

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, as)
COMMISSIONER OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 01-1919PL
)
JAMES M. McMILLAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on July 12 and 13, 2001.

APPEARANCES

For Petitioner: Robert E. Sickles
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For Respondent: Robert F. McKee
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STATEMENT OF THE ISSUE

The issue is whether Petitioner should discipline Respondent's teaching certificate for immorality, misconduct in office, or incompetency in connection with his supervision, as a

high school baseball coach, of a team trip, during which hazing occurred, and his subsequent investigation of the incident.

PRELIMINARY STATEMENT

By Administrative Complaint dated March 28, 2001, Petitioner alleged that Respondent was aware of and condoned hazing while supervising the Coconut Creek High School baseball team that he coached during a trip to Orlando from April 16-19, 2000. The Administrative Complaint alleges that, on the first night of the trip, an assistant coach informed Respondent that he had found a student athlete, D. B., in his room acting abnormal and angry. The assistant coach allegedly informed Respondent that D. B. had marks on his back and there was a problem.

The Administrative Complaint alleges that Respondent and the assistant coach went to D. B.'s room, where they found him standing by an air conditioning fan with his boxer shorts open, and asked him if there was a problem. D. B. allegedly replied "no." Respondent allegedly failed to take any action to investigate further.

The Administrative Complaint alleges that, the next day, Respondent pulled D. B. from a baseball game and asked if why he was not playing well. D. B. allegedly responded, "You know what's wrong with me and you aren't going to do anything about it." D. B. allegedly told Respondent that several players

applied Icy Hot to D. B.'s genitals the prior evening and he was still in pain. The Administrative Complaint alleges that older players had hazed D. B. and several other younger players. However, despite D. B.'s statement, Respondent failed to investigate or assist the student's pain, but merely questioned several students, who denied that anything had happened.

The Administrative Complaint alleges that Respondent did not investigate until an assistant coach told him that D. B. had told his parents that he had been hazed. At a team meeting, students allegedly informed Respondent that hazing had taken place and identified who was involved.

The Administrative Complaint alleges that Respondent subsequently tried to conceal his knowledge of the hazing by tampering with a witness. Respondent allegedly asked an assistant coach to say that he did not know what happened in the meeting if the incident was investigated.

The Administrative Complaint alleges that Respondent was guilty of gross immorality or moral turpitude, in violation of Section 231.2615(1)(c), Florida Statutes; a breach of the Principles of Professional Conduct, in violation of Section 231.2615(1)(i), Florida Statutes; the failure to make a reasonable effort to protect a student from conditions harmful to learning, his mental health, or his physical health or safety, in violation of Rule 6B-1.006(3)(a), Florida

Administrative Code; the intentional exposure of a student to unnecessary embarrassment or disparagement, in violation of Rule 6B-1.006(3)(e), Florida Administrative Code; and the failure to maintain honesty in all professional dealings, in violation of Rule 6B-1.006(5)(a), Florida Administrative Code.

The Joint Pre-hearing Statement filed July 3, 2001, sets forth Petitioner's statement of the case and emphasizes that Respondent is liable for allowing the hazing to take place and for failing to take adequate action after the hazing.

This case was consolidated with Broward County School Board v. James M. McMillan, DOAH Case No. 01-0020PL. The Administrative Law Judge is issuing a separate recommended order to the Broward County School Board in that case.

At the hearing, Petitioner and the Broward County School Board jointly called eight witnesses. Petitioner offered into evidence nine exhibits: DOE Exhibits 1-9. The Broward County School Board offered into evidence five exhibits: Petitioner Exhibits 1-5. Respondent called two witnesses and offered into evidence two exhibits: Respondent Exhibits 1 and 2. All exhibits were admitted except Petitioner Exhibit 1 and DOE Exhibit 7. Petitioner Exhibit 2, DOE Exhibit 5, and Respondent Exhibit 2 were not admitted for the truth of their contents. As designated at the hearing, "Petitioner" exhibits are those of

the Broward County School Board; otherwise, as used in this recommended order, "Petitioner" refers to Charlie Crist.

Petitioner's exhibits are part of the record in this case and DOAH Case No. 01-0020PL, and Broward County School Board's exhibits in DOAH Case No. 01-0020PL are part of the record of that case and this case. The Administrative Law Judge therefore requests each petitioner to copy its original exhibits and forward the copy to the other petitioner as soon as possible after the receipt of the record in each case from the Division of Administrative Hearings.

The court reporter filed the transcript on August 17, 2001. The parties filed their proposed recommended orders by September 10, 2001.

FINDINGS OF FACT

1. Respondent has been a teacher and a coach for 27 years. He taught and coached in Illinois for 11 years before moving to Florida, where he has taught and coached in Florida for the past 16 years. He currently is teaching health, and he sometimes teaches physical education. Respondent holds Florida Educator's Certificate 551145, which is valid through June 30, 2005, and he is certified in health education, physical education, and social science.

2. Respondent has coached basketball, football, and baseball. Most recently, Respondent was the head baseball coach

at Coconut Creek High School where he was the Fort Lauderdale Sun-Sentinel Coach of the Year for Broward County three years ago. He coached baseball four years at Coconut Creek High School and the preceding eight or nine years at Fort Lauderdale High School. The events in this case arose during the 2000 season; Respondent did not coach during the 2001 season.

3. During spring break of 2000, Respondent took his baseball team to Orlando and Sebring. The purpose of the trip was to allow the team to play two high-school baseball games against teams from different regions of the state and to visit an Orlando theme park. The trip took place toward the end of the season, prior to the commencement of the district tournament.

4. The Orlando trip extended from Sunday, April 16, through Wednesday, April 19. Twenty-four student athletes went on the trip. In addition to Respondent, the other adults supervising the students were assistant coaches Reynaldo Nieves, Joseph Leone, and Rex Nottage. Respondent's wife was also with him, as were several parents, but they did not share with Respondent and the assistant coaches supervisory responsibility for the students.

5. On arriving in the Orlando area early in the morning, the group first visited Islands of Adventure, a theme park. They finally reached their hotel at about 8:00 p.m. Respondent

gathered the students together and gave them directions as to where they could go. He told them they could not leave the motel property without the permission of a coach. Some students wanted to eat; most wanted to shower. Respondent told them they had to be in their rooms by 11:00 p.m. and their lights must be out by midnight. Respondent warned them that he and the other coaches would perform bed checks at these times.

6. Respondent and his wife had arranged the rooms so that the group was together at the motel. Their rooms were on the second or third floor of the motel. Each room accommodated four students. Respondent and his wife were in a room, Mr. Leone was in a room, and Mr. Nieves and Mr. Nottage shared a room. The students' rooms were between the rooms of the adults to enable the adults to exercise closer control over the students.

7. At some point prior to the first bed check, the older students began entering the rooms of the younger students, by trick or by force. A large group of the older students would then overpower the younger student and, typically, apply Icy Hot liniment to a towel and then to the testes of the student.

8. The students were aware that this hazing was likely to occur during this trip. Seven of the students were hazed by nearly all of the remainder of the team.

9. Prior to being hazed himself, D. B. was aware that other students had been hazed and was aware of the form of the

hazing because some of the other students had come to D. B.'s room and asked to use the shower. D. B. was a junior, but this was his first year on the varsity, and he knew that the older students would try to haze him too. However, he did not try to contact one of the coaches or parents to intervene in the half hour that D. B. estimates elapsed between the hazing of the last of the other students and his hazing.

10. As had happened to most of the other hazed students, most, if not all, of the older students on the team entered D. B.'s room, pulled down his pants, and applied Icy Hot and shaving cream to his genital area. D. B. yelled and struggled against four or five students on various parts of his prone body. He sustained some minor scratches while he was held down for about one minute.

11. As soon as he was released, D. B. took a shower. He chased the remaining students out of his room, swinging a belt and yelling. While in the shower, D. B. was so angry that he threw soap and shampoo containers in the shower stall.

12. About ten minutes after D. B. was hazed, Mr. Nieves was roaming the rooms and entered D. B.'s room. D. B. testified that the hazing took place around 9:00 to 9:30 p.m. If so, Mr. Nieves entered the room around 9:10 to 9:40 p.m.

13. When Mr. Nieves entered D. B.'s room, he found him in a bad mood. D. B. was throwing things around the bathroom and

seemed mad. The door to his room was open, so Mr. Nieves walked inside and asked if he was okay. D. B., who was wearing only a towel wrapped around his waist, did not answer, but left the bathroom and stood in front of the wall air conditioning unit, which was blowing cold air. Mr. Nieves saw about five marks on D. B.'s back and saw that D. B. was beet red. The marks appeared as though someone had been grabbing him. Mr. Nieves offered to get Respondent, and D. B. said to do so.

14. Mr. Nieves thought that D. B. had been wrestling or something. His visit to D. B.'s room had occurred not long before the first room check. Mr. Nieves walked down the hall to Respondent's room and found Respondent inside. Mr. Nieves informed Respondent that D. B. wanted to talk to him. He told Respondent that it looked like something was wrong.

15. Respondent and Mr. Nieves returned to D. B.'s room. They arrived there about three minutes from the time that Mr. Nieves had left the student's room. Respondent entered D. B.'s room ahead of Mr. Nieves and found D. B. standing in front of the air conditioning fan, holding the towel open like he was cooling down. In a conversation that lasted about 30 seconds, Mr. Nieves said to D. B., "Coach is here. Tell him what's wrong." Respondent added, "What's wrong?" To these inquiries, D. B. replied, "Nothing. Don't worry about it."

Mr. Nieves and Respondent asked about the red marks, but D. B. said they were nothing and everything was fine.

16. D. B. testified that he did not disclose the hazing because he knew that Respondent would punish the team. He assumed that the team would be upset with D. B. for telling the coach that they had done something of which Respondent disapproved.

17. Somewhat irritated that D. B. had asked to see Respondent and three minutes later declined to tell him anything, Mr. Nieves left the room with Respondent. They then completed the bed check, and Mr. Nieves did not see Respondent again that night.

18. However, Mr. Nieves returned to D. B.'s room about a half hour later. He found D. B. still standing by the air conditioning fan. Mr. Nieves told D. B. that it was not fair to Mr. Nieves to say to Respondent that nothing was wrong. Mr. Nieves then asked if something was wrong. D. B. replied, "They got me, coach." Mr. Nieves did not know what he meant, but thought that D. B. meant some sort of rough-housing. Mr. Nieves asked D. B. why did you not say something to Respondent. Mr. Nieves spent about 15 minutes in D. B.'s room, but did not learn anything more specific. However, D. B. expressed considerable anger to Mr. Nieves.

19. The Icy Hot that came into contact with D. B.'s penis was most painful. The next morning, the pain was somewhat reduced. Early that morning, the team went to a baseball field to prepare for a game that day. They did a lot of situational baserunning so the fielders could practice. Because D. B. was not a starter, he and the other nonstarters had to do much of the baserunning. He displayed no problems running in the morning.

20. However, hours later, during the pregame practice, a ball was hit toward D. B. in the outfield. He charged it, but it got by him. Instead of turning and running after the ball, as Respondent required of all players, D. B. turned and walked toward the ball.

21. Seeing D. B. and another student not hustling, Respondent pulled them off the field. When Respondent demanded to know why D. B. had not run after the ball, D. B. said that "my balls are on fire." D. B. had a poor attitude at times and was stubborn. Without responding meaningfully to D. B.'s explanation, Respondent benched both players for the entire game. D. B.'s explanation is discredited due to his ability to run without impediment in the morning.

22. D. B. had called his parents Monday at around noon and had told them what had happened the prior evening. D. B. called them again after the afternoon game. During the first call,

D. B.'s parents told him to defend himself if necessary and not to worry about talking to Respondent about the hazing.

23. Respondent had not been feeling well Sunday night. By the time of practice Monday morning, his throat was so sore that he had to have his assistant coaches direct the students on the field and yell instructions. After the game, in which Respondent's team had played poorly and lost, Respondent spoke only briefly to the team and allowed Coach Nottage to yell at the students to fire them up and make them work harder.

24. After the team had returned to the motel, Mr. Nieves talked to D. B.'s roommates. He was somewhat concerned about D. B. because, after the game, when he had asked the student what was wrong, D. B. had only laughed as if he were mad. The roommates talked vaguely about Icy Hot, but they were unwilling to be more specific.

25. Around 8:00 or 9:00 p.m. Monday at the motel, D. B. came to Respondent's room and asked if he could talk to the coach for a minute. Respondent said he could. D. B. then told Respondent that he had had Icy Hot put on his testes. Whispering, Respondent asked if he was alright and what did D. B. want Respondent to do about it. The record is unclear whether he asked this in a challenging or inquisitive tone. D. B. did not add more details.

26. On Tuesday morning, the team departed Orlando in vans headed for Sebring, where they were to play another game Tuesday night. Respondent had been quite sick Monday night, unable to swallow or talk. By Tuesday, he was even more sick. No one spoke to him about D. B. or hazing. With considerable effort, Respondent was able to escort the team to the Sebring motel, and then he went directly to a nearby hospital emergency room. Diagnosed as having pharyngitis, Respondent obtained an injection of antibiotics, which provided him relief the next day.

27. Scheduling problems resulted in postponing the Sebring game, so that the team did not return to the motel until after 11:00 p.m. Respondent directed the students to go directly to their rooms and told them that there would be a midnight bed check.

28. Late the next morning, Wednesday, the team left Sebring to return to Fort Lauderdale, where they arrived at 3:00 p.m. One of the parents traveling with the team told Respondent at a gas stop that D. B. had called his parents. Respondent summoned D. B. and complained about D. B. calling his parents without first informing Respondent of the problem. The conversation was brief because the group was waiting in their vans. D. B. replied, "Well, coach, you know what happens."

Respondent answered, "I don't know what happens. Go get in your van."

29. On the way back to Fort Lauderdale, Mr. Nieves told Respondent what he knew about hazing in the form of older students applying Icy Hot to the genitalia of younger students and, in some cases, paddling younger students. Respondent expressed his frustration that D. B. had not complained to him about the hazing.

30. When they returned to Fort Lauderdale, Respondent told D. B. that he wanted to speak to him and his father, who was there to pick him up. However, D. B. and his father left the school without speaking to Respondent.

31. Respondent decided to call a team meeting to find out what had happened. Respondent called D. B.'s mother to assure that D. B. would come to the meeting, but she said that he was at work and that she had already called the school board. D. B. was not at work.

32. In the team meeting, Respondent warned the students that hazing was very serious. He asked for those persons directly and indirectly involved to identify themselves. Various students began raising their hands, admitting to various levels of involvement, and Mr. Nottage recorded their names, at Respondent's direction. Respondent then warned the students that the school board was involved and there could be criminal

punishments for certain persons. He told the students that there was nothing that he could do about these consequences, but he would take his own actions. At this point, many of the students began retracting admissions. Feeling that the notes had become useless, Respondent obtained the notes from Mr. Nottage and discarded them later that weekend.

33. Prominent among the many differences in testimony concerning the events of this trip and its immediate aftermath is a difference in recollection between Respondent and Mr. Nieves concerning a conversation between the two of them following the meeting. Mr. Nieves testified that Respondent instructed him to deny that the notes existed, and Respondent denied that this is true. Such dishonesty, if true, would merit punishment.

34. It is possible that Respondent did ask Mr. Nieves to conceal the truth in order to protect Respondent's students, who had made confessions prior to understanding the potential administrative and criminal consequences. Perhaps Respondent regretted his role in securing this inculpatory information.

35. On the other hand, Mr. Nottage, as well as over 22 students were at this meeting (another student had failed to attend), so Respondent had to know that such a concealment was unlikely to go undetected. Most importantly, though, Mr. Nieves was a most unconvincing witness. His recollection of details

was poor, contradictory, and entirely inconsistent with his apparent intelligence. His demeanor was poor. The Administrative Law Judge was left with the opinion that Mr. Nieves was lying at the time that he first provided statements concerning the events--for some reason, trying unfairly to inculcate Respondent or to exculpate himself--or he was lying at the hearing--belatedly, trying to protect Respondent. On balance, it is impossible to credit Mr. Nieves' testimony on this crucial point.

36. After talking the matter over with Mr. Nieves and Mr. Nottage (Mr. Leone had already left before the meeting), Respondent decided to punish the students as best he could by making them run. Those who had actually touched the younger students had to run 10 miles. Older students who had stood by and encouraged or supported the hazing had to run an intermediate distance. Even the victims, such as D. B., had to run because they had not reported the hazing, but their distance was the shortest.

37. The team had a game the next morning. Late in the afternoon or early in the evening on Thursday, Respondent called his supervisor for athletics, the Coconut Creek High School athletic director, and reported the hazing in general terms. The athletic director told Respondent that he had done the right

thing by calling him and said to come see him Monday, when school was back in session.

38. On Saturday morning, Respondent required the students to run the distances that he had determined appropriate. He also informed the team that he would be recommending to the principal that the baseball team not take field trips. The athletic director later suggested that Respondent not make that recommendation.

39. D. B. and his parents have filed a civil action against the school board for damages arising out of the incident.

40. School officials have known that hazing has been a problem in the past at Coconut Creek High School, although more with the soccer team. In 1997, the athletic director asked Respondent, as the baseball head coach, to draft a letter stating a policy prohibiting hazing. Addressed to the parents of baseball players, the letter states in part: "The athletic department has a policy of zero tolerance when it comes to 'initiating' or 'hazing' a fellow student. Anyone guilty of participating in a hazing or a form of initiation will be immediately dismissed from the team." Respondent and the athletic director signed the letter.

41. At the start of the 2000 season, Respondent warned the students on the team that he would not tolerate any sort of

misbehavior, including hazing. Respondent had not been aware of any hazing incidents on the baseball team since 1997. As already noted, other students knew of the continuation of the practice. Some of the parents of the older students also knew of the practice, at least as it had been inflicted on their sons. However, it does not necessarily follow that what a student shares with a parent, he also shares with his coach.

42. Petitioner has failed to prove gross immorality or moral turpitude on the part of Respondent. Petitioner has failed to prove a violation of any of the Principles of Professional Conduct. Petitioner has failed to prove that Respondent failed to make reasonable effort to protect a student from conditions harmful to learning, his mental health, or his physical health and safety. Petitioner has failed to prove that Respondent has intentionally exposed a student to unnecessary embarrassment or disparagement. Petitioner has failed to prove that Respondent has failed to maintain honesty in all professional dealings.

43. The evidence does not establish that Respondent knew or had reason to know that hazing was about to occur or that hazing had occurred. At all times, Respondent was in charge of 24 students, and, most of the time, he was sick--after Sunday, very sick. The scrutiny that Respondent could reasonably be expected to give the D. B. situation, especially given the

student's reluctance to make a straightforward declaration of what happened, must be assessed in light of these circumstances.

44. As the last person to be hazed, D. B. had ample opportunity to alert the coaches. After the hazing, D. B. repeatedly declined to disclose the problem to Respondent. D. B. knew that Respondent did not condone hazing. D. B. knew that, rather than ignore a hazing complaint, Respondent would punish the responsible players, and this would draw unwanted attention to D. B. Seeking advice from his parents, D. B. was reinforced in his earlier determination not to seek the effective remedies that he knew were available within the structure of the team.

45. Respondent's investigation was sufficient for imposing intra-team discipline. His apparent departure from school policy of dismissal from the team may be explained by Respondent's awareness that the school board and possibly law enforcement would also investigate the matter and impose their own sanctions; presumably, the athletic department policy was intended to operate in isolation.

46. Although Respondent could have informed the athletic director of the problem Wednesday night or Thursday morning, Respondent did so later Thursday. This brief delay caused no prejudice, as Respondent's supervisor assured Respondent that he had done the right thing and he would visit him the next Monday.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

48. Section 231.2615(1)(c) and (i) provides:

The Education Practices Commission may suspend the teaching certificate of any person as defined in s. 228.041(9) or (10) for a period of time not to exceed 3 years, thereby denying that person the right to teach for that period of time, after which the holder may return to teaching as provided in subsection (4); to revoke the teaching certificate of any person, thereby denying that person the right to teach for a period of time not to exceed 10 years, with reinstatement subject to the provisions of subsection (4); to revoke permanently the teaching certificate of any person; to suspend the teaching certificate, upon order of the court, of any person found to have a delinquent child support obligation; or to impose any other penalty provided by law, provided it can be shown that the person:

(c) Has been guilty of gross immorality or an act involving moral turpitude.

(i) Has violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules.

49. Section 240.1325(1) provides a good definition of hazing:

As used in this section, "hazing" means any action or situation which recklessly or intentionally endangers the mental or physical health or safety of a student for the purpose of initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution. Such term includes, but is not limited to, any brutality of a physical nature, such as whipping, beating, branding, forced calisthenics, exposure to the elements, forced consumption of any food, liquor, drug, or other substance, or other forced physical activity which could adversely affect the physical health or safety of the student, and also includes any activity which would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct which could result in extreme embarrassment, or other forced activity which could adversely affect the mental health or dignity of the student.

50. Rule 6B-1.006 provides in part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

51. Rule 6B-1.006(5)(a) provides that the "[o]bligation to the profession of education requires that the individual . . . [s]hall maintain honesty in all professional dealings."

52. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

53. Using the statutory definition as guidance, it is clear that hazing occurred on this team trip. However, for the reasons already stated, Petitioner has failed to prove the material allegations against Respondent.

RECOMMENDATION

It is

RECOMMENDED that the School Board of Broward County, Florida, enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 20th day of September, 2001, in
Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of September, 2001.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.