

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A AND M UNIVERSITY)
BOARD OF TRUSTEES,)
)
 Petitioner,)
)
vs.) Case No. 08-5912
)
TRAVIS A. BLUE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on February 12, 2009, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Linzie F. Bogan, Esquire
Florida A & M University
Office of the General Counsel
300 Lee Hall
Tallahassee, Florida 32307

For Respondent: Sha'Ron James, Esquire,
Monica Evans, Esquire
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent may be dismissed from employment with Florida Agricultural and Mechanical University (FAMU) for violation of FAMU Regulation 10.111.

PRELIMINARY STATEMENT

This termination case was referred, per contract, to the Division of Administrative Hearings on or about November 25, 2008. The Division file reflects all pleadings, notices, and orders intervening before final hearing on February 12, 2009.

At the commencement of the de novo hearing, Respondent's Motion for Continuance, filed the preceding day, was orally denied.

Petitioner presented the oral testimony of Beverly Jean Stephens, Willie J. Pettigrew, William Lewis Hayes, Sr., and Edwin Pata, and the deposition testimony of Respondent, Nellie Woodruff, and William Bennett, and had 13 exhibits (P-A, P-C, P-D, P-F, P-G, P-H, P-I, P-J, P-K, P-L, P-M, P-N, and P-O, which include the three depositions) admitted in evidence. There is no Petitioner's Exhibit B, and Petitioner's Exhibit E was withdrawn as repetitious and cumulative because it was already a part of Exhibit C. Respondent presented the oral testimony of Thomas Blue III, Darren Folsom, Dr. Edward R. Scott II, George H. Thompson, and William Lewis Hayes, Sr., and testified on his own behalf. Respondent's Exhibit A was admitted in evidence.

The Transcript was filed on March 10, 2009. Both parties timely filed their respective Proposed Recommended Orders on or before the stipulated date of April 9, 2009, which proposals have been considered in preparation of this Recommended Order. "Stipulated facts" 1-6, and 8-9, as set out in Petitioner's Unilateral Prehearing Statement, and as orally agreed-to by Respondent at hearing, have been utilized herein, with appropriate modifications for grammar, continuity, and style.

FINDINGS OF FACT

1. FAMU Regulation 10.111, a duly promulgated regulation, was in effect at all times relevant hereto. (Stipulation 5.)

2. FAMU Regulation 10.206, a duly promulgated regulation, was in effect at all times relevant hereto. (Stipulation 6.)

3. FAMU Regulations 10.100, 10.101, 10.105, 10.106, and 10.120, all duly promulgated regulations, were in effect at all times material.

4. At all times material, Dr. Cynthia Hughes-Harris served as FAMU's Provost and Vice-President for Academic Affairs. On May 6, 2008, Dr. James H. Ammons, in his capacity as President of FAMU, had delegated to Dr. Hughes-Harris authority to administer all applicable FAMU regulations, policies, and procedures. (Stipulation 9.)

5. The incident that gave rise to FAMU's letter of termination to Respondent occurred in the FAMU football

stadium's field house during the FAMU homecoming game on November 1, 2008.

6. As of November 1, 2008, Respondent had been employed in the football program at FAMU since 1997. He had served successfully under five athletic directors without receiving a bad employment rating. On June 28, 2008, he had received the American Football Coaches Association's Outstanding Equipment Manager of the Year Award.

7. On November 1, 2008, and at the time of his termination, Respondent was employed by Petitioner FAMU as Coordinator, Intercollegiate Athletics. The contract period for Respondent's employment in effect at the time covered July 1, 2008, through June 30, 2009. (Stipulation 1.)

8. As Coordinator, Intercollegiate Athletics, Respondent worked as the equipment manager for the FAMU football program. (Stipulation 2.)

9. At all times material, Respondent's employment classification was Administrative and Professional (A&P), with a regular appointment status. As such, Respondent was not a FAMU employee with "permanent status" as contemplated by FAMU Regulation 10.206. (Stipulation 3.)

10. At all times material, William Lewis Hayes, Sr., was employed by FAMU as Director of Athletics. (Stipulation 4.) As such, Mr. Hayes had oversight of FAMU's Department of Athletics,

including 18 intercollegiate sports teams, and supervisory responsibility for approximately 67 employees, including Respondent. Not the least among Mr. Hayes' many responsibilities was to act as head coach. As a result, Mr. Hayes was often referred to as "Coach Hayes."

11. At all times material, Respondent was subordinate to Coach Hayes.

12. Upon his arrival and assumption of his duties at FAMU, in January 2008, Coach Hayes had become aware that scheduled intercollegiate football games played in the FAMU stadium were losing money. He also became aware that during home games, a significant number of people were entering the football stadium, its field, and its out-buildings without a game ticket.

13. Coach Hayes regarded all non-paying attendees for both home and away games as gatecrashers and freeloaders. He reasonably believed that if all non-paying attendees were denied entrance, or if their number were at least reduced, the same people would pay the cost of admission; FAMU would increase its game receipts accordingly; FAMU's \$4,000,000, deficit would be eliminated; and the significant number of athletic scholarships which he administered would be on firmer financial ground.

14. On November 1, 2008, Coach Hayes was 65 years old. He had successfully worked in athletics for 50 years and had coached football for 39 of those years. He had the reputation

of being large and loud, and of occasionally emitting some of the verbal belligerency characteristic of male athletics generally, and of a "coach in charge" specifically. However, at all times material, he was the "coach in charge," and the record is devoid of any evidence that he has ever been physically violent to employees or co-workers.

15. In an attempt to reduce the Athletic Department's financial deficit, Coach Hayes started, in March 2008, to hold weekly "game operations meetings" with mandatory attendance of most of his staff. At these meetings, he explained his reasons for tightening up on the number of non-paying game attendees; pointed out problems encountered at the last game; and asked security personnel and his subordinates to "brainstorm" ways to keep people from getting into games without paying for a ticket. Respondent attended at least some of these meetings.

16. At one of the game operations meetings, Sgt. Beverly Stephens of the FAMU Police Department explained that the field house at FAMU's Stadium had been identified as a significant, even the primary, entry point for non-paying attendees to get into home games and that some people were using Respondent's name in their request for entry. Respondent was present at that meeting.

17. Respondent was not the only FAMU employee assigned to the athletic field house, but Respondent's office, equipment

room, and general operating area were located in the field house. During the meeting with Sgt. Stephens, Respondent became visibly agitated by Sgt. Stephens' remarks and stood up, loudly challenging her statements. He was either cajoled into calmness or physically restrained by a member of the group. Respondent explained his out-of-proportion reaction to Sgt. Stephens as "feeling disrespected" by her or because he was not familiar with Sgt. Stephens' way of speaking or doing things.

18. Prior to November 1, 2008, Respondent knew that one of the ways Coach Hayes planned to thwart non-paying game attendees was to retract entry credentials from everyone except absolutely necessary game personnel. For purposes of this case, the term "credentials" encompasses FAMU printed materials, FAMU paraphernalia such as items to carry balls, and FAMU football jerseys.

19. Willie J. Pettigrew had been FAMU's Athletic Transportation Officer for the 14 years preceding the material time frame and held that position at all times material hereto. Mr. Pettigrew had attended one or more of the game operations meetings and knew Coach Hayes wanted to keep unauthorized people out of the field house. At the commencement of the homecoming game on November 1, 2008, Mr. Pettigrew observed a bunch of people in the equipment room and told Respondent that he needed to get them out.

20. As the first half of the homecoming game was ending, Mr. Pettigrew told Coach Hayes that he had seen a bunch of people in the field house; that the people had been gotten out of there; and that Coach Hayes should go check out the equipment room himself. Mr. Pettigrew was not specific as to why Coach Hayes should check out the equipment room, but his inference was that there continued to be unauthorized people in the equipment room.

21. Most football games require only one or two ball boys for each side of the field for a total of four ball boys per game. At some point in time, possibly as Coach Hayes was making his way towards the field house at half time on November 1, 2008, Coach Hayes told Respondent to clear out, from the end zone near the field house, 6-to-12 boys who had failed to get appointed as official ball boys but to whom Respondent had given identifying jerseys, anyway. Respondent got the jerseys back from the boys, but Respondent considered Coach Hayes' directive to him with regard to the ball boy "wantabees" to be Coach Hayes' first of three "disrespectful" actions towards Respondent.

22. Respondent felt Coach Hayes had hurt and disappointed boys whom Respondent had been mentoring, but there is no credible evidence that the boys reacted in the same way as did

Respondent, and the boys were not ejected from the game, but were asked to go sit in the stadium.

23. At half time on November 1, 2008, Respondent proceeded to the equipment room inside the field house and closed the door behind him. Coach Hayes came immediately behind Respondent, but he reached the door to the equipment room after it closed, and the equipment room door was locked when he tried to open it. Coach Hayes twice knocked loudly on the door to the equipment room, and when no one opened the door, Coach Hayes used his all-access key to enter the equipment room. Respondent considered the loud knocking to be the second of three disrespectful things Coach Hayes did to him.

24. Apparently, when Coach Hayes unlocked the door and entered the equipment room, an 18-year-old, very tall ball boy and Respondent's adult brother were with Respondent in Respondent's office, and in the equipment room, or in another equipment room office there was an adult ball boy "wantabee."

25. As soon as Coach Hayes entered the equipment room, he observed an individual he did not recognize. He then passed on to Respondent's office within the equipment room, where he observed Respondent and two other individuals. He demanded to know who the two people in Respondent's office were.

26. Precisely what Coach Hayes said in Respondent's office is in dispute, as is whether Coach Hayes went out into the

equipment room and came back into Respondent's office again, but the evidence is clear that what Coach Hayes did and said amounted to shaking his finger at Respondent and saying something to the effect of "You know we have talked about unauthorized people being in the field house. Why are you trying me? Who are these people?" Respondent considered Coach Hayes' inquiry to be the third instance of Coach Hayes "disrespecting" him, and Respondent further felt Coach Hayes was "harassing" him.

27. One of the two people in Respondent's equipment room office with Respondent was Respondent's brother. Coach Hayes did not recognize the brother or the other person in Respondent's office when he asked Respondent who they were.

28. Coach Hayes had given Football Coach Taylor permission to have one or two people enter the fence around the field house and set up a grill near the field house to cook for some of Coach Taylor's family. Respondent's brother was one of these cooks. Coach Hayes had authorized Coach Taylor's group to enter and leave the field house by a particular outside door so as to use the restrooms near that door. Coach Hayes also was aware that someone was cooking and preparing to serve food to the football team in another room of the field house. However, at the time Coach Hayes asked Respondent to identify the people in Respondent's office and to explain what they were doing there,

neither of them was cooking outside, using the restroom near the appropriate doorway, or distributing food to football players. At the time Coach Hayes asked Respondent who Respondent's brother and the tall ball boy were and what they were doing in the equipment room's office, both visitors were sitting in Respondent's office watching the game on television.

29. Upon Coach Hayes' inquiry, Respondent informed him that one person was a ball boy and one "the cook," but Respondent did not volunteer that the cook was also his brother.

30. Nobody showed Coach Hayes an admission ticket.

31. Respondent then advanced upon Coach Hayes, yelling loudly that Coach Hayes should let Respondent do his job and that Coach Hayes should stop "disrespecting" Respondent. Respondent screamed at Coach Hayes that he would not respect Coach Hayes or tolerate Coach Hayes' treatment any longer. Respondent got his own face within six-to-eight inches of Coach Hayes' face, and Coach Hayes began to back out of the doorway into the hall. Respondent continued to loudly threaten to get Coach Hayes fired and advanced on him in the hallway in such a way that Tight End Coach Edwin Pata was attracted to the scene by Respondent's yelling and recognized the situation as "serious" and needing intervention. Coach Pata described Respondent as being so far "in Coach Hayes' face" that they could have "kissed."

32. Coach Hayes testified credibly that Respondent was using profanity and making oral threats of physical violence against him as he backed away from Respondent and Respondent continued to advance upon him. Respondent denied both using profanity and making threats. Although other witnesses waffled as to whether Respondent used profanity at this time, Coach Hayes is the more credible witness over Respondent on the profanity issue. Regardless of what Respondent said, the volume and tone of his voice, his demeanor, and his proximity to Coach Hayes was physically threatening to Coach Hayes.

33. No credible witness heard Coach Hayes saying anything, as he backed away from Respondent into the hallway, which amounted to more than "I'm just trying to do my job."

34. Once in the hallway, the noise and threatened violence from Respondent was serious enough that Coach Pata grabbed Respondent from behind and pulled him away from Coach Hayes. Respondent then broke away from Coach Pata and pushed himself into Coach Hayes' face again, all the time screaming at Coach Hayes. At that point, Coach Pata grabbed Respondent from behind a second time and "handed off" Respondent to William Bennett, FAMU's Videography Coordinator, who forcibly removed Respondent from the hallway into another room.

35. Neither Coach Pata nor Mr. Bennett felt physically threatened by Respondent.

36. Coach Hayes was initially "stunned" by the sudden and intense aggression of Respondent, who, though smaller than Coach Hayes, was also approximately 35 years' younger, fitter, and overwrought.

37. When the second half of the game began, Coach Hayes was still so shaken by the incident with Respondent that he had to sit down outside the field house. He sat there for the entire second half of the game, unable to proceed with his usual second half activities.

38. As early as FAMU's Human Resources Office opened on Monday, November 3, 2008, Coach Hayes went there to ask what to do about Respondent. He was told to report the incident to the FAMU Police Department, which he did.

39. A FAMU police officer interviewed Coach Hayes and Respondent. He got a signed, written statement from Coach Hayes and one from Respondent that day. In his written statement, Respondent admitted that he "went off" on Coach Hayes. Other potential witnesses could not be contacted on November 3, 2008, so the FAMU Police Department did not get written statements from other potential witnesses until much later. However, on the basis of what he had heard that day, Officer Darren Folsom concluded that Respondent should be charged with simple assault.

40. Later on Monday, November 3, 2008, Respondent accosted Willie J. Pettigrew and threatened to "bar [his] ass from the

field house" for telling Coach Hayes to check out the equipment room the previous Saturday, November 1, 2008.

41. Still later on Monday, November 3, 2008, a representative of FAMU's General Counsel's Office physically presented Respondent with a termination letter signed by Dr. Hughes-Harris which read, in pertinent part, as follows:

Pursuant to Florida A & M University (FAMU or University) Regulation 10.111, you are hereby notified that your employment with the University is terminated effective immediately. This employment action is taken against you for your disruptive conduct on November 1, 2008. Please see the enclosed copy of the police report filed on November 3, 2008, as documentation in support of this employment action.

42. After that, Respondent was escorted off campus by a member of FAMU's legal staff and one of its police officers.

43. Respondent has never been arrested for the alleged assault.

44. The letter dated November 3, 2008, informed Respondent that his employment with the University was terminated "effective immediately." (Stipulation 8.) He also received this correspondence on November 7, 2008, by certified mail, return receipt requested. (Stipulation 9.)

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to contract and Sections 120.569 and 120.57(1), Florida Statutes (2008).

46. The duty to go forward was upon Petitioner FAMU.

47. The parties disagree as to the burden of proof herein, but it does not matter whether that burden is by a preponderance of the evidence, Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3rd DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3rd DCA 1990); cf. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), or by clear and convincing evidence Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). The higher burden of proof has been met.

48. Respondent was rightfully terminated for cause, pursuant to FAMU Regulation 10.111, which provides:

(1) Disruptive Conduct - Faculty, Administrative and Professional, and USPS employees who intentionally act to impair, interfere with, or obstruct the orderly conduct, processes, and functions of the University shall be subject to appropriate disciplinary action by the University authorities.

(2) Disruptive Conduct shall include, but not be limited to, the following:

a. Violence or threat of violence against any employee, student or guest of the University community;

b. Theft, conversion, misuse or willful damage or destruction of University property, or of the property of employees of the University;

c. Interference with the freedom of movement of any employee or guest of the University;

d. Deliberate impediment to or interference with the rights of others to enter, use, or leave any University facility, service, or scheduled activity, or in carrying out their normal functions or duties;

e. Deliberate interference with academic freedom and freedom of speech of any employee or guest of the University.

(3) The disciplinary action to be imposed against an employee for any act of disruptive conduct may include a written reprimand, suspension or dismissal from employment with the University. The penalty that is imposed will depend upon the seriousness of the offense and any aggravating or mitigating circumstances.
(Emphasis supplied.)

49. Respondent's unruly and threatening behavior was insubordinate and disruptive to the smooth running of the University and to Coach Hayes' authority. For a short period of time it also disrupted Coach Hayes' ability to direct and govern his subordinates.

50. Respondent's only defense was that Coach Hayes, his superior, was rude and disrespectful to him. Like beauty, courtesy and respect are often merely "in the eye of the

beholder." Each of the three interactions between Coach Hayes and Respondent that Respondent found disrespectful of Coach Hayes towards Respondent were situations a majority of employees would have considered annoying but non-provocative employment interactions. However, as demonstrated by his interactions with Sgt. Stephens and Mr. Pettigrew, Respondent has a pattern of disproportionate reactions to other employees simply doing their jobs.

51. Under the circumstances of this case, Coach Hayes' final inquiry as to the names of facially unauthorized personnel present within Respondent's area of control was not sufficient provocation for Respondent to "go off at Coach Hayes," or to "get in Coach Hayes' face." While Respondent's words and actions do not rise to the level of an aggravated assault, a simple assault does not require physical touching. Clearly, Respondent's behavior constituted a threat of violence, interfered with Coach Hayes' directional movement, and impeded Coach Hayes from performing all of his employment duties on November 1, 2008.

52. Admittedly, Coach Hayes' assumption that Respondent had disobeyed his repeated instructions not to have unauthorized personnel in the field house probably would have been irritating to anyone, but the Coach's inquiry and finger-shaking was not unreasonable, given the circumstances, and it did not warrant

Respondent's out-of-proportion verbal assault and physically threatening behavior towards him.

53. Respondent's breaking-free from Coach Pata's grasp and renewed shouting in Coach Hayes' face a second time, were deliberate acts on Respondent's part which interfered with Coach Hayes' right and ability to pursue his own employment duties of making reasonable inquiries.

54. Coach Hayes' reaction (being incapacitated for the second half of the game) was in excess of Coach Pata's and William Bennett's reactions because Coach Hayes was older and was the person whom Respondent chose to directly intimidate, but both Pata and Bennett clearly recognized the serious threat of violence by Respondent.

55. Respondent has an excellent employment record with FAMU, but employers cannot maintain a safe working environment where behavior such as Respondent's is potentially possible at any time. Termination is not an excessive punishment under the circumstances.

RECOMMENDATION

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

RECOMMENDED that Florida Agricultural and Mechanical University enter a Final Order ratifying its termination letter of November 3, 2008.

DONE AND ENTERED this 14th day of May, 2009, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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Filed with the Clerk of the
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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.