as a marker for “aging” or dating the earth. The periodic table is used by Creationists also to challenge the age of the earth by showing that one element cannot transmute into another, also showing a “flaw” in the theory of evolution.</p>	<p>argue the earth is approximately 5000-6000 years old. The argument often made by YEC followers suggests there are irresolvable inconsistencies in the theory of the Big Bang, such as an unexpectedly uneven distribution of matter in the universe and a need for dark matter. It is often erroneously presented that several astronomers think it is no longer a valid theory.</p>
<p>Mark Isaak, <i>The Counter-Creationism Handbook</i> (University of California Press 2007) pp. 191-92, 198.</p>	<p>Mark Isaak, <i>The Counter-Creationism Handbook</i> (University of California Press 2007) pp. 144-46.</p>	<p>Mark Isaak, <i>The Counter-Creationism Handbook</i> (University of California Press, 2007) pp. 187-88.</p>
<p>[Excerpt at Attachment 4]</p>	<p>[Excerpt at Attachment 4]</p>	<p>[Excerpt at Attachment 4]</p>

In addition to Mr. Freshwater’s own admission that he taught topics which challenged evolution, several former students testified about his use of ID based teaching materials and classroom debates addressing Creationism/ID *after* 2003. In light of this testimony, Mr. Freshwater cannot maintain his claim he **never** taught Creationism or ID or his subsequent claim that he ceased all impermissible activity after his 2003 proposal was rejected. (Freshwater, T. 375-77, 398). Both of these statements cannot be true and, in fact, neither is true.

The entire crux of Mr. Freshwater’s denial is that he “never” uttered the exact words, “creationism” or “intelligent design” to his students; however, that argument is both illogical and offends the intelligence and perceptiveness of his eighth grade students¹³. In addition, it is clear

¹³ On page 111 of Mr. Freshwater’s post-hearing brief he asserts that “Zach Dennis admitted John Freshwater did not use words to connect the hydrosphere theory to the Biblical flood involving Noah’s Ark, but the Zach Dennis revealed his deceptive plan by stating, ‘He didn’t say that, but I took it that way.’” This is a circular and nonsensical argument. Mr. Freshwater seems to assert that if he doesn’t name a concept or theory that his students are too dense to be able to infer a meaning. Moreover, Mr. Freshwater attempts to vilify Zach for engaging in “thinking for

from testimony offered that Mr. Freshwater’s former students felt the pressure of a religious atmosphere in his classroom and understood the implications of Mr. Freshwater’s “lessons.” (See e.g. Hoeffgen, T. 660-663; S. Shoudrada, T. 895). The following students provided an “eyewitness” account of Mr. Freshwater’s religious advocacy after 2003:

James Hoeffgen ¹⁴	2004-2005	Mr. Freshwater taught that the Earth was only a few thousand years old; Carbon dating inaccurate; Dinosaurs and Humans roamed the earth at the same time; Used Survival of the Fakest handout; Didn’t like being Jewish in Mr. Freshwater’s classroom. (T. 660-663).
Simon Shoudrada	2005-2006	Freshwater discredited evolution; Freshwater told students he only taught evolution because it was the standards; Freshwater used handouts to discredit evolution, (T. 881); Discussed radio carbon dating as inaccurate; dinosaurs and humans roamed earth at the same time; Freshwater made a comment about Catholics not being Christians. (T. 895).
Zach Dennis	2007-2008	Mr. Freshwater held up the bible and discussed the end of the world (T. 3119); Mr. Freshwater showed the Watchmaker video in class (T. 3128); Mr. Freshwater referred to a higher being (T. 3131-3132); Mr. Freshwater discussed the hydrosphere theory (T. 3145); Mr. Freshwater discussed the meaning of Easter/Good Friday (T. 3137).

Three adults who were present in Mr. Freshwater’s classroom agree Mr. Freshwater was teaching ID/Creationist concepts to eighth grade students:

Katie Beach	2007-2008	Mr. Freshwater taught about the Big Bang and recommended the bible as an alternative; Radiometric Dating; Dinosaurs and humans roamed the earth at the same time; and taught students to use the word “here” when the textbook was “wrong.” (T. 962-974)
Jim Stockdale	2006-2007	Mr. Freshwater taught his students that the Bible taught that homosexuality was a sin; that the textbook and scientists could be wrong in relation to the unit on the creation of the universe. (T. 4153, 4168).

[himself] and asking questions,” a concept which Mr. Freshwater has identified in his brief as advantageous and contrary to a student who needs concepts spelled out for him, like a “robot.” (FB, p. 93; Dennis, T. 5622).

¹⁴ Mr. Freshwater’s brief attempts to discredit James Hoeffgen by suggesting that he was confusing a debate on abortion in Wes Elifritz’s classroom with conduct observed in the classroom of Mr. Freshwater. (FB, p. 108). This is both inaccurate and demonstrative of Mr. Freshwater’s flippant treatment of the facts in this case. Wes Elifritz testified he began his employment at Mount Vernon in the Spring of 2006. (Elifritz, T. 2820). James Hoeffgen was in Mr. Freshwater’s eighth grade science classroom during the 2004-2005 school year. Thus, by the time Wes Elifritz became employed at Mount Vernon, James was already in high school.

Carrie Mahan	FIVE YEARS	Mr. Freshwater taught that dinosaurs and humans roamed the earth at the same time; about the Big Bang theory; about radiocarbon dating; viewed the Watchmaker; Debate; Woodpecker and Giraffe handouts and hydrosphere theory. (BX 39, T. 1003, 3731-47, 3776).
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This consistent testimony stands in direct contrast to Mr. Freshwater’s flexible interpretation of what he taught. Similarly, even Mr. Freshwater’s account of his conduct is challenged by the assertion he was permitted to teach about his own religious beliefs under the premise of Academic Freedom. (FB, p. 124). Such a concept distorts the Board policy and seeks to use that policy as a mechanism of violating the Establishment Clause.

C. Academic Freedom is a Creationist Tool Used to Disguise the Teaching of Intelligent Design Concepts and Theories

Mr. Freshwater’s attempt to use “Academic Freedom” as protection for his actions, fails. Academic Freedom is a code word touted by Creationists/Intelligent Designers and a frequent notation in “Expelled, No Intelligence Allowed”, the “science documentary” promoted by Mr. Freshwater. (BX 105). The film argues academic freedom is under attack because science academics who embrace ID are being persecuted. ID has no place in the science classrooms of our public schools:

[W]e find that ID is not science and cannot be adjudged a valid, accepted scientific theory, as it has failed to publish in peer-reviewed journals, engage in research and testing, and gain acceptance in the scientific community. ID, as noted, is grounded in theology, not science...Moreover, ID’s backers have sought to avoid the scientific scrutiny which we have now determined that it cannot withstand by advocating that the controversy¹⁵, but not ID itself, should be taught

¹⁵ Mr. Freshwater has asserted he was merely attempting to “teach the controversy.” (FB, p. 113). However, this argument fails for two reasons: 1) There is no scientific controversy surrounding the pre-evolution or fundamental issues of the theory of evolution, like facts of common descent and natural selection, and 2) Controversies over details of substantive evolutionary theory require a great deal of background in biology and are not suitable for beginning students. Mark Isaak, *The Counter-Creationism Handbook* p. 9 (University of California Press 2007).

Moreover, the “teach the controversy” campaign is merely an attempt by Mr. Freshwater to use Religious Advocacy in his classroom. Lessons about the sociological issues of the evolution-creation controversy may be appropriate to teach eighth grade students, but the topic should be addressed in a history or other non-science classes. Further, the discussion of controversial issues is carefully guarded by the Mount Vernon City School District Administrative Guidelines. When a controversial issue is not part of an approved course of study, its use must be approved by the

in science class. This tactic is at best disingenuous, and at worst[,] a canard. The goal of the IDM [intelligent design movement] is not to encourage critical thought, but to foment a revolution which would supplant evolutionary theory with ID.

Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707, 745 (2005). Similarly, the use of Academic Freedom to disguise religious advocacy was specifically addressed by the U.S. Supreme Court in *Edwards v. Aguillard*:

True, the Act's stated purpose is to protect academic freedom. [] This phrase might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will. The Court of Appeals, however, correctly concluded that the Act was not designed to further that goal. We find no merit in the State's argument that the "legislature may not [have] used the terms 'academic freedom' in the correct legal sense. They might have [had] in mind, instead, a basic concept of fairness; teaching all of the evidence." [] Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Edwards v. Aguillard, 482 U.S. 578, 586 (1986). Merely asserting the words "academic freedom" does not provide Mr. Freshwater with an escape hatch for his violations of the Establishment Clause.

Instead of retreating back to his initial denial of never teaching ID or Creationism, Mr. Freshwater switches gears once again and claims (incorrectly) he can teach his own religious beliefs pursuant to Board Policy 3218. (FB, p.124). This is a frightening glimpse into the true motive behind John Freshwater's actions; the promotion of his personal religious convictions to

Principal. This approval has not been given to Mr. Freshwater. Further, it is clear the Mount Vernon City School Board has gone so far as to reject the teaching of ID, as part of the science curriculum. Mount Vernon City School District Policy 2240 (2003). (BX 81).

Likewise, the Mount Vernon City School Board Bylaws and Policies will permit the introduction and proper educational use of controversial issues provided their use in the instructional program does not tend to indoctrinate or persuade students to a particular point of view. Mount Vernon City School District Bylaw and Policy 2240 (2003). (BX 81).

impressionable eighth grade students. Board Policy 3218¹⁶ provides:

The freedom to speak and share ideas is an inherent precept of a democratic society governed by the will of the majority. Teachers and students need to be free to discuss and debate ideas. When ideas that may be controversial are introduced, teachers, while having a right to their opinion on the subject, shall state it as such and they should be objective in presenting various sides of issues.

This provision is completely inapplicable to Mr. Freshwater's use of religious advocacy in his classroom. There is no controversy associated with Mr. Freshwater's personal religious beliefs nor are those religious beliefs in any way connected to his eighth grade science curriculum. In fact, Mr. Freshwater's personal religious convictions are expressly prohibited from integration into his eighth grade **science** classroom. (See e.g., *Edwards v. Aguillard*, 482 US 578 (1987); *Santa Fe Independent School Dist. v. Doe*, 530 US 290 (2000); *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (2005)).

Mr. Freshwater's responsibility regarding expression of his own religious beliefs is explained by Principal White:

A. There's a policy¹⁷ that would prevent a teacher from going in depth with some of those types of questions where you would have the possibility of sharing your own beliefs.

Q. So as long as they didn't share their own beliefs, they could answer that question, correct?

A. Uh-huh.

(White, T. 516). Mr. Freshwater testified he found this concept "confusing;" however, this is likely because it contradicts his intended practice of promoting his religious "truth."

D. OAT Scores Do Not Justify Violations of the Establishment Clause

¹⁶ EX 84.

¹⁷ Mr. Freshwater's assertion that "Teachers have a right to express their own opinions, and must simply 'state it as such'" is a clear illustration of the careful wording used in asserting his argument. While that statement would appear facially correct, it implies Mr. Freshwater was "free" to assert his personal religious convictions, at will, as long as he provided a general disclaimer that it was "his opinion." The unique nature of Mr. Freshwater's role, as a public school educator makes this statement not only patently false, but a frightening account of the liberties that he assumed within the four walls of his classroom.

The results of Mr. Freshwater's students on the OAT are not germane to the reasons for the termination of his employment. We applaud him and the results achieved by the sixth and seventh grade teachers who also contributed to his students' performance on the OAT. More significantly, we applaud Ms. Beach and Ms. Mahan, who had the difficult job of assisting students with Individualized Education Plans ("IEP's") to learn the materials from sixth, seventh and eighth grade science. However, no matter how well or how poorly Mr. Freshwater's students may have done, it has no bearing on, and cannot excuse Mr. Freshwater's conduct.

E. Freshwater Attempts to Justify His Religious Advocacy through the "Bias" Standard

Mr. Freshwater is able to provide a clear and accurate description of the "bias" standard during his testimony (Freshwater, T. 4237-38); but is now unable to recollect or understand what the standard is attempting to portray. Mr. Freshwater also asserts any "[i]nquiry in this matter should be immediately halted if the teacher charged with instructing upon this concept can provide a reasonable explanation for their understanding and application." (FB, p. 83). This assertion is fundamentally flawed as a "reasonable explanation" cannot, and does not excuse a violation of the Establishment Clause.

The Ohio Academic Standards are broken down into three pieces: Standards, Benchmarks and Grade Level Indicators. (BX. 37). All three elements are progressive and rely upon skills and knowledge obtained in previous years of study. (Id). Each element must be considered within the context of what was taught in the previous year, and what skills the Benchmark seeks to further develop. (Id). Mr. Freshwater specifically focuses on Benchmark B, Indicator 2 which states: "Explain why it is important to examine data objectively and not let bias affect observations." (T. 1374; BX.37). The seventh grade Indicators for Benchmark B

describes bias within the context of experimental repetition and the reproducibility of results. (BX 37).

Dr. Rissing, a professor of evolution, ecology and organismal biology at the Ohio State University, was apart of the advisory committee in 2001 and 2002 for the preparation of the new science Academic Content Standards. (Rissing, T. 6127). Dr. Rissing explained that “Grade 7 [shows] that reproducibility of results is essential to reduction of bias in scientific investigation[] and describe[s] how repetition of an experiment may reduce bias, may decrease the variance in the things that you’re measuring, [and] may increase the accuracy of the kinds of things you’re trying to test. [T]hen in grade 8, [the standards] explain why it is important to examine data objectively and not let bias affect observations.” (Rissing, T. 6134). This is confirmed by Dr. Joseph Faber, a science consultant for the Ohio Department of Education during the development of the science Academic Content Standards, who explained the standard is “not personal bias,” but rather goes to reproducibility and the production of bias in scientific methods which are processes that are conducted within the laboratory. (Faber, p. 1406). Other eighth grade science teachers were able to understand and explain the proper application of the bias indicator. (See Adkins, T. 1478).

Therefore, within the context of the other indicators for Benchmark B, “bias” is restricted to the interpretation of data and has no bearing on individual’s “personal” bias. In addition, Mr. Freshwater did not teach the “bias” indicator when he presented handouts and classroom materials that challenged the concept of evolution¹⁸. The only proper application of the “bias” indicator involves the analysis of data and its association with the reproducibility of experimental

¹⁸ Dr. Princehouse explains about the Creationist view of bias: “Creationists often present school boards and law makers the idea that both sides should be taught. And, of course, their side is entirely religious material, but they call it science. And they say both sides should be taught. Therefore, it would be unfair to teach only one side, and, therefore, that would constitute bias, because not all sides are being heard.” (Princehouse, T. 6064).

results. (BX 37; Faber, T. 1377, 1406-07). Any other instruction on “bias” is not covered under the Academic Content Standards for science.

Finally, Mr. Freshwater asserts Dr. Rissing and Dr. Princehouse were impermissible rebuttal witnesses. (FB, p. 85-86). Mr. Freshwater’s assertion is contrary to the Rules of Evidence and Trial Practice. By definition, a rebuttal witness is an individual used to refute or oppose a claim or claims made by the opposing party that would not otherwise belong to that party’s case in chief. (See e.g. *State v. Grinnell*, (1996) 112 Ohio Spp. 3d 124, 146-147). Dr. Rissing and Dr. Princehouse testified specifically to assertions raised by Mr. Freshwater in his case in chief. For example, Dr. Rissing testified to Mr. Freshwater’s improper use of the bias standard and Dr. Princehouse testified to Mr. Freshwater’s use of ID concepts in his lesson plan, which was introduced into evidence after Dr. Princehouse’s testimony in the Board’s case in chief, she also testified the 2003 proposal was, in fact, a proposal to teach ID. There is absolutely no distinction between a lay or expert rebuttal witness.

Mr. Freshwater’s brief cites to the singular case of *State v. Hawn*, (2000) 138 Ohio app. 3d 449 to protest the testimony of these experts witnesses. This case fails to support Mr. Freshwater’s contention. *State v. Hawn* simply states “the rebuttal testimony of the state’s firearms experts [] was improper because it was cumulative to the state’s evidence-in-chief and was offered merely to bolster the testimony previously given by the state’s other firearms expert [] during the state’s case in chief.” (*State v. Hawn*, (2000) 138 Ohio app. 3d 449, 468). As noted above, Dr. Rissing’s testimony and Dr. Princehouse’s testimony are directly responsive to claims asserted in Mr. Freshwater’s case in chief. As such, they are not redundant, cumulative nor impermissible.

V. MR. FRESHWATER BURNED 500-600 STUDENTS WITH THE TESLA COIL

Mr. Freshwater takes no responsibility for **his actions using the Tesla Coil and endangering students and injuring Zach Dennis, claiming:** “[i]f there was any culpable party that party name would be Superintendent Short.” (FB p. 64). Mr. Freshwater attacks the Dennis Family and their claims. (FB, p. 64). He indicates he is not responsible because other teachers have used the Tesla coil on students and his former principal was aware of his use of the Tesla coil. (FB, p. 65).

It was Mr. Freshwater who burned Zach Dennis. It was Mr. Freshwater who burned Justin Newland. It was Mr. Freshwater who has risked injuring students with the Tesla Coil throughout his career in Mount Vernon. It is Mr. Freshwater whose employment should be terminated for good and just cause.

A. Mr. Freshwater Used the Tesla Coil

There is no debate about whether Mr. Freshwater used the Tesla Coil. The issue is whether or not he should have, or, if he did, whether he should have exercised better care. It makes no difference whether he intended to create an “x” or a cross on the arm of a thirteen year old boy. It makes no difference whether a student’s arm was held down, while he was burned¹⁹. The simple facts are:

- (1) Mr. Freshwater admitted to using the Tesla Coil on 500-600 students (T. 379, 403);
- (2) Mr. Freshwater testified 90% of students would pull away when he applied the Tesla

¹⁹ Mr. Freshwater argues Zach Dennis is not credible because he did not assert his arm was held down when the injury was reported or when he was interviewed by HR On Call. The testimony clarifies Zach simply did not think the placement of Mr. Freshwater’s hand was as important as the fact he was burned by the Tesla Coil. In addition, neither Zach nor his parents have ever asserted that Mr. Freshwater held Zach’s arm down in malice. The manner in which Mr. Freshwater used the Tesla coil on Zach only became clear when Zach was asked by Mr. Millstone to demonstrate what had occurred on December 6, 2008. That other students do not necessarily agree with Zach is not surprising as none of the student witnesses had clear recollections as to everything going on in Mr. Freshwater’s classroom and were not personally involved in Zach’s experience. One of Mr. Freshwater’s witnesses corroborated Zach’s testimony stating “he would bring them up to the overhead and set their arm down and draw, use the Tesla coil on them.” (T. 3866) “[I]f the student felt pain, then John would release his arm . . .” (T. 3850). Additionally, another of Mr. Freshwater’s witnesses, Andrew Thompson, testified “He [Freshwater] pulled the student by the bottom of the hand or the wrist. . . .” (Thompson, T. 2910).

Coil because “it hurt” (Freshwater, T. 399); and

(3) Mr. Freshwater admitted the Tesla Coil could leave a “mark²⁰.”(Freshwater, T. 401).

Despite these admissions, Mr. Freshwater continued to use the Tesla Coil during the 2007-2008 school year, causing physical injury to Zach Dennis and Justin Newland.

B. Mr. Freshwater Asserts the District “Approved” of his Conduct

Mr. Freshwater asserts his conduct is somehow permissible because former Principal Jeff Kuntz allegedly “observed the full use of the Tesla Coil to include application by Teacher Freshwater on the skin of students.” (T. 4550-4560).

From Mr. Kuntz’s observation in 1999, it appears he observed a class where Mr. Freshwater used the Tesla Coil to light neon gas. (EX 92). Mr. Freshwater is “adamant” Mr. Kuntz observed him using the Tesla Coil on students. (FB at p. 67) Mr. Freshwater testified on that day he would have charged the neon light with the Tesla Coil and then he “followed up with the two other demonstrations and that would be the pathway of least resistance with the students, and then the third one doing the ET.” (T.456)

There are several problems with the scenario as described by Mr. Freshwater. First, Mr. Kuntz testified he does not recall seeing Mr. Freshwater using the Tesla Coil in a manner where it came in contact with students. (T. 3826). Second, the Observation form completed by Mr. Kuntz is quite detailed as to activities in the classroom and there is no activity listed for a demonstration of a “pathway of least resistance” or “the ET” demonstration. (EX 92) In the Observation form he lists other activities students went on to do during the class period. Third, Mr. Freshwater testified when he used the Tesla Coil for demonstration in the classroom he did not always let students experience it, particularly if there was no time left in the period or if the

²⁰ A “mark” left by an electrostatic device is a burn. BX 83, p. 156. Throughout the remainder of this Reply Brief, the terms burn and mark will be used interchangeably.

class was running behind where they needed to be for the year. (T. 397-98)

It is more likely John Freshwater refrained from using the Tesla Coil on students during the observation simply because the Principal was observing his classroom conduct.

Additionally, even if Mr. Kuntz had observed Mr. Freshwater use the Tesla Coil on students, it does not give Mr. Freshwater license to burn, injure or otherwise put students at risk by using an electrical device on their bodies.

C. Mr. Freshwater Offers an Inaccurate and Incomplete Survey of Classroom Students

Mr. Freshwater’s brief asserts that “ten (10) classroom eyewitnesses testified, each of whom shared the same class with Zach Dennis, and each denied any mention of crosses (religious symbols) or making of crosses occurred by the mouth or hand of John Freshwater.” (FB p. 68). In the chart that follows we have put in the actual testimony for each student to accurately represent what each student said. The result is a clear depiction of one of the several misrepresentations offered in Mr. Freshwater’s brief:

DID JOHN FRESHWATER MARK STUDENTS IN THE SHAPE OF A “CROSS”?			
Student	Freshwater Claim	Actual Testimony	Actual Answer
M. Baer	No (T. 5081:7-13)	Freshwater did not say anything about tattoos or crosses. “He touched them twice to make the x, cross, whatever.” (T. 5092)	Yes
K. Wells	No (T. 5102:7-16)	Multiple questions as one – unknown whether she is responding no to all parts of question or whether a single part renders her answer as a no. Testimony was she was not sure what he did because she was not watching closely. (T. 5112)	Unknown
T. Redman	No (T. 5128: 7-10)	Does not recall Freshwater saying he was making a temporary tattoo on students. No comment concerning whether he marked students in the shape of a cross.	Question Not Asked
M. Wayne	No (T. 5271:1-3)	Multiple questions as one – (Question actually starts at 5270 line 20) unknown whether she is responding no to all parts of question or whether a single part renders her answer as a no.	Unknown

Student	Freshwater Claim	Actual Testimony	Actual Answer
A. Conkel	No (T. 5217:24-5218:7)	Multiple questions as one –unknown whether she is responding no to all parts of question or whether a single part renders her answer as a no.	Unknown
A. Ruhl	No (T. 5242:12-5243:4)	Horizontal and vertical passes; Cross or a T. (5255, 5260)	Yes
J. Grubaugh	No (T. 5289:3-6)	Multiple parts to question as one – unknown whether he is responding no to all parts of question or whether a single part renders his answer as a no.	Unknown
A. Morris	No (T. 5325:15-19)	Multiple questions as one – unknown whether he is responding no to all parts of question or whether a single part renders his answer as a no. “...just went down and across” speaking about his own experience. (T. 5335)	Yes
J. Stotts	No (T. 5345:11-19)	Multiple questions as one – unknown whether he is responding no to all parts of question or whether a single part renders his answer as a no. The only person he recalls volunteering is A. Morris (T. 5353)	Unknown
C. Heck	No (T. 2178:2-4)	Question is did “Freshwater utter the word ‘cross’ as he was using the tesla coil?”	Question not asked
B. Nielson	Not mentioned	Mark on his arm looked a lot like a cross. (T. 2645)	Yes

D. No Other Teacher Used the Tesla Coil in the 2007-2008 School Year

Mr. Freshwater seeks to justify his actions based upon other teachers using the Tesla coil. No other teacher used the Tesla Coil on students in the 2007-2008 school year. Mr. Freshwater looks at use by Lori Miller, Bill Oxenford and Dino D’Ettore to justify his use of the Tesla coil. (FB at p. 67-68)

Lori Miller testified she last used the Tesla coil in 2000 and would simply touch the students who volunteered. The arc came in contact with the student for a fraction of a second, “if that.” (T.2436-37)

Bill Oxenford testified it has been ten to twelve years since he used the Tesla Coil and let students touch it. (T. 1431). When he did permit students to experience it, he first warned them

it would be a “very hot shock” and made sure they were not improperly grounded. (T. 1432-33) He did not apply it to students but permitted them to touch the arc with their finger. (T. 1432) Mr. Oxenford went on to testify he would not let them touch it today because of the advent of pacemakers and the concern that if a child had a pacemaker it could cause serious injury. (T. 1433).

Dino D’Ettore testified he did not let students experience the Tesla Coil in either 2007-2008 or 2008-2009. (T. 1747). He also testified he made a single pass on a student’s arm, “however it was presented” and if they came up a second time would make a shape as requested by the student. (T. 1754-55). He made sure the Tesla Coil was on the lowest level that would still arc. (T. 1745-46).

The use by other teachers in prior years does not excuse Mr. Freshwater’s misuse.

E. The Burn Was Not Poison Ivy

The Board described the burn in detail in its Post Hearing Brief pp. 22-23. Mr. Freshwater attempted to rely on the testimony of Patrick Johnston²¹ suggesting Zach might have been exposed to poison ivy²². (Johnston, p. 5417). Dr. Johnston failed to explain how the poison ivy could have formed the perfect shape of a cross on Zach’s arm. He also failed to explain where such exposure would occur in Ohio in the month of December. Dr. Johnston also offered that the pictures of Zach’s injuries, Bx. 7 and Bx. 8, were worthless because he had not seen “the physician’s notes,” and because the burn was “not severe.” Again, Dr. Johnston fails to explain how he is not able to identify a burn from a photograph, but is somehow able to ascertain its

²¹ Mr. Freshwater’s counsel made no attempt to qualify Patrick Johnston as an expert witness. Conversely, Dr. Levy is the chairman of the department of emergency medicine at St. Elizabeth health Center in Youngstown with extensive experience in emergency medicine.

²² Dr. Johnston also opined that Zach might have had a skin condition (Johnston, p. 5424), and that Zach might have had a scrape. (Johnston, p. 5424).

degree of severity.

F. Mr. Freshwater Attempts to Discredit Zach Dennis

Mr. Freshwater attempts to discredit the testimony of Zach Dennis throughout his brief.

1. Mr. White Erroneously Reported Zach as Being Dishonest with His Parents.

Mr. Freshwater asserts “[e]ven Principal White testified he learned Zach Dennis had been dishonest with his parents as reported to Principal White by the Dennis Parents.” (T. 587 Line 22- T. 588, Line 11). This statement is a mischaracterization of the testimony offered and plays fast and loose with the facts.

First, Bill White testified he had a conversation with Steve Dennis (Zach’s father) where he was told that John Freshwater was contacting speakers for the Fellowship of Christian Athletes (“FCA”) and was having students take credit for the efforts. (T. 608, 609-610). White stated that he interpolated from this conversation Zach had been “dishonest” with his parents by stating that he had contacted guest speaker, Jeff Cline. White confused Steve Dennis’s message. Steve Dennis clarified Zach never told his parents he contacted Jeff Cline and he does not believe his son was dishonest about contacting speakers. (T. 3267, 3290-91). Mr. Dennis also testified that when he stated to Mr. White, “he was dishonest,” he was referring to John Freshwater and not his son. (Id). Zach Dennis testified Freshwater had him call two speakers²³, but that he never called Jeff Cline, nor did he ever tell his parents he had. (T. 353, 3173, 3175, 3182). Thus, Mr. Freshwater suggests “fire” when there isn’t even “smoke.”

2. The Attempt to Discredit Zach Through Ben Nielson.

Mr. Freshwater relies on testimony of Ben Nielson in another attempt to discredit Zach. (FB, p. 71). Mr. Nielson’s testimony is frequently exaggerated and on three occasions is patently

²³ It would have been improper for Mr. Freshwater to direct Zach or any other student to contact speakers in his role as monitor of the FCA.

false. First, Ben Nielson offered testimony that Zach “presented the underside of his right forearm” as the location of his burn. To support his testimony, Mr. Nielson drew a picture of Zach’s arm, which was entered into evidence. (Id; 2649, 5260, EE 194). Mr. Nielson’s testimony is dispelled by a simple comparison of the photograph depicting Zach’s injury with Mr. Neilson’s artistic drawing. (BX 7, 8; EX 63, 64; Neilson, T. 2646-50, 3099-3101).

Ben Nielson’s zeal to be helpful to Mr. Freshwater is evident when he testified he identified Zach Dennis’s arm in a locally published newspaper some time after school had started. (T. 2663) Zach Dennis was not identified as the injured student until the hearing started in October, 2008. Superintendent Short investigated Mr. Nielson’s claims and discovered Zach had not been identified by name or photo in either the *Mount Vernon News* or *Columbus Dispatch* until the hearing started. (T. 6255-56). Once Zach was identified, there was never a picture of his arm in either paper. (Id). Accordingly, Mr. Nielson could never have seen a picture of the arm in the paper with Zach Dennis identified. Therefore, his story cannot be true.

Mr. Nielson also claimed to have contacted Father Hammond, a guest speaker at the FCA. Mr. Nielson confirmed that he had filled out a speaker report form, representing that he had invited Father Hammond to the middle school. (Nielson, T. 2663). This testimony was contradicted by Father Hammond, himself. Father Hammond testified John Freshwater had contacted him and that at no point had he been invited to speak at the FCA by Ben Nielson or any other student. (Hammond, T. 6067).

3. Zach Cannot Be Discredited Based on Others Estimation of Pain

Mr. Freshwater offers testimony regarding different student’s perception of pain, as labeled on a generic “pain scale.” (EX 200, 206, 209). Pain is subjective. No one else can testify how Zach did or did not feel when he was shocked with the Tesla Coil. His experience was

unique to him. The argument about the “pain scale” is simply not valid.

G. Mr. Freshwater Attempt to Diminish Justin Newland’s Injury

Perhaps the most troubling victim of Mr. Freshwater’s Tesla Coil experiment is Justin Newland. Justin’s injury came to light *after* Mr. Freshwater received the January 22, 2008 letter, directing him to stop burning students. This incident is more fully described in the Board’s Brief at pages 24-26.

VI.MR. FRESHWATER FALSELY CREDITED STUDENTS WITH CONTACTING FCA GUEST SPEAKERS

A. Mr. Freshwater Contacted Father Hammond, Pastor Turner, and Ricky Warren

Whether Mr. Freshwater classifies his actions as a monitor, facilitator or supervisor; or whether he states that his conduct was not “primarily [leading],” he may not directly contact guest speakers for the FCA. (20 U.S.C.A. § 4071; FB, p. 136). On at least three occasions, Mr. Freshwater did just that.

First, Mr. Freshwater contacted Father Hammond to speak at the FCA during the 2007-2008 school year. Father Hammond testified Mr. Freshwater contacted him by phone call or at the Care Net dinner, where he was asked to serve as a guest speaker at the Middle School FCA. (Hammond, T. 6066). Mr. Freshwater argues the resource speaker forms²⁴ for April 1, 2008 and April 4, 2008, listing FCA students who contacted speakers as: Doug Reitsman, Ben Neilson and Jordan Freshwater, demonstrate students contacted Father Hammond. However, Father Hammond testified he was never contacted by any student at Mount Vernon Middle School. (Hammond, T. 6067; FB, p. 147). Moreover, Mr. Freshwater mischaracterizes Father Hammond

²⁴ Of some concern is the fact Mr. Freshwater has submitted resource speaker forms which purport to credit FCA students with contacting guest speakers when he, himself contacted the speaker. The testimony of guest speakers Father Hammond and Pastor Turner do not correlate with Mr. Freshwater’s speaker logs. Plain and simple, both cannot both be true. This is further supported by the fact that the resource speaker form for Jeff Cline lists Zach Dennis as his student contact. Both Jeff Cline and Zach Dennis have testified this form is inaccurate.

by stating he “testified it was possible the students did contact him.” (FB, p 147) The testimony cited provides:

Q: Is it possible a student called your office and spoke to one of the two ladies that you just referenced and talked to them about FCA?

A: Well, again, sir, it’s possible, but I don’t think it’s very likely.

(Hammond, T. 6070).

Father Hammond testified that he schedules his own calendar and any appointment for him to speak would have required him to be contacted directly. (Id). The Board’s Brief details the contact with Pastor Turner at page 44.

Contrary to his testimony and that of his daughter, the evidence indicates Mr. Freshwater contacted Ricky Warren to serve as a guest speaker for the FCA. Despite the fact that Mr. Freshwater and Ricky Warren accused the Board of “doctoring²⁵” the email, forensic document expert John Liptak confirmed the email represents an accurate copy of the email sent from Ricky Warren to John Freshwater. (Freshwater, T. 423; Warren, T. 4658-59, 4690-91; Liptak, T. 5992-93). The email provides:

John, Right now I have time to do which ever one you want me to and I can do both if you want me to.

Ricky would you be able to do F.C.A. at the middle school on Jan. 29th or Feb. 5th from 10:30- !2:45? Each of the 3 sessions are about 12 min. long.

Thanks You Freshwater

(BX 22). While Ricky Warren provided an affidavit which proclaims, “Jordan Freshwater emailed me more than one time,” this statement fails to account for the context and source of the email, or for the fact that Ricky Warren has no personal knowledge of who drafted the e-mail.

²⁵ This is not the only instance of Mr. Freshwater (and his counsel) asserting meritless allegations at the Board. For example, Mr. Freshwater alleged BX 91 had been “forged” with handwriting that was not his own. In order to faithfully address this meritless charge, the Board of Education was required to hire questioned document expert, Harold Rodin, to dispel Mr. Freshwater’s assertion that it was not his handwriting on the Tall Towers exhibit. (Freshwater, T. 4853-54; Rodin, T. 5977).

(See EX 175). Jordan Freshwater acknowledged she would not sign an email “Freshwater.” (T. 1685). The evidence points to John Freshwater as having contacted Ricky Warren and then attempting to disguise his overstep by crediting the contact to his daughter.

There is further discussion in the Board’s Brief at pages 45-46, detailing improper contacts of speakers acknowledged by Mr. Freshwater.

B. Mr. Freshwater Engaged in Active Prayer with FCA Students, Over Pastor Zirkle

Mr. Freshwater’s brief asserts that Zach Dennis is “caught red-handed in his most notorious lie as documented medical proof demonstrates John Freshwater suffered a medical condition which prevented him from raising his hands and arms into the air.” (FB, p. 138; EX 140). While this is certainly a strong statement, it carefully omits Mr. Freshwater’s admission that he “may have raised [his] hands” during the FCA prayer. (Ritchey, T. 5944). He also conceded in his note concerning the FCA meeting “I had arms up.” (EX 132)

Former vice principal Ritchey testified he met with Mr. White and Mr. Freshwater concerning charges Mr. Freshwater participated in a prayer at an FCA meeting, about the health of a speaker. (Ritchey, T. 5945). Ritchey testified that Mr. Freshwater admitted he “may have put my hands up,” and lifted his arms way above his head, in demonstration. At no point did Mr. Freshwater notify Ritchey he couldn’t lift his arms because he was undergoing therapy. (Ritchey, T. 5946). Despite Mr. Freshwater’s recently acquired “irrefutable medical evidence,” his failure to make an outright denial is a good indication of his actions. That Mr. Freshwater would have trouble recollecting whether he raised his hands, shortly after the FCA meeting, and two years later have a perfect recollection that his injury would have prevented that conduct renders his testimony incredible. (FB, p. 138).

VII. CONCLUSION

“A teacher affects eternity, he can never tell where his influence stops.” *The Education of Henry Adams*, Chapter XX, Henry Adams, 1905 (The Project Gutenberg, Jan. 2005). As our educators have a broad and enduring effect, it is imperative the rights of the students left in their charge are guarded with vigor and diligence. John Freshwater taught in Mount Vernon Middle School for twenty-one years. He accepted an enormous responsibility to educate, protect and guide thousands of students. Mr. Freshwater failed to live up to his responsibility:

- Mr. Freshwater engaged in religious advocacy and promoted his Christian faith until he was removed from the classroom after the 2007-20008 school year;
- Mr. Freshwater improperly used a Tesla Coil to burn 500-600 students and put them in harm’s way;
- Mr. Freshwater exceeded his role as a monitor of the FCA by participating in its activities rather than serving as a non-participant; and
- Mr. Freshwater intentionally and publicly refused to follow legitimate directives of his supervisors, engaging in gross insubordination.

Each one of these actions constitutes good and just cause for the termination of Mr. Freshwater’s employment with the Mount Vernon City School District.

Respectfully submitted,

/s/ David J. Millstone

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