

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER)
OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 03-0178PL
)
MARK D. SWANSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was held in this case before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings, on April 15 and 16, 2003, in Naples, Florida.

APPEARANCES

For Petitioner: Bruce P. Taylor, Esquire
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For Respondent: Robert J. Coleman, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent's educator's certificate should be subject to discipline for the violations alleged in the Administrative Complaint dated February 13, 2002.

PRELIMINARY STATEMENT

Following an investigation by the Department of Education (the "Department"), Petitioner filed an Administrative Complaint against Respondent on February 13, 2002. Respondent denied the allegations and filed an Election of Rights, seeking a formal hearing. This matter was referred to the Division of Administrative Hearings on January 21, 2003. The case was initially set for hearing on March 11 and 12, 2003. The case was continued once and rescheduled for final hearing on April 15 and 16, 2003.

The Administrative Complaint set forth the following material allegations of fact:

On or about September 8, 2000, Respondent engaged in inappropriate conduct and used profane language during halftime of a football game as part of a preplanned [sic] effort to motivate the team. Specifically, Respondent threw a football helmet which hit [Fenwick Paul], a 16-year-old player, in the back. Respondent pushed [Jim Muth], a 17-year-old player, into a locker. Respondent threw [Brandon Tyler], a 17-year-old player, into the bathroom and then threw him into several walls. Respondent also threw a clip board which hit another coach and cut his hand. On or about September 26, 2000, the superintendent accepted Respondent's resignation as head football coach and issued Respondent a letter of reprimand and suspended him without pay for 3 days. Respondent resigned his teaching position effective November 3, 2000.

Based on the these factual allegations, the Administrative Complaint alleged two statutory violation counts and two rule violation counts. Count one stated the misconduct alleged was in "violation of Section 231.2615(1)(c), Florida Statutes,¹ in that Respondent has been guilty of gross immorality or an act involving moral turpitude." Count two stated the misconduct alleged was in "violation of Section 231.2615(1)(i), Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education Profession in Florida prescribed by the State Board of Education." Count three stated the misconduct alleged constituted a rule violation in which Respondent "failed to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical safety," in violation of Florida Administrative Code Rule 6B-1.006(3)(a). Count four stated the misconduct alleged constituted a rule violation in which Respondent "intentionally exposed a student to unnecessary embarrassment or disparagement," in violation of Florida Administrative Code Rule 6B-1.006(3)(e).

At the hearing, Petitioner presented the testimony of Kim G. Butts, Mario Doria, Roy Terry, and Peter DeBaun. Petitioner recalled Mr. DeBaun as a rebuttal witness. Petitioner's Exhibits 1 through 15 were admitted into evidence.

Respondent testified in his own defense and presented the testimony of Steven Pricer, Jason Woodward, Steven Sapere, Heidi Roderick, and William Sparacio. Respondent also testified in surrebuttal on his own behalf. Respondent's Exhibits 1 through 7 were admitted into evidence.

A two-volume Transcript of the hearing was filed on August 21, 2003. By Order dated August 26, 2003, Petitioner's motion for extension of time was granted and the parties were given until September 12, 2003, to file their Proposed Recommended Orders. Both parties timely filed their Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record of this proceeding, the following Findings of Fact are made:

1. Respondent, Mark D. Swanson (Coach Swanson), holds Florida Educator Certificate No. 585952, covering the areas of mathematics and business education, which was valid through June 30, 2003. At the hearing, Respondent testified that it was his intention to maintain his certification beyond June 30, 2003.

2. At all times relevant to this proceeding, Coach Swanson was employed by the Collier County School District (the

"District") and was assigned to Lely High School ("Lely") as a teacher and as head football coach.

3. In 1995, Coach Swanson took over a Lely program that had fielded poor teams for several years. Within three years, Coach Swanson had guided the team to a district championship. In the 1999 season, despite a rash of injuries and discipline problems, Lely made the playoffs, though the team's performance declined after a 5-1 start.

4. At the conclusion of the 1999 season, Lely's principal Roy Terry, himself a former high school football coach, sent Coach Swanson a memorandum expressing "concerns with the turn we took the last half of this past season." After reciting a list of the positive aspects of Coach Swanson's performance, Mr. Terry noted nine areas of concern, including "Continue to monitor language of staff with students."

5. Coach Swanson's expectations for the 2000 season were not as high as in recent years past. He believed that a record of 6-4 would constitute a successful season. Summer practices had gone well. However, the team lost its first game to Barron Collier High School by a score of 24-0.

6. To Coach Swanson, the manner of losing the Barron Collier game was more important than the loss itself. The game was a scoreless tie at half time, and Lely trailed only by 7-0 at the start of the fourth quarter. However, in Coach Swanson's

view, the team quit in the fourth quarter and allowed Barron Collier to win the game going away.

7. Lely's second game, on September 8, 2000, would be against Fort Myers High School. Fort Myers was one of the best teams in the area, and Coach Swanson did not seriously believe that Lely could win the game. Nonetheless, he believed that his team's effort in this game would determine the fate of the season. If his team played hard and did not give up against a clearly superior team, Coach Swanson could use that effort to motivate Lely in subsequent winnable games. Throughout the week's practices, the Lely coaching staff emphasized maximum effort and not quitting against Fort Myers.

8. The Fort Myers game began relatively well for Lely. The team was behind only 14-0 near the end of the first half. Then, Fort Myers took over the ball on its own nine yard line and drove 91 yards to a touchdown in a little over one minute. Coach Swanson believed that his team "just laid down and quit" on that touchdown drive.

9. On the touchdown play, Lely's defensive coordinator Steve Sapere called for a linebacker blitz. Linebacker Brandon Tyler, one of the best players on the Lely team, made a halfhearted effort on the play. As the defense came off the field, Coach Sapere told Brandon Tyler that he would not call

any more blitzes unless Brandon's effort improved. Coach Sapere then walked away.

10. William Sparacio, then the running backs coach at Lely, witnessed the scene between Coach Sapere and Brandon Tyler. After Coach Sapere walked away, Brandon told Coach Sparacio, "You better get that guy out of my face."² After the ensuing kickoff, Coach Sparacio shouted to Brandon Tyler in an effort to get his attention, but Brandon ignored him. Coaches Sparacio and Sapere consulted and agreed that if Brandon would not accept coaching, he would not be put back into the game.

11. Coach Sparacio reported the incident to Coach Swanson at the commencement of half time. Coach Swanson told Coach Sparacio that the decision whether to play Brandon Tyler in the second half would be left to Coaches Sapere and Sparacio, but that he would deal with Brandon during half time.

12. Coach Swanson testified that, as the first half came to a close, he wondered what he could do to motivate his listless team. When apprised of the situation with Brandon Tyler, his first thought was that Brandon's insubordination would provide a perfect subject for a half time talk to the team.

13. Coach Swanson thought that Brandon Tyler was the perfect person to criticize in front of the team because Brandon was one of his best players, and "calling out" a team leader

would have more impact than picking on a lesser player. Brandon was a tough player, "very intense," and had always liked the fact that Coach Swanson was himself "fiery" and intense. Coach Swanson believed that Brandon would understand being used as an example in a half time speech and that Brandon would respond positively.

14. Coach Swanson walked to the locker room with Heidi Roderick, the Lely team trainer. Ms. Roderick asked him what he was going to do about the team's performance. Coach Swanson responded that he was going to make a fool of himself and create a "spectacle" that might make the team mad enough to play hard. He told Ms. Roderick, "Maybe they'll picture my face on a guy across the line . . . and want to beat the crap out of him." He believed that the second half of this game was essential to the team's entire season and that he had to try something drastic to break the team out of its lethargy.

15. The Lely locker room was not an open football locker room, but a typical highschool locker room with rows of benches separated by rows of lockers. Thus, there was no central area where the team could gather during half time. The players would scatter throughout the locker room at half time. Coach Swanson decided that the only way to get the attention of all the players was to make a big noise and that the best way to do that was to bounce a football helmet off a metal locker.

16. Coach Swanson took a helmet from a player and glanced down a row of lockers to make sure no one was in the line of fire, then skipped the helmet "off the floor so it'd go 'bing, bing, bing, bing,'" down the row of lockers. At the moment he let go of the helmet, Coach Swanson looked farther down the row of lockers and saw Fenwick Paul, a Lely player, sitting on a bench at the far end of the row. The helmet traveled about 40 feet down the row of lockers and struck Mr. Paul in the back. Mr. Paul was unharmed by the helmet glancing off his back. Coach Swanson apologized to Mr. Paul for hitting him with the helmet.

17. Another player, Jim Muth, demanded to know who was throwing helmets. Coach Swanson said, "It's me. You got a problem with that?" Jim Muth, cowed, said, "No, coach." The weight of the evidence established that Coach Swanson did not push Jim Muth into a locker.

18. Coach Swanson then loudly called for Brandon Tyler. When he found Brandon, Coach Swanson grabbed him by the shoulder pads and said, "Brandon, who the hell do you think you are talking to Coach Sapere like that?" Coach Swanson walked Brandon around the locker room by the shoulder pads, all the while shouting at the player.

19. The weight of the evidence established that Coach Swanson did not throw Brandon Tyler into the bathroom, into

walls, or down to the floor. Coach Swanson credibly testified that he held Brandon tightly by the shoulder pads both for the visual effect and to keep Brandon from slipping in his cleats on the tile floor of the locker room. He intended to intimidate the player while making an example of him in front of the team, but Coach Swanson had no intention of causing physical injury to Brandon Tyler.

20. Coach Swanson admitted that he swore as he walked Brandon Tyler around the locker room. He admitted that he repeatedly used the word "fuck." When Coach Swanson accosted him, Brandon began shouting, "I didn't do it. Coach Sparacio, you better fix this, you better tell him," apparently meaning that Coach Sparacio should intervene on Brandon's behalf. In response, Coach Swanson told Brandon to "be a fucking man and own up to it, because that's what this game is about, is being honest and reasonable and owning up to when you make a mistake." At that point, Coach Swanson released Brandon Tyler.

21. Coach Sparacio and Ms. Roderick heard Brandon Tyler say he was quitting the team during the altercation. Coach Swanson did not recall Brandon's saying he was quitting, but testified that "I could see myself" taking Brandon's statement to make the point to the team that its problem was quitting when the going gets tough. Coach Swanson testified that such a statement by Brandon would not have concerned him because "I

knew Brandon wasn't going to quit." In fact, Brandon Tyler did not quit the football team. He played the entire second half of the Fort Myers game and played the rest of the season.

22. After releasing Brandon, Coach Swanson spoke to the team as a whole, urging the players to fight to the end and give their best effort. He asked them, "Aren't you tired of this shit?" Some of the players chimed in their agreement.

23. After completing his speech to the team, Coach Swanson walked into the coaches' office adjacent to the locker room. Several assistant coaches, but no players, were in the office. Coach Swanson saw two of his assistants, Kim Butts and Steven Pricer, drawing up blocking schemes on a hand-held dry-erase board. Coach Swanson took the board away from Coach Pricer, saying that the team's problem was not "X's and O's" but a lack of heart and will to win. He threw the board against a wall. The board bounced off the wall and nicked the hand of assistant coach Brian Wallace.

24. Ms. Roderick testified that before the team left the locker room, Coach Wallace asked her to look at his hand. She stated that there was a small scratch on Coach Wallace's hand. It was not bleeding. Ms. Roderick testified that she would not have seen the mark on Coach Wallace's hand had he not shown her where it was. She gave Coach Wallace a band-aid in case the cut started bleeding during the second half.

25. No players or students testified at the hearing. Coach Wallace did not testify. Assistant coaches Kim Butts, Steve Pricer, Jason Woodward, Steve Sapere, William Sparacio, and Mario Doria all testified as witnesses to some or all of the events in the locker room at half time of the Fort Myers game. Aside from Coach Doria, all the assistants generally agreed with the facts as set forth above.

26. Coach Doria testified that Coach Swanson shoved Brandon Tyler into a locker and down to the ground. While Brandon lay on the ground, Coach Swanson told him to quit being "a fucking pussy," to get up and be a man. Brandon was crying and begging for help, but Coach Doria did not intervene for fear of creating a confrontation between himself and Coach Swanson. Coach Doria testified that when Coach Swanson took the dry-erase board from his assistants, he snapped it in half and threw one-half of the board across the room.

27. Coach Doria's singular version of events cannot be credited. He was the sole testifying witness to claim that Coach Swanson shoved Brandon or called him names. His witness statement of October 24, 2000, did not mention Coach Swanson's calling Brandon a "fucking pussy." No other witness claimed to have seen Coach Swanson snap the dry-erase board in half. The board belonged to Coach Pricer, who testified that he still uses it, though it did receive a crack from Coach Swanson's toss.

28. Whether they approved or disapproved of his actions, the assistant coaches agreed that Coach Swanson was engaged in an effort to motivate the team and that he was not out of control or acting in a blind rage. Coach Swanson himself testified that, while not scripted, his actions were a conscious effort to spark his team into giving a better effort in the second half of the Fort Myers game, which he believed key to the remainder of the season.

29. All of the witnesses agreed that Coach Swanson's tirade began and ended in the locker room at half time. His behavior on the field during the second half indicated nothing out of the ordinary. Lely lost the game by a score of 35-0.

30. In summary, the Department demonstrated by clear and convincing evidence that Coach Swanson threw a football helmet that struck Fenwick Paul; that Coach Swanson placed his hands on Brandon Tyler and cursed at the player while reprimanding him for his disrespectful comments to an assistant coach; and that Coach Swanson threw a dry-erase board that struck a fellow coach on the hand, causing a small cut.

31. There were no allegations that Coach Swanson committed any improper act in his role as a classroom teacher. Roy Terry, the principal of Lely, described him as a "fine person," who did a "fine job" as a teacher.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2003). See also § 231.262(5), Fla. Stat. (2001).

33. License revocation and discipline proceedings are penal in nature. The burden of proof on Petitioner in this proceeding was to demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

34. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The findings in this case were made based on the standard set forth in Osborne Stern and Ferris.

35. The Administrative Complaint alleged that Coach Swanson committed the acts prohibited by the provisions of Section

231.2615(1)(c) and (i), Florida Statutes (2001). The Administrative Complaint further alleged that Coach Swanson violated Florida Administrative Code Rule 6B-1.006(3)(a) and (e).

36. Section 231.2615(1), Florida Statutes (2001), authorizes the Education Practices Commission to suspend, revoke or otherwise penalize a teaching certificate provided it can be shown that the holder of the certificate, inter alia:

(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 the State Board of Education rules.

37. Florida Administrative Code Rule 6B-1.006 reads in pertinent part:

6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.

(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.

38. Florida Administrative Code Chapter 6B-4 applies to school districts, but its definitions provide guidance as to the terms "immorality" and "moral turpitude." Florida Administrative Code Rule 6B-4.009 provides:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

39. The term "moral turpitude" is defined in Florida Administrative Code Rule 6B-4.009(6), as follows:

Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

Moral turpitude has also been defined by the Supreme Court of Florida as follows:

Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . . It

has also been defined as anything done contrary to justice, honesty, principle, or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated.

State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611, 146 So. 660, 661 (1933).

40. The Department has urged that Coach Swanson be held to the standard of a classroom teacher and argues that profane, equipment-throwing tantrums, and the physical handling of students would never be tolerated in the classroom and, thus, should not be tolerated when a teacher takes on the role of football coach. Coach Swanson's position is that the football field and the classroom are two entirely separate arenas and that it is unrealistic to hold a football coach to the same standards of propriety expected of a classroom teacher.

41. The truth lies somewhere between the extremes outlined by the parties. The Department correctly states that Coach Swanson's behavior would be clearly beyond the pale in a math class. However, by the same token, high school football players perform acts of violence on the field that would subject them to expulsion and arrest if performed in that same math class. Coach Swanson's job as a football coach is to demand that his players engage in that behavior with maximum discipline and proficiency. In other words, the Department's position ignores

the reality that football is an intense, emotional, violent sport and that a football coach cannot always engage with his players in a calm, conversational tone and a gentle demeanor. The relationship between a football coach and his players is qualitatively different than that between a classroom teacher and his students. This reality must be acknowledged in assessing a penalty on Coach Swanson.

42. Acknowledging the violent reality of football does not require acceptance of Coach Swanson's behavior in this case. Coach Swanson intentionally set out to create the spectacle of a stereotypical coach's temper tantrum. Even accepting that a football coach is granted more behavioral leeway than a classroom teacher, there is no excuse for a coach putting his hands on a player, throwing a helmet hard enough to hit another player 40 feet away, or employing the kind of language that Coach Swanson conceded he used during half time of the Fort Myers game.

43. It is concluded that none of the acts Coach Swanson committed rise to the level of "gross immorality" or "moral turpitude." The allegations in the Administrative Complaint essentially accused him of beating up one of his players, which would constitute "moral turpitude." The facts established at the hearing did not sustain this accusation. The proven facts--that Coach Swanson threw a football helmet and a

dry-erase board; that he grabbed a player and walked him around the locker room; and that he gave a profanity-laced half time speech to his team--indicate poor judgment, but do not approach "inherent baseness or depravity."

44. It is concluded that Coach Swanson did not make reasonable efforts to protect the students from conditions harmful to learning and/or to the student's mental, physical health, and/or safety. Specifically, Coach Swanson's throwing the football helmet down a row of lockers endangered the physical safety of the players. It was simply fortuitous that no one was injured by Coach Swanson's careless action.

45. It is concluded that Coach Swanson did intentionally expose a student to unnecessary embarrassment or disparagement. Specifically, the manner in which Coach Swanson confronted Brandon Tyler exposed the student to unnecessary embarrassment. The coach could have singled out Brandon Tyler for discipline, and even made an example of him to inspire the team, without adding the elements of physical intimidation and liberal use of the word "fuck" in a high school locker room.

46. Section 231.262, Florida Statutes (2001), reads in pertinent part:

(7) A panel of the [Education Practices] commission shall enter a final order either dismissing the complaint or imposing one or more of the following penalties:

* * *

(b) Revocation or suspension of a certificate.

(c) Imposition of an administrative fine not to exceed \$2,000 for each count or separate offense.

(d) Placement of the teacher, administrator, or supervisor on probation for a period of time and subject to such conditions as the commission may specify, including requiring the certified teacher, administrator, or supervisor to complete additional appropriate college courses or work with another certified educator, with the administrative costs of monitoring the probation assessed to the educator placed on probation.

(e) Restriction of the authorized scope of practice of the teacher, administrator, or supervisor.

(f) Reprimand of the teacher, administrator, or supervisor in writing, with a copy to be placed in the certification file of such person.

47. The facts led to the conclusion that Coach Swanson violated Florida Administrative Code Rule 6B-1.006(3)(a) and (e). It is noted that this episode constituted the only disciplinary proceeding against Coach Swanson in his teaching career and that his behavior in the classroom has never been an issue.

48. It is concluded that the appropriate penalty is a written reprimand and a probationary period of one year to commence if and when Coach Swanson again becomes an active teacher and/or football coach.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be issued finding that Respondent did violate the provisions of Florida Administrative Code Rule 6B-1.006(3)(a) and (e), but did not violate Section 231.2615(1)(c) or (i), Florida Statutes (2001). It is further

RECOMMENDED that a final order be issued providing that a written reprimand be placed in his certification file and placing him on a one-year period of probation subject to such conditions as the Commission may specify, to commence if and when Respondent again becomes an active teacher and/or football coach in the State of Florida.

DONE AND ENTERED this 8th day of December, 2003, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2003.

ENDNOTES

1/ After the filing of the Administrative Complaint in this case, Section 231.2615, Florida Statutes (2001), was repealed and its substance reenacted as Section 1012.795, Florida Statutes (2002). See Chapter 2002-387, § 757, Laws of Florida.

2/ There was some conflict as to Brandon's exact words on the sidelines at the Fort Myers game. Coach Sparacio testified that Brandon may have said, "Get him the fuck out of my face." However, Coach Sparacio's written statement of October 24, 2000, did not include the word "fuck," and in cross-examination Coach Sparacio conceded that his written statement was probably a more accurate recollection because it was closer in time to the relevant events. Heidi Roderick, the Lely team trainer, testified that Brandon was generally venting his frustration on the sidelines, yelling at the coaches, "Fuck that coach" and "I'm not going to listen to him." However, no other witness shared Ms. Roderick's recollection.

COPIES FURNISHED:

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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 should be filed with the agency that will issue the final order in this case.