BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BOARD AGENDA ITEM NO. F-29
September 8, 2009

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

vs. DOAH CASE NO. 08-4093

JAMES MICHAEL MURRAY,

Respondent.

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

vs. DOAH CASE NO. 08-4404

JOHN M. HACKNEY,

Respondent.

FINAL ORDER

This consolidated case was referred to the Division of **Administrative Hearings ("DOAH")** for a formal administrative hearing. The assigned **Administrative Judge ("ALJ")** has submitted a Recommended Order to the Agency, **Brevard County School Board ("School Board")** recommending that the School Board enter a final order adopting the Findings of Fact and Conclusions of Law in the Recommended Order and reinstate each of the Respondents to their positions as classroom teachers with back pay and benefits. Timely exceptions were filed by the Petitioner and replied to by Respondents in the Reply To Petitioner's Exceptions dated July 21, 2009.

RULING ON EXCEPTIONS TO FINDINGS OF FACT

Petitioner takes exceptions to findings of fact contained in paragraphs 8, 13, 15, 16, 17, 18, 21, 22, 25, 26, 30, 31, 32, 33, 34 and 35 of the Recommended Order as being either incomplete or not supported by competent substantial evidence in the record.

The agency may not reject or modify the findings of fact made by the ALJ in the Recommended Order unless the findings of fact were not based upon competent substantial evidence or the proceedings on which the findings were based did not comply with essential requirements of law. Section 120.57(1)(l), Florida Statutes. In reviewing the record the agency is not permitted to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion. Haines v. Department of Children & Families, 983 So.2d 602 (Fla.5th DCA 2008).

A review of the complete record of the proceeding shows that there is some evidence to support the ALJ's findings of fact in the paragraphs excepted to by Petitioner and therefore the School Board must accept the findings of fact even though there was ample evidence presented that would refute or dispute the findings of fact made by the ALJ.

Therefore, Petitioner's exceptions to the findings of fact in the Recommended Order must be denied.

PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

Petitioner takes exception to paragraphs 40, 41, 42, 43, 44 and 45 of the Recommended Order as being an incorrect interpretation of the law or an incomplete application of the law to the facts.

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction. The rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. Section 120.57(1)(l), Florida Statutes.

It must be stated at the onset that the ALJ found as a fact that Respondent Hackney engaged in all of the actions charged in Superintendent Richard A. DiPatri's letter of August 5, 2008, to wit: falsely registering and substituting an ineligible middle school student under the name of an injured Astronaut High School varsity wrestling student at an FHSAA sanctioned wresting tournament at Poinciana High School and at another FHSAA sanctioned dual meet a few days later at Eau Gallie High School. The ALJ also found that Respondent Murray was fully aware of what was happening at the Poinciana tournament while he was there helping Hackney with the varsity squad, as charged in Dr. DiPatri's letter. (See paragraphs 8-9, 11, 13, 14, 15 and 16 of Recommended Order). The ALJ also found that the removal of both Hackney and Murray from their coaching positions is an appropriate penalty (see paragraph 40 of Recommended Order).

Despite these findings the ALJ found as conclusions of law that termination of Respondents as classroom teachers was not reasonable and would be inconsistent with Petitioner's past implementations of its progressive discipline policy. The ALJ further found as a conclusion of law that the Respondents' effectiveness as classroom teachers was unimpaired after the Poinciana tournament and the Eau Gallie dual meet citing Respondents' favorable evaluations as classroom teachers after the Poinciana tournament and Eau Gallie dual meet. (See paragraphs 43 and 44 of Recommended Order).

The School Board rejects the ALJ's conclusion of law that the Respondents' favorable evaluations as classroom teachers established that the Respondents' effectiveness as classroom teachers was not impaired or a result of their misconduct. This is so because nothing in the record shows that it was known to the administration of the School Board that Hackney and Murray had committed the offenses at the time they received the evaluations. As admitted by Respondents in their Reply To Petitioner's Exceptions, "it is undisputed that the use of the ineligible wrestler was not reported until July, and that Respondents were not terminated until August" (Reply at pages 13 and 14). The evaluations at issue were for the 2007-2008 school year and were given before Respondents' misconduct was known to the decision makers in this case. To conclude as a matter of law that a favorable evaluation given to a classroom teacher by an administrator who was unaware of the teacher's misconduct involving

his coaching of students is evidence that the teacher's effectiveness was not impaired is not reasonable and is hereby rejected.

Similarly rejected is the ALJ's conclusions of law that Respondents' termination was inconsistent with Petitioner's progressive discipline policy and therefore unreasonable as a matter of law.

The School Board concludes that it is appropriate to evaluate employee discipline based upon the unique facts and circumstances of each case. To conclude that an agency or its current administration and governing board are forever bound by previous decisions involving other employees and differing circumstances is not reasonable. On the contrary, the School Board finds that prior disciplinary actions involving substantially similar offensives are a relevant consideration but not dispositive in a subsequent disciplinary case.

In the instant case, however, the ALJ concluded as a matter of law that the Petitioner had not shown by a preponderance of the evidence that Respondents were guilty of misconduct in office or immorality as these offenses are defined by Florida Administrative Code Rules 6B-4.009(2) and (3) and 6B-1.006(4). The ALJ found that an essential element of each ground is that the conduct either impaired the effectiveness of the Respondents in the classroom or impaired their effectiveness as teachers in the community (Paragraph 42 of Recommended Order). Here the ALJ's finding that it was not shown by a preponderance of evidence that the

Respondents were guilty of misconduct in office or immorality involved both factual and legal conclusions. As such, the agency cannot reject the finding where there is substantial competent evidence to support the factual conclusion and the legal conclusion necessarily follows. Berger v. Department of Professional Regulation, Board of Dentistry, 653 So.2d 479 (Fla. 3rd DCA 1998). Although the School Board rejects any conclusion of law that Respondents' favorable teaching evaluations which predated the reporting of Respondents' misconduct as wrestling coaches negates a finding of impaired effectiveness there was other evidence which could support the ALJ's finding in this regard. Consequently, the School Board is bound to accept the ALJ's finding that the Respondents' effectiveness as teachers was not so seriously impaired as to warrant termination of employment.

By virtue of their leadership capacity, teachers are traditionally held to a high moral standard in a community. Adams v. State of Florida Professional Practices Council, 406 So.2d 1170 (Fla. 1st DCA 1981). The School Board expects its teachers and administrators to act ethically at all times whether serving in their role as an instructional employees or as athletic coaches who are role models for students. This expectation is manifested in the Collective Bargaining Agreement between the School Board and the Brevard Federation of Teachers which gives classroom teachers at a school preference for athletic coaching positions over others, all other things being equal. Teachers serve as role models for students whether in the classroom or, as here, as athletic coaches.

Teachers who are athletic coaches are expected to adhere to the same high moral standards while serving in either role and their actions as coaches will be considered as their actions as a teacher in the Brevard County School District.

Based upon the foregoing, it is ordered that Respondents be reinstated to the position of classroom teachers effective September 9, 2009, with back pay and benefits.

DONE AND ORDERED this 8th day of September, 2009, in Viera, Brevard County, Florida.

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BY: _____
ROBERT L. JORDAN, JR., Chairman

RIGHT TO APPEAL

Parties to this Final Agency Action are hereby advised of their right to seek judicial review of this Final Agency Action pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rule of Appellate Procedure 9.110, with the Clerk of the School Board of Brevard County, 2700 Judge Fran Jamieson Way, Viera, Florida 32940. The second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

Filed with the Clerk in the Office of the Superintendent this 8th day of September, 2009.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U. S. Mail to the persons named below on this 9th day of September, 2009.

Joseph R. Lowicky, Esquire
Glickman, Witters and Marrell, P.A.
The Centurion, Suite 1101
1601 Forum Place
West Palm Beach, Florida 33401

Matthew E. Haynes, Esquire
Thomas L. Johnson, Esquire
Johnson, Haynes & Miller, P.A.
510 Vonderburg Drive, Suite 3004A
Brandon, Florida 33511

Thomas J. Thompson, Esquire
Thomas Thompson, P.A.
1007 South Washington Avenue
Titusville, Florida 32780

Clerk, Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

HAROLD T. BISTLINE
School Board Attorney