

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-4093
)
JAMES MICHAEL MURRAY,)
)
 Respondent.)

BREVARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 08-4404
)
JOHN M. HACKNEY,)
)
 Respondent.)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on January 21 and 22, 2009, in Viera, Florida.

APPEARANCES

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

For Respondent, James Michael Murray:

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

For Respondent, John M. Hackney:

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

STATEMENT OF THE ISSUES

The issues for determination are whether Petitioner has just cause to terminate the Professional Services Contract of each of the respondents because each respondent allegedly engaged in immorality and misconduct in office in violation of Subsection 1012.33(6)(a), Florida Statutes (2007),¹ and the Rules of Professional Conduct in Florida Administrative Code Rules 6B-4.009(2) and (3), 6B-1.001, and 6B-1.006(3)(a), (4)(b) and (c), and (5)(a) and (h).

PRELIMINARY STATEMENT

On August 12, 2008, Petitioner dismissed each of the respondents from his position of employment as instructional employees and wrestling coaches. Each of the respondents timely requested an administrative hearing, and Petitioner referred the requests to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of nine witnesses, including two by deposition, and submitted 28 exhibits for admission into evidence. The respondents presented the testimony of eight witnesses, including their own testimony, and submitted 30 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the three-volume Transcript of the hearing filed with DOAH on March 3, 2009. Pursuant to three agreed motions for an extension of time to file proposed recommended orders (PROs), the parties timely filed their respective PROs on May 18, 2009.

FINDINGS OF FACT

1. Petitioner is the agency responsible for the employment and dismissal of instructional staff (teachers) in Brevard County, Florida (the school district). During the 2007-2008 school year, Petitioner employed each of the respondents as teachers and wrestling coaches.

2. Petitioner employed John M. Hackney as a teacher and the varsity wrestling coach at Astronaut High School (Astronaut). Petitioner employed James Michael Murray as a teacher at Space Coast Junior Senior High School (Space Coast) and as the junior varsity wrestling coach at Astronaut.²

3. Mr. Hackney and Mr. Murray have extensive experience in competitive wrestling. Mr. Hackney has coached high school

wrestling for more than 20 years and has been the head coach of the Astronaut varsity wrestling team for approximately 15 years. For the last 15 years, Mr. Hackney has also coached competitive wrestling in the Amateur Athletic Union (AAU). Mr. Hackney has also served as the head of AAU wrestling in Florida.

4. Mr. Murray began wrestling competitively in 1967 for the wrestling team at Cocoa High School (Cocoa), a high school located within the school district. Mr. Murray wrestled for Cocoa for three years, wrestled for Brevard Community College for two years, and was a member of wrestling team at the University of Florida for one year, although he did not compete in any event for the university.

5. Mr. Murray completed law school and practiced law as a licensed attorney in Florida. While in private practice, Mr. Murray was a wrestling referee for the Florida High School Athletic Association (FHSAA). The FHSAA is the officiating body for all high school athletic programs in the state, including wrestling.

6. Mr. Murray authored some parts of the FHSAA officiating exam. He also taught classes to prepare candidates for the FHSAA exam.

7. In 2000, Mr. Murray left his law practice to become a high school teacher and a wrestling coach. Mr. Murray became the head coach of the Space Coast varsity wrestling team in the

2003-2004 school year. When the principal at Space Coast removed Mr. Murray as head coach, Mr. Murray remained as a teacher at Space Coast, but became a junior varsity wrestling coach at Astronaut. Mr. Murray also has extensive experience as a coach in AAU wrestling.

8. On December 1, 2007, the Astronaut varsity wrestling team competed in a multi-team tournament at Poinciana High School (Poinciana). A regular member of the Astronaut team, identified in the record as W.P., was injured and unavailable to compete in the Poinciana tournament. Mr. Hackney substituted a student, identified in the record as T.G., for W.P.

9. T.G. was a seventh-grade middle school student. He was not enrolled in Astronaut and was not eligible to compete for Astronaut in the Poinciana tournament, because the Poinciana tournament was a high school event sanctioned by the FHSAA.

10. T.G. was at the Poinciana tournament because Mr. Hackney and Mr. Murray coached T.G. in AAU wrestling events. T.G. was a very good wrestler for his age group and very interested in wrestling. Mr. Hackney allowed T.G. to ride on the team bus with the Astronaut varsity team and attend the tournament with the Astronaut team.³

11. Mr. Murray also attended the Poinciana tournament. The Poinciana tournament was a varsity tournament, and Mr. Murray was a junior varsity coach. Mr. Murray was not

present at the varsity tournament in any official capacity.

Mr. Murray attended the varsity tournament to help Mr. Hackney.

12. While the Astronaut team members were weighing in prior to the Poinciana tournament, the father of T.G., identified in the record as Mr. G., approached Mr. Hackney and asked Mr. Hackney if Mr. Hackney would substitute T.G. for W.P. and allow T.G. to wrestle a high school student from another school who was at the tournament. The student was ranked number one in the nation in the AAU, and Mr. G. wanted T.G. to get experience wrestling at that level of competition. T.G. welcomed the opportunity to wrestle such a highly-ranked opponent.

13. Mr. Hackney agreed to the request by Mr. G. Mr. Hackney discussed the matter with Space Coast coaches Mr. Toni McCormick and Mr. Richard Jones, and the coaches for Space Coast agreed to T.G. wrestling as W.P.⁴

14. Mr. Murray was not present during the discussions between Mr. Hackney, Mr. G., and the Space Coast coaches. When Mr. Hackney informed Mr. Murray of the decision to allow T.G. to compete as W.P., Mr. Murray advised Mr. Hackney not to proceed.

15. T.G. competed as W.P. in three matches at the Poinciana tournament. One of the matches was against the number one ranked AAU wrestler.

16. On December 5, 2007, Mr. Hackney allowed T.G. to compete as W.P. for Astronaut in a dual meet with the Eau Gallie High School (Eau Gallie) wrestling team. Mr. G. approved the entry of his son as W.P. Mr. Murray was not present at the Eau Gallie dual meet.

17. Petitioner knew, or should have known, that Mr. Hackney allowed T.G. to compete as W.P. in the Poinciana tournament and dual meet at Eau Gallie. Mr. Hackney informed the coaches of the opposing teams of his intent to allow T.G. to compete as W.P. Mr. Jones also discussed the situation with Ms. Sharon Travis, the athletic director at Space Coast.

18. Within days of the Eau Gallie match, the area newspaper published a picture of T.G. wrestling with a caption identifying T.G. as W.P. Parents and spectators at both the Poinciana tournament and the Eau Gallie dual meet knew that T.G. was competing as W.P.

19. The principal at Space Coast, Mr. Bob Spinner, knew that T.G. had competed as W.P. in the Poinciana tournament and the Eau Gallie dual meet. In preparation for an arbitration hearing in April of 2008 concerning Mr. Murray's grievance against the principal for removing Mr. Murray as head wrestling coach at Space Coast, Mr. Spinner learned that Mr. Hackney had allowed T.G. to compete as W.P. in the Poinciana tournament and Eau Gallie dual meet. The principal called a student,

identified in the record as W.C., to his office approximately four times to interview the student concerning the involvement of Mr. Hackney, Mr. Murray, and T.G. in the Poinciana tournament and Eau Gallie dual meet.

20. Other employees and agents of Petitioner also knew of the competition of T.G. in the Poinciana tournament and the Eau Gallie dual meet. Prior to the arbitration, Mr. Terry Humphrey, the principal at Astronaut, and Ms. Joy Salamone, the director of Human Resource Services and Labor Relations, learned of the actions of Mr. Hackney and Mr. Murray involving T.G.

21. The actions of the respondents did not impair their service in the community as teachers or their effectiveness as teachers in the classroom. Each of the respondents continued to teach in the classroom and receive favorable evaluations as classroom teachers after the Poinciana tournament and the Eau Gallie dual meet.

22. Mr. Hackney and Mr. Murray received the highest marks available on all of their evaluations, including the evaluations completed after the Poinciana tournament and Eau Gallie dual meet. Petitioner selected Mr. Hackney as the Teacher of the Year for the 2006-2007 school year.

23. After Mr. Murray prevailed in the arbitration proceeding, he was scheduled to be reinstated as head coach for the Space Coast varsity wrestling team. Mr. Jones, a community

coach at Space Coast, met with several parents, and they decided to raise the ineligible competition by T.G. as a ground to prevent the reinstatement of Mr. Murray at Space Coast.

24. One of the parents reported the ineligible competition by T.G. to the FHSAA. The FHSAA imposed a fine of \$2,500.00 against Astronaut.

25. Sometime in July 2008, the school district superintendent asked Ms. Salamone to conduct an investigation. On or about August 4, 2008, the investigation concluded that Mr. Hackney and Mr. Murray should be removed as wrestling coaches, but retained as classroom teachers.

26. The superintendent convened a meeting to reconsider the recommendation. The recommendation was changed, and the superintendent recommended that Petitioner terminate the respondents as classroom teachers.⁵

27. Mr. Hackney and Mr. Murray cooperated fully in the investigation. Neither of the respondents ever attempted to conceal their actions.

28. Mr. Hackney was motivated solely by his desire and the desire of Mr. G. for T.G. to gain experience T.G. would not otherwise enjoy. Neither of the respondents sought personal gain, either direct monetary gain or indirect gain through a winning season. Astronaut would have gained nothing in season standings by winning the Poinciana tournament and Eau Gallie

dual meet. There is no evidence that T.G. was successful in the matches with older competitors, and the number one ranked AAU wrestler pinned T.G. in their match.

29. The competition of T.G. in the Poinciana tournament and Eau Gallie dual meet did not expose the school district to increased liability. Mr. G. paid an additional premium for AAU insurance that covered his son in any competition, including the Poinciana tournament and the Eau Gallie dual meet. Mr. Hackney knew that T.G. was insured for both events.

30. The entry of T.G. in the Poinciana tournament and Eau Gallie dual meet did not cause harm to T.G. The FHSAA suspended T.G. from varsity competition for one year, but T.G. was ineligible for varsity competition before the suspension. The competition by T.G. in each event was not a violation of AAU rules and regulations.

31. T.G. did not suffer any physical harm from his competition with older, more experienced wrestlers. There is no evidence that T.G. suffered any academic or personal harm. The testimony of T.G. at the hearing demonstrated his appreciation for the experience he gained in the Poinciana tournament and Eau Gallie dual meet.⁶

32. The termination of the respondents from their classroom teaching positions deviates from Petitioner's progressive discipline policy. Petitioner has never terminated

a coach from his or her teaching position for any reason other than an improper relationship with a student.

33. Petitioner has refused to terminate other teachers for conduct more egregious than that of Mr. Hackney and Mr. Murray. For example, a teacher who provided alcohol to a student and allowed her to drink until she became incapacitated was suspended for 30 days from June 12 through July 12, 2008; was reprimanded; and was subjected to a salary freeze for one year.

34. In another incident, three assistant principals conspired over a two-year period to move 52 special education students into different grades so they would not have to take the Florida Comprehensive Assessment Test (FCAT). The goal was to raise the school's overall performance and receive higher funding from the state. Both administrators and teachers may receive financial benefits from increased FCAT scores. Petitioner did not terminate any of the employees. One assistant principal was demoted to teacher, and another was subjected to a salary freeze for one year. The assistant principal, who knew of the plan and failed to report it, was promoted to the position of elementary school principal.

35. In 2005, two coaches punished two players, who missed practice, by subjecting the two players to tackling by fellow players during practice. The coaches instructed the other players to hurt the two players who missed practice and allowed

tackling after blowing the whistle to end the session. The incidents received publicity in the local media after the investigation. Petitioner issued letters of reprimand to each of the coaches.

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. DOAH provided the parties with adequate notice of the administrative hearing.

37. The termination of employment at issue in this proceeding is proposed agency action, rather than final agency action taken previously. DOAH does not review the employment termination as would an appellate court. The purpose of a proceeding conducted pursuant to Subsection 120.57(1) is to formulate final agency action rather than to review agency action previously taken. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

38. The administrative hearing is a de novo proceeding in which either party may submit relevant and material evidence through the date of the hearing. The evidence is not limited to that evidence available to Petitioner when Petitioner proposed the termination of the respondents' professional service contracts.
Id.

39. The burden of proof is on Petitioner. Petitioner must show by a preponderance of evidence that just cause exists to terminate the professional service contracts of the respondents for the reasons stated in the charging document and that termination is an appropriate penalty. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

40. Petitioner showed, by a preponderance of evidence, that removal of the respondents from their coaching positions is an appropriate penalty. The respondents violated FHSAA rules and regulations, the FHSAA imposed a financial penalty on Astronaut, and parents opposed the reinstatement of Mr. Murray as the head coach of the Space Coast varsity wrestling team.

41. Petitioner did not show by a preponderance of the evidence that termination of the employment of the respondents as classroom teachers is reasonable. Termination is not reasonable when considered in light of the facts and circumstances in this proceeding or Petitioner's past implementation of its progressive discipline policy.

42. The grounds for the proposed termination are based on allegations of immorality, misconduct in office, and violations of the Code of Professional Responsibility. Each ground is defined, respectively, in Florida Administrative Code Rules 6B-4.009(2) and (3) and 6B-1.006(4). An essential element of each ground is

that conduct either impaired the effectiveness of the respondents in the classroom or impaired their effectiveness as teachers in the community.

43. The trier of fact may draw an inference of impaired effectiveness from the nature of the offense. Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000); Walker v. Highland County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175 (Fla. 5th DCA 1995). Unlike the cited cases, this proceeding includes direct evidence of the continued effectiveness of the respondents as educators after the Poinciana tournament and the Eau Gallie dual meet.

44. Direct evidence includes the continued effectiveness of the teachers in the classroom and the favorable performance evaluations after the Poinciana tournament and Eau Gallie dual meet. In addition, parent complaints were limited to the reinstatement of Mr. Murray as head coach of the Space Coast varsity wrestling team. An inference authorized in the cited cases would require the fact-finder to ignore the direct evidence of unimpaired effectiveness as classroom teachers.

45. Petitioner's proposed determination that the actions of Mr. Hackney and Mr. Murray impaired their effectiveness as teachers would be inconsistent with the determination by Petitioner that giving alcohol to a female student did not impair

the effectiveness of a male teacher. Petitioner's proposed determination of impaired effectiveness in this proceeding would be inconsistent with Petitioner's determination that the FCAT scheme implemented by three assistant principals did not impair their effectiveness.⁷ Petitioner's proposed determination of impaired effectiveness in this proceeding would be inconsistent with Petitioner's determination that subjecting two students to the risk of physical harm did not impair the effectiveness of two football coaches.⁸

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order adopting the Findings of Fact and Conclusions of Law in this Recommended Order and reinstating each of the respondents to their positions as classroom teachers with back pay and benefits.

DONE AND ENTERED this 17th day of June, 2009, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2009.

ENDNOTES

- ^{1/} All references to subsections, sections, and chapters are to Florida Statutes (2007), unless otherwise stated.
- ^{2/} Petitioner pays additional compensation to teachers who are also wrestling coaches.
- ^{3/} There is no allegation or finding that the practice of allowing an ineligible student to ride on the team bus and attend the tournament with the team violated a statute or rule.
- ^{4/} Mr. McCormick and Mr. Jones were community coaches. Community coaches are not classroom teachers and are employed under annual contracts.
- ^{5/} When the decision was made to recommend termination, termination was initially proposed only for Mr. Murray.
- ^{6/} Counsel for Petitioner surmises in Petitioner's PRO that T.G.'s experience must have been harmful to T.G.'s educational environment. Surmise, speculation, and suspicion cannot form the basis of a finding of fact. Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994).

^{7/} In fact, Petitioner moved one of the offending assistant principals from administration back into the classroom.

^{8/} The doctrine of administrative stare decisis applies to final agency action. Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501 (Fla. 4th DCA 1993).

COPIES FURNISHED:

Harold T. Bistline, Esquire
Stromire, Bistline & Miniclier
1037 Pathfinder Way, Suite 150
Rockledge, Florida 32955

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

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

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

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Eric J. Smith, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Richard A. DiPatri, Superintendent
Brevard County School Board
2700 Judge Fran Jamieson Way
Viera, Florida 32940-6601

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.