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From: McKeever Joe [joe.mckeever@doj.state.or.us]
Sent: Monday, December 12, 2005 9:15 AM
To: CHAMBERLAIN Vickie
Cc: HANSON Melody
Subject: McBee settlement agreement

Vickie -

The settlement agreement is not confidential. It is a public record, and we can disclose it upon request. In fact, when we send a copy of the amended order to the school district and the complainant, it might make sense to include the settlement order, so they understand what is going on.

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STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION

In The Matter Of The Teaching)
License Of) AMENDED FINAL ORDER
)
BRADLEY DEAN MCBEE,) OAH No. 116237

On May 5, 2005, Administrative Law Judge (ALJ) Alison Greene Webster issued a proposed order in the above-captioned case. After considering the exceptions to the proposed order the Teacher Standards and Practices Commission issued a final order on August 9, 2005. The Final Order adopted the findings of fact, conclusions of law and proposed sanction of the ALJ, except that the Commission rejected Conclusion of Law Number 1 of the proposed order concerning the issue of corporal punishment and explained the Commission's reasoning in doing so.


Upon further consideration and based on negotiations between the Commission and counsel for Mr. McBee, the Commission now withdraws the Final Order dated August 9, 2005 and issues this Amended Final Order. The Commission adopts and incorporates by reference the findings of fact, conclusions of law and sanction contained in the attached proposed order issued by ALJ Alison Green Webster on May 5, 2005.

ORDER

The Teacher Standards and Practices Commission imposes a Public Reprimand on Respondent Bradley Dean McBee, and this Order shall serve as the Public Reprimand.

DATED this 7th day of November, 2005.

TEACHER STANDARDS AND PRACTICES COMMISSION


Victoria Chamberlain, Executive Director

Notice: You are entitled to judicial review of this order. Filing a Petition for Reconsideration or Rehearing shall be a condition of judicial review of any Final Order of the Commission pursuant to OAR 584-019-0045. If the Commission does not act on your petition for reconsideration or rehearing, the petition shall be deemed denied the 60th day following the date the petition was filed. ORS 183.482. In such case, a petition for judicial review shall be filed within 60 days only following this date. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
TEACHER STANDARDS AND PRACTICES COMMISSION

D.O.J., GENERAL COUNSEL
SALEM, OREGON

IN THE MATTER OF THE TEACHING) PROPOSED ORDER
LICENSE OF)
)
BRADLEY DEAN MCBEE,) OAH No. 116237

HISTORY OF THE CASE

On May 28, 2003, the Teacher Standards and Practices Commission (TSPC) issued a Notice of Opportunity For Hearing, in which it charged Bradley Dean McBee, Respondent herein, with misconduct and proposed to suspend or revoke his Oregon teaching license or impose other discipline under ORS 342.177. Respondent timely requested a hearing. TSPC issued an Amended Notice of Hearing on June 24, 2004. On January 18, 2005, TSPC issued a Second Amended Notice of Hearing, alleging six counts of gross neglect of duty in violation of OAR 584-020-0040(4)(n).¹

On June 25, 2004, TSPC referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Alison Greene Webster was assigned to preside at hearing. A prehearing conference was convened on January 24, 2005. Assistant Attorney General Joe Gordon McKeever represented TSPC. Barbara J. Diamond, Attorney, represented Respondent.

A hearing was held on February 1, 2, 3 and 4, 2005, in Salem, Oregon. Respondent McBee appeared with counsel, Barbara J. Diamond. TSPC was represented by Assistant Attorney General Joe Gordon McKeever. Testifying on behalf of TSPC were: Jim Mannenbach, Christian Mannenbach, Darek Smith, Ken Thompson, Joe Hagler, Harry Mondale, Richard Johnston, Robert Johnston, Thad C. Stanford, M.D. and Brad Garrett. Testifying on behalf of Respondent were Mari Brabbin, Bob Bergin, Bill Jones and Chuck Kearney. Respondent also called Susan Nisbet, TSPC Investigator, and Victoria Chamberlain, TSPC Executive Director. Respondent also testified on his own behalf.

The record remained open for receipt of written closing argument. TSPC's brief was received February 28, 2005, Respondent's brief was received March 17, 2005, and TSPC's reply was received April 12, 2005. The record closed on April 12, 2005.

¹ At the January 24, 2005 prehearing conference, TSPC withdrew allegation six set forth in the Second Amended Notice of Hearing.

ISSUES

1. Whether Respondent's withholding of water for more than three hours from members of the Eagle Point High School wrestling team during a December 20, 2001 team practice constituted corporal punishment in violation of ORS 339.250(12).
2. Alternatively, whether this conduct constituted gross neglect of duty in violation of OAR 584-020-0040(4)(n).
3. Whether Respondent's conduct at a December 1999 wrestling competition in Newberg, Oregon constituted gross neglect of duty in violation of OAR 584-020-0040(4)(n).
4. Whether Respondent's conduct at the January 2001 Rogue Valley wrestling competition constituted gross neglect of duty in violation of OAR 584-020-0040(4)(n).
5. Whether Respondent's conduct at a January 2002 wrestling competition in Eagle Point, Oregon constituted gross neglect of duty in violation of OAR 584-020-0040(4)(n).

EVIDENTIARY RULINGS

Exhibits A1 and A6 through A32, offered by TSPC were admitted into the record. TSPC withdrew Exhibits A2 through A5. Respondent's Exhibits R1 through R63 were admitted into the record. Respondent's Exhibits R31, R37, R42, and R45 through R48 were admitted over TSPC's relevancy objection.

FINDINGS OF FACT

1. Respondent Bradley McBee has been licensed by TSPC as a physical education teacher since July 14, 1999. That same year, he was hired by Jackson County School District No. 9 to teach physical education at Eagle Point High School. He also accepted an extra duty assignment as Eagle Point High School's head wrestling coach. (Ex. R1.)
2. On December 10, 1999, Eagle Point High School's wrestling team participated in a competition in Newberg, Oregon. Respondent's son, Chet McBee, was a member of the team. Jim Mannenbach, a health teacher at Eagle Point High School, was serving as an assistant coach. The crowd attending the competition largely favored the home town school, Newberg High School. During the competition, Chet won his match against a Newberg high school wrestler, who was one of the top high school wrestlers in the state at that time. At the end of the match, the referee raised Chet's arm to signify that he had won the match. After that, when Chet walked over to the sideline, Respondent took Chet by the arm, walked him back in front of the crowd and thrust his arm into the air again. When Respondent thrust Chet's arm in the air, Chet's singlet was pulled down off his chest. Respondent's conduct elicited boos, howls and yelling from the Newberg crowd. (Test. of J. Mannenbach.)
3. The referees and officials at the Newberg wrestling competition did not warn or sanction Respondent for his conduct at the competition. (Test. of McBee.)

4. In August 2000, Respondent received a positive teacher performance evaluation. His supervisor noted that Respondent "is a great new addition to Eagle Point High School. He goes above and beyond his teaching responsibilities. Mr. McBee provides students with the opportunity to be successful in his classes. He continually updates his supervisor on classroom and extracurricular activities." (Ex. R6.)

5. Despite his positive performance evaluation, not everyone was satisfied with Respondent as Eagle Point High School's head wrestling coach. Respondent and Mr. Mannenbach had different approaches to coaching wrestling. This led to disagreements between the two and Respondent's later decision to remove Mr. Mannenbach from his assistant coaching position. (Test. of McBee.)

6. In January 2001, Eagle Point High School's wrestling team participated in the Rogue Valley Classic tournament. The competition was set up so that the coaches' chairs were situated across the mat from the scorer's table, rather than next to the scorer's table.² The big match of the evening was between Chet McBee and a Phoenix High School wrestler, Brandon Sousa. Emotions of the coaches, wrestlers and crowd ran high during their match. During time outs, Respondent walked across the mat numerous times to question the referee's rulings. He also walked across the mat when Chet got a bloody nose. Respondent exchanged heated words with the Phoenix coaches and cursed at Mr. Mondale, Phoenix's head coach. At one point, when the two wrestlers were squaring off during a time out, Respondent stepped between them and guided Chet to the sideline to counsel him. (Ex. A22; test. of Mondale; test. of Hagler; test. of McBee.)

7. Chet McBee won the match 10-6. Immediately afterwards, Respondent turned towards the crowd and waved his arms. His gesturing was construed by some as encouraging the Eagle Point fans to cheer and by others as taunting the Phoenix High School fans. (Ex. A22; test. of Hagler; test. of McBee.)

8. Although emotions ran high during and after the McBee-Sousa match, the officials did not warn or sanction Respondent for his conduct at the Rogue Valley Classic. (Test. of McBee; test. of Hagler.) Respondent's conduct was, however, discussed in a January 11, 2001 article in the *Medford Mail Tribune*. Under the headline, "Father-Son Wrestling Act Crosses Line," sports writer Don Hunt noted:

Coach McBee stormed onto the mat three or four times to protest the official's calls. He stared at the fans rooting against his son and made it clear that his son was winning. And he shouted at Phoenix coach Harry Mondale, telling him to quit begging for calls. * * * Phoenix assistant coach Jon Farmer was visibly incensed over the

² The National Federation of High School Wrestling Rules require that the scorer's table be placed at least 10 feet from the edge of the wrestling mat and at least 10 feet from the coaches seats (Ex. R53), but it is unusual for the coaches chairs to be situated across the mat from the scorer's table. (Test. of Garrett.) The rules further state: "Coaches and other team personnel are restricted to the bench while the clock is running and during normal out of bounds and resumption of wrestling. * * * The coach may move towards the mat only during a charged time-out or at the end of the match." (Ex. R53.)

demeanor of the match, and several coaches from other schools were also upset.

(Ex. A17.)

9. In May 2001, Respondent received another positive teacher performance evaluation. Eagle Point High School Principal, Mari Brabbin, noted that Respondent "does an excellent job of challenging the many levels of students' abilities in his classes with his well prepared and organized physical fitness activities." (Ex. R9.)

10. On December 20, 2001, the day before the wrestling team was scheduled to compete in dual meet against Crook County High School in Prineville, Oregon, Respondent held a strenuous practice. Prior to that practice, a couple of Eagle Point wrestlers were caught chewing tobacco at school, which led to their suspension and ineligibility for the Crook County meet. Between 25 to 40 wrestlers attended the December 20, 2001 practice. At the team meeting beforehand, Respondent warned that it was going to be a tough practice. He appeared angry and frustrated with the team. He lectured about individual responsibility and accountability. Respondent also mentioned that the athletes' responsibility and accountability included making weight for competitions. One of the wrestlers, sophomore Robert ("Robbie") Johnston, took this comment personally. Robbie weighed in before practice at 150 pounds, 10 pounds heavier than the 140 pound weight class in which he believed Respondent wanted him to compete.³ (Test. of C. Mannenbach; test. of Robert Johnston; test. of McBee.)

11. The December 20, 2001 practice began around 3:30 p.m. There was no drinking fountain in the practice room. The nearest water fountain was down the hall, near the locker room. Respondent told the wrestlers that they had to stay in the room throughout the practice. He had them jog around the room and stretch as a warm-up. He then had them do pushups and "sprawls." After that, they broke up into groups of two or three for sparring and drilling. During this segment, Respondent paired Robbie Johnston with two former Eagle Point wrestlers, his son Chet and Darek Smith, both of whom were now wrestling at the college level. Chet and Darek were bigger and stronger than Robbie. Chet wrestled hard against Robbie and gave 100 percent resistance. Robbie was unable to execute any moves against Chet. At one point, Robbie got a bloody nose while he was sparring with Chet. When Robbie took a break from sparring to deal with his bleeding nose, Respondent made the other team members run. Robbie felt like he was being singled out and punished by Respondent. Other team members chided Robbie during the practice as well, because they had to run while he cleaned up his bloody nose. (Test. of Robert Johnston; test. of Smith; test. of C. Mannenbach.)

12. The December 20, 2001 practice continued for at least three hours. After the sparring, drilling and running, Respondent had the wrestlers break up into groups of three for a "live wrestling" session. About two thirds of the way through this "live wrestling" session, Respondent announced that one person from each group could leave the room and get a drink of

³ Robbie had been wrestling in the 145 pound weight class on the junior varsity team, but had recently wrestled one tournament in the 140 pound class. Robbie believed that Respondent wanted him to continue competing in the 140 pound class, but both he and his father thought it would be too difficult and unhealthy for him to wrestle at the lower weight. (Test. of Robert Johnston; test. of Richard Johnston.)

water. He had each group decide among themselves which person could have the water. (Test. of C. Mannenbach; test. of Robert Johnston.) Respondent considered this as a team building and decision making exercise. (Test. of McBee.) Respondent concluded the long practice with a last push by having the wrestlers do "Iowa squats" and leg lifts for several minutes. (Test. of C. Mannenbach.)

13. In addition to Respondent, two assistant coaches were present for the December 20, 2001 practice: Rob Cowden, a counselor at Eagle Point High School, and Chip Emigh, a volunteer coach. Although the practice was both mentally and physically challenging to the wrestlers, neither assistant coach witnessed any wrestler acting as if he could not continue with the practice. (Ex. R24; test. of Bergen; test. of Brabbin.)

14. Robbie Johnston was one of wrestlers that had water during the practice. Although he drank a lot of water during that break, he still lost six pounds during the practice. (Test. of Robert Johnston.) After practice, he was both physically and emotionally drained. He told his father that, during the practice, Respondent had belittled and embarrassed him by saying that he was overweight and had let the whole team down. (Test. of Richard Johnston.)

15. Team member Christian Mannenbach, a junior at the time of the December 20, 2001 practice, weighed in at 161 pounds before the practice. He did not get any water during the practice. Immediately afterwards, Christian weighed 149 pounds.⁴ He also felt extremely tired and lightheaded. Later that evening, he experienced intensely painful cramping in both legs. He drank water until the cramping subsided about 20 minutes later. (Test. of C. Mannenbach; test. of J. Mannenbach.)

16. That same night, Christian's mother, Kelly Mannenbach, called Respondent to advise him about Christian's leg cramps. She expressed concern over Christian's health. Respondent told Mrs. Mannenbach that her "concern was noted," but he did not apologize for the rigorous practice. He also told her that if she was not happy with his coaching, she could take her complaints elsewhere. (Test. of J. Mannenbach; test. of McBee.) Mrs. Mannenbach then called Bob Bergen, Eagle Point High School's Athletic Director, to complain about Respondent and his withholding of water from wrestlers during the long practice. (Test. of Bergen.)

17. Christian participated in the Crook County competition the next day, but he felt worn out. He became very fatigued in the third round, and lost his match to a wrestler he had previously beaten. Eagle Point High School also lost the meet. (Test. of C. Mannenbach.)

18. Robbie Johnston's parents also complained to Mr. Bergin and Ms. Brabbin about the December 20, 2001 practice. On January 7, 2002, Mr. Bergen met with Respondent to discuss parent concerns about allowing the wrestlers adequate water breaks during practice. Mr. Bergin also counseled Respondent on the issue of sportsmanship, because he had also received complaints that Respondent had engaged in taunting and/or had allowed such behavior by his athletes or volunteer coaches. (Ex. A12; test. of Bergen.)

⁴ While some evidence indicates that Christian lost 11, rather than 12 pounds during practice, he testified that he weighed in at 161 pounds before practice, and 149 pounds afterwards. By losing 12 pounds during the three hour practice, Christian experienced an eight percent change in body weight.

19. The Mannenbachs and Johnstons were not satisfied with the school administrators' response to their complaints about Respondent. They were also upset with Respondent's decision in January 2002 to close the wrestling practices to parents. They complained about Respondent to the District Superintendent, Bill Jones. Mr. Jones then directed Mr. Bergen to conduct a further investigation into the December 20, 2001 practice. Specifically, Mr. Jones asked Mr. Bergen to investigate whether the practice had put the student wrestlers' health at risk. (Test. of Bergen; test. of Jones; test. of Brabbin.)

20. Mr. Bergen interviewed the assistant coaches and eight wrestlers who were at the practice. He selected wrestlers that he believed would be "neutral" voices. Mr. Bergen did not interview Christian Mannenbach or Robbie Johnston. The assistant coaches reported that although the practice was strenuous and longer than usual, they did not believe it put the wrestlers' health at risk. With the exception of one wrestler who reported that he felt like he was going to pass out during the practice, the other seven advised Mr. Bergen that they did not feel their health was at risk. Some of the wrestlers mentioned, however, that Respondent made the whole team do sprints because Robbie Johnston was overweight. (Ex. R25; test. of Bergen.)

21. In a March 1, 2002 memo to Mr. Jones, Mr. Bergen summarized his investigation into the December 20, 2001 practice. He reported the student wrestlers did not believe that their health or safety was compromised and that neither assistant coach felt it necessary to step in. He also assured Mr. Jones that all of the coaches agreed and understood that withholding water from the wrestlers was inappropriate, even if the wrestlers' health was not compromised. (Ex. A11.)

22. Meanwhile, at a January 2002 wrestling competition at Eagle Point High School, Respondent got into a heated discussion with Ken Thompson, the South Medford High School wrestling coach. Some of the South Medford wrestlers and some wrestlers from another team were disqualified from the competition because they did not follow the proper weigh-in protocol before the meet. Mr. Thompson spoke to Mr. Bergen about what he perceived as shortcomings or unfairness in the weigh-in process. Mr. Bergen agreed to check into the process. After that, Respondent came into the gymnasium and chastised Mr. Thompson because his wrestlers did not know the proper procedures. Mr. Thompson got angry, and responded with a snide comment. Respondent, in turn, responded with a series of expletives directed at Mr. Thompson. Respondent was speaking in a loud voice, and Mr. Thompson realized Respondent's use of profanity could be over heard by students standing nearby. Mr. Thompson suggested that they continue their conversation outside. They did so, and ultimately had a productive discussion about the issue. (Test. of Thompson.)

23. In May 2002, Respondent received a satisfactory teacher performance review. The vice principal noted that Respondent ran a structured classroom environment, held students accountable for their actions and provided a challenging curriculum to meet the needs of all students. (Ex. R26.)

24. Although Respondent had supporters in the community, the Mannenbachs and the Johnstons remained unhappy with Respondent as their sons' high school wrestling coach. They threatened to file a tort claim against the school district unless Respondent was fired as the

coach. (Test. of Jones; Ex. R29.) In August 2002, both couples filed complaints about Respondent with TSPC. (Exs. A14, A15.)

25. In October 2002, Athletic Director Bergen gave Respondent a positive coaching evaluation, rating him above average in 9 of the 10 identified areas. Mr. Bergin remarked that Respondent was to give adequate water breaks during practice. In discussing whether Respondent established realistic training goals, Mr. Bergin noted: "In compliance with Eagle Point High School and School District 9 standards, Coach McBee will insure that appropriate language is used by both athletes and coaches and that strategies for discipline or motivation are absent of taunting (by coaches or athletes)." (Ex. A13.)

26. Respondent resigned from his position as Eagle Point High School's wrestling coach last year. He has not sought to reinstate his special duty contract. (Test. of Brabbin.)

27. Over the last several years, high school and college athletic associations have recognized the medical risks associated with athletes' dehydration during practices and competitions. In 1997, three college wrestlers died in preseason workouts trying to cut weight. (Ex. A27.) In 2000, the National Athletic Trainers' Association issued recommendations for fluid replacement in athletes. (Ex. A28.)

28. As part of the certification process, coaches are taught about the importance of fluids and hydration. The publication, *Successful Coaching* is used by the American Sports Education Program and the National Federation of Interscholastic Coaches Association as a text in the coaching certification program. With regard to dehydration, it advises as follows:

Even moderate water loss (2-3% of body weight) has a noticeable effect on performance, and dehydration over 5% brings a risk of heat exhaustion. Dehydration not only rids the body of needed water, it also alters the balance of electrolytes. * * * When dehydration alters the electrolyte balance, nerve conduction and muscular contraction are affected and strength and endurance decrease. Endurance is further affected by the drop in blood volume resulting from water loss.

(Ex. A31.)

29. In a similar vein, the *USA Wrestling Coach's Guide to Excellence* advises:

Water is absolutely essential for optimal health and peak performance. You may be surprised to know that dehydration is a major cause of decreased performance. Some wrestlers are more sensitive to dehydration than others. A fluid loss of 2-3% of your weight can quickly occur during intense training. Even modest levels of dehydration should be avoided because dehydration harms performance. It is important to drink plenty of fluid during

practice and between matches. * * * During physical activity, thirst is not an adequate signal of the need for fluid.

(Ex. A32.) The *Coach's Guide* then sets forth fluid guidelines, including drinking 2 1/2 cups of fluid two hours before training or competition, 1 1/2 cups 15 minutes beforehand and 1 cup every 15-20 minutes during training and competition. *Id.*

30. The Oregon School Activities Association (OSAA) is the governing body for high school sports and activities. In 1970, OSAA, in conjunction with the Oregon Medical Association, formed a committee to address medical issues as they relate to high school sports. OSAA recognizes that there are medical risks associated with athletes' dehydration, especially in football and wrestling. OSAA recommends proper hydration of athletes, and considers all athlete deaths related to heat stroke to be preventable. (Test. of Stanford.)

31. OSAA has also adopted the National Federation of State High School Association's rules for high school wrestling and a code of conduct for wrestlers and wrestling coaches. The rules prohibit unsportsmanlike conduct and coach misconduct. Unsportsmanlike conduct includes violations of the bench decorum rule, taunting, acts of disrespect or actions which incite negative reaction by others. Officials are to call coach misconduct when a coach challenges the judgment of a referee. (Ex. R53 at 3 and 4.) OSAA keeps records of when coaches are ejected during high school sporting events. OSAA also has the authority to fine a school when a coach is ejected. (Exs. R59, R60, R61.) It tracks the school and the number of ejections by sport as well as the total amount owed and the total amount paid by each high school. Although other Eagle Point High School coaches have been ejected from games and/or meets in recent years, Respondent has never been ejected. (Exs. R60 and R61; test. of Garrett.)

32. Lack of hydration that results in loss of 3 to 5 percent body weight is significant. Loss of more than 5 percent body weight is serious dehydration. Serious dehydration can result in heat stroke, collapse and, in extreme circumstances, death. While symptoms of dehydration include headache, muscle cramps and difficulty breathing, oftentimes the athlete is unaware that he or she is seriously dehydrated until it is too late. (Test. of Stanford; Ex. A28.)

CONCLUSIONS OF LAW

1. Respondent's withholding of water for more than three hours from members of the Eagle Point High School wrestling team during the December 20, 2001 team practice did not constitute corporal punishment under ORS 339.250(12).

2. Respondent's withholding of water for more than three hours from members of the wrestling team on December 20, 2001 did, however, constitute gross neglect of duty in violation of OAR 584-020-0040(4)(n).

3. Respondent's conduct at the December 1999 wrestling competition in Newberg, Oregon did not rise to the level of gross neglect of duty.

4. Respondent's conduct at the January 2001 Rogue Valley wrestling competition did not rise to the level of gross neglect of duty.

5. Respondent's conduct at the January 2002 wrestling competition in Eagle Point, Oregon did not rise to the level of gross neglect of duty.

OPINION

TSPC bears the burden of proving the allegations and that the proposed sanction is warranted by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Here, TSPC alleges that Respondent engaged in misconduct that constituted gross neglect of duty. Specifically, TSPC alleges that Respondent violated ORS 342.175 and OAR 584-020-0040(4)(n) by withholding water from members of the wrestling team during a three hour practice, and by engaging in unprofessional behavior at three wrestling competitions in December 1999, January 2001 and January 2002.

ORS 342.175 authorizes TSPC to discipline educators licensed in the State of Oregon. It provides in pertinent part, as follows:

- (1) The Teacher Standards and Practices Commission may suspend or revoke the license of a teacher or administrator, discipline a teacher or administrator or suspend or revoke the right of any person to apply for a license if the person has held a license at any time within five years prior to issuance of the notice of charges under ORS 342.176⁵ based on the following:

* * *

- (b) Gross neglect of duty;

OAR 584-020-0040(4) describes "gross neglect of duty" as "any serious and material inattention to or breach of professional responsibilities." Under subparagraph (n), a "substantial deviation from professional standards of competency set forth in OAR 584-020-0010 through 584-020-0030" may be admissible as evidence of gross neglect of duty. The Commission has also adopted Standards for Competent and Ethical Performance of Oregon Educators, which are set forth in OAR chapter 584, division 20. The Commission will determine whether an educator's

⁵ ORS 342.176(1) provides: "Upon receipt of a complaint or information that a person has violated ORS 342.143 or 342.175, the Teacher Standards and Practices Commission shall promptly undertake an investigation."

performance is ethical or competent in light of all the facts and circumstances surrounding the educator's performance as a whole. OAR 584-020-0000(3).

ORS 584-020-0010(5) requires that teachers demonstrate a commitment to "use professional judgment." ORS 584-020-0020(1) provides that a competent educator "respect the rights of all persons without discrimination." ORS 584-020-0020(2)(d) provides that the competent teacher demonstrate "skill in the supervision of students." ORS 584-020-0025(1) and (2) address management skills for the competent educator and ORS 584-020-0030 deals with human relations and communication skills for the competent educator.

December 20, 2001 Wrestling Practice

TSPC asserts alternative theories in alleging that Respondent's conduct at the December 20, 2001 wrestling practice constituted gross neglect of duty. First, TSPC contends that Respondent withheld water from members of the team as a punitive measure, and that such conduct violated ORS 339.250(12),⁶ the law that prohibits infliction of corporal punishment on students. Alternatively, TSPC alleges that, even if not intended as a punitive measure, Respondent violated standards of competency and seriously breached his professional duties by withholding water from students for more than three hours during strenuous athletic activity. Respondent, on the other hand, denies that his actions were punitive in nature or intended to cause physical pain. Respondent further asserts that his actions did not constitute gross neglect of duty.

⁶ ORS 339.250 addresses student conduct and discipline. Subparagraph (12) provides as follows:

(a) The authority to discipline a student does not authorize the infliction of corporal punishment. Every resolution, bylaw, rule, ordinance or other act of a district school board, a public charter school or the Department of Education that permits or authorizes the infliction of corporal punishment upon a student is void and unenforceable.

(b) As used in this subsection, "corporal punishment" means the willful infliction of, or willfully causing the infliction of, physical pain on a student.

(c) As used in this subsection, "corporal punishment" does not mean:

(A) The use of physical force authorized by ORS 161.205 for the reasons specified therein; or

(B) Physical pain or discomfort resulting from or caused by participation in athletic competition or other such recreational activity, voluntarily engaged in by a student.

Corporal Punishment.

Oregon law prohibits discipline in the form of corporal punishment in public schools. For purposes of ORS 339.250(12), corporal punishment means "the willful infliction of or willfully causing the infliction of, physical pain on a student." ORS 339.250(12)(b). An exception to this rule is set out in ORS 339.250(12)(c)(B): Corporal punishment does not include physical pain or discomfort resulting from or caused by a student's voluntary participation in athletic competition or other such recreational activity.

The first question in this case is whether Respondent acted willfully. Although the term is not defined in the statute, it generally means a knowing or intentional act. *See, e.g., Pierce v. Dept. of Public Safety Standards and Training*, 196 Or App 190, 195 (2004). In this case, Respondent knew that there was no water available in the practice room, yet he directed his wrestlers to remain in the room throughout the practice. He did not offer a water break until late in the three hour practice, and allowed only about a third of the team members to get a drink at that point. The evidence establishes that Respondent's conduct was willful.

The next inquiry is whether his acts caused physical pain to a student. At least one wrestler (Christian Mannenbach) experienced painful leg cramps following the practice.⁷ The cramps were due to severe dehydration, which resulted from Respondent's failure to make water available during the long and strenuous workout.

The remaining issue is whether Respondent's conduct violated the statute, considering that Christian Mannenbach's physical pain resulted from his voluntary participation on the high school's wrestling team. TSPC argues that the exemption set forth in ORS 339.250(12)(c)(B) does not apply because withholding water was not "part of the deal." TSPC contends that withholding water is not an appropriate training strategy or a legitimate means for making weight, and therefore Respondent's conduct falls outside the exemption. Notwithstanding TSPC's position, however, the statutory language is not so limited. Even though dehydration is an avoidable risk, and Respondent may have had no legitimate reason for withholding water from his wrestlers during the long practice, the student who experienced pain did so as a result of his voluntary participation in the wrestling practice. For this reason, Respondent's conduct at the December 20, 2001 practice falls outside the corporal punishment statute.

Gross Neglect of Duty.

Even if Respondent had no malicious intent toward his wrestlers, he did intentionally withhold drinking water from two-thirds of the team members during a rigorous three hour practice. As a result, at least one student-wrestler experienced symptoms of serious dehydration. Christian Mannenbach lost eight percent of his body weight and experienced painful muscle cramps. Another student acknowledged that he felt as if he was going to pass out after practice. Although the assistant coaches did not note signs of dehydration and other wrestlers (those interviewed by the athletic director) did not believe that their health was at risk, Respondent's

⁷ Although some of the wrestlers believed that Respondent was angry at Robbie Johnston because he was overweight, there is no evidence that Respondent intended to punish or discipline Christian Mannenbach during this practice.

actions caused actual physical pain to at least one wrestler and had the potential to cause harm to the others. Respondent's conduct was also contrary to accepted coaching standards and the Jackson County School District's policy on corporal punishment.⁸

As set forth in the findings above, proper hydration is essential to optimum athletic performance. Dehydration, even in modest form, hampers performance. Dehydration decreases muscle strength, stamina and mental functioning. It can also cause heat exhaustion. As a licensed educator and experienced wrestling coach, Respondent should have known the risks associated with dehydration. He should have followed fluid guidelines for athletic training, and made water readily available to all of the wrestlers during this and every other practice. The fact that other wrestling coaches hold practices without water does not justify Respondent's conduct. By limiting the wrestlers' access to water during the rigorous three hour wrestling practice, Respondent substantially deviated from standards of competency. He used bad judgment under OAR 584-020-0010(5) and failed to use skill in the supervision of students under OAR 584-020-0020. Consequently, Respondent's conduct at the December 20, 2001 practice was gross neglect of duty in violation of OAR 584-020-0040(4)(n).

December 1999 Newberg Competition

TSPC contends that Respondent acted unprofessionally by taunting the crowd, and permitting Chet to taunt the crowd after he won his wrestling match. TSPC further asserts that such conduct amounts to gross neglect of duty. Respondent, on the other hand, asserts that even if his conduct was perceived as taunting, it did not rise to the level of gross neglect of duty in violation of OAR 584-020-0040(4)(n).

As discussed above, the "gross neglect of duty" standard requires a "serious and material" breach of professional responsibilities. A "substantial deviation from professional standards of competency" may constitute gross neglect of duty. OAR 584-020-0040(4)(n) Based on the plain language of the rule, therefore, not all breaches or deviations from professional standards constitute "gross neglect of duty." Only serious and material breaches give rise to TSPC discipline. *See Britton v. Board of Podiatry Examiners*, 53 Or App 544 (1981) (recognizing that gross negligence connotes an act beyond mere inadvertence or error in judgment).

While Respondent may have deviated from professional standards by thrusting his son's arm in the air following the match win, this conduct was not a serious and material breach of his professional judgment. In other words, while he may have acted unprofessionally at the meet, his actions did not amount to *gross* neglect of duty. Indeed, the fact that the meet officials did not call unsportsmanlike conduct or sanction Respondent during the meet suggests that his actions did not amount to a substantial deviation from acceptable coaching behavior. Consequently, TSPC has not proven this alleged violation.

⁸ The school district strictly prohibits the use of corporal punishment on students. The policy defines corporal punishment as the willful infliction of, or willfully causing the infliction of physical pain but, unlike ORS 339.250(12)(c), does not exclude physical pain caused by or resulting from a student's participation in athletic competition or recreational activity. (Ex. A21.)

January 2001 Rogue Valley Competition

TSPC contends that Respondent acted unprofessionally during the Rogue Valley Competition by repeatedly walking across the mat during his son's match against Brandon Souza, by using profanity and by taunting the crowd after Chet won the match. Respondent maintains that his conduct at this meet did not constitute gross neglect of duty.

The videotape demonstrates that Respondent repeatedly walked across the mat during the meet. It also documents that, following the match, he turned toward the crowd and waved animatedly. He even motioned for one or more to come down from the bleachers. Regardless of Respondent's intent, others construed his actions as taunting. Respondent also shouted at the opposing team's coaches. While this conduct was not professional, it did not rise to the level of gross neglect of duty. Again, although some fans, other coaches and a Medford sports writer were critical of Respondent's actions, the officials who supervised the meet did not penalize Respondent for unsportsmanlike conduct or coach misconduct during the meet. The record therefore does not establish any gross neglect of duty by Respondent at this competition.

January 2002 Meet at Eagle Point High School

TSPC also alleges that Respondent's use of profanity and his angry interchange with Coach Thompson prior to the January 2002 wrestling meet at Eagle Point High School constitutes gross neglect of duty in violation of OAR 584-020-0040(4)(n). The evidence establishes that Respondent chastised another school's wrestlers and, when Coach Thompson responded with a snide comment, Respondent uttered expletives within earshot of students. Such conduct is inconsistent with Respondent's obligation to communicate effectively with others (OAR 584-020-0030). But, under the totality of circumstances, and considering the continuum of professional conduct, this instance of bad language does not constitute a substantial deviation from professional standards of competency. For this reason, Respondent's conduct at this meet did not amount to gross neglect of duty.

Sanction

In considering disciplinary action against a teacher, the TSPC may consider any of the following factors set out in OAR 584-020-0045 in its determination:

- (1) If the misconduct or violation is an isolated occurrence, part of a continuing pattern, or one of a series of incidents.
- (2) The likelihood of a recurrence of the misconduct or violation.
- (3) The educator's past performance.
- (4) The extent, severity and imminence of any danger to student, other educators, or the public.

- (5) If the misconduct was open and notorious or had negative effects on the public image of the school.
- (6) The educator's state of mind at the time of the misconduct and afterwards.
- (7) The danger that students will imitate the educator's behavior or use it as a model.
- (8) The age and level of maturity of the students served by the educator.
- (9) Any extenuating circumstances or other factors bearing on the appropriate nature of a disciplinary sanction.

Considering the factors above in light of the circumstances in this case, I find that a Public Reprimand is an appropriate sanction. Respondent's act of withholding water from his wrestlers during the December 20, 2001 practice was an isolated incident. While his conduct put his wrestlers at risk of dehydration, Respondent was counseled by the Athletic Director, and agreed to give adequate water breaks during practices. There is also little likelihood of a recurrence, because Respondent is no longer the school's wrestling coach. Both before and after the incident in issue, Respondent received positive teaching and coaching evaluations. Furthermore, none of the conduct at issue in this case involves Respondent's performance and/or competency as a teacher.

As Respondent notes, the Commission has previously issued reprimands for conduct more egregious than one occasion of withholding water during a strenuous practice. For example, in the case of *David John Larson* (TSPC, Stipulation and Order of Reprimand and Probation, October 2003), the licensee used unreasonable physical force on a student when he intentionally struck the student in the back with a basketball. The Commission found that the licensee's conduct constituted gross neglect of duty, and was part of a continuing pattern of behavior. It imposed a public reprimand and two years probation. Similarly, in *Peter Paul Lucas* (TSPC, Stipulation and Order of Reprimand and Probation, September 2001), the licensee was reprimanded and placed on probation for putting his hands on a student's shoulders and arm, yelling at the student in an angry manner and using the word "ass."

While the Commission has previously suspended educators who have failed to take steps to ensure the health or safety of students,⁹ Respondent's one instance of bad judgment shown in this case does not merit a suspension of his teaching license.

⁹ See, e.g., *David Richard Sammons* (TSPC, Final Order, July 2004) (license revoked where licensee had a long history of failing to properly supervise students and manage his classroom, and did not report a threat to a student and the possibility that another student had a gun); *Marcia Jean Meyers* (TSCP, Stipulation and Order of Suspension, May 2000) (six month suspension for science teacher who had students prick their fingers using unsterilized pushpins to draw blood to smear on microscope slides); *Phillip Stanley Peyton* (TSPC, Stipulation and Order of Suspension and Probation, August 2003) (90 day suspension for educator who appeared on duty at school while under the influence of alcohol and drove students in a school van while his driver license was suspended).

ORDER

I propose the Teacher Standards and Practices Commission impose a Public Reprimand on Respondent Brad McBee for violating OAR 584-020-0040(4)(d) on one occasion.



Alison Greene Webster, Administrative Law Judge
Office of Administrative Hearings

MAILING AND ISSUE DATE: May 5, 2005

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Teacher Standards and Practices Commission. If you disagree with any part of this proposed order, you may file written objections, called "exceptions," to the proposed order and present written argument in support of your exceptions. Written argument and exceptions must be filed **within fourteen (14) days after mailing of the proposed order** with the:

Teacher Standards and Practices Commission
465 Commercial Street, NE
Salem, Oregon 97301

The Commission need not allow oral argument. The Executive Director may permit oral argument in those cases in which the Director believes oral argument may be appropriate or helpful to the Commissioners in making a final determination. If oral argument is allowed, the Commission will inform you of the time and place for presenting oral argument.

**APPENDIX A
LIST OF EXHIBITS CITED**

- Ex. A11: Memo to Bill Jones from Bob Bergin, 3/1/2002
- Ex. A12: Memo to Brad McBee from Bob Bergin, 1/9/2002
- Ex. A13: Coach Evaluation of Respondent, 10/7/2002
- Ex. A14: TSPC Complaint, 8/18/2002
- Ex. A15: TSPC Complaint, 8/16/2002
- Ex. A17: Excerpt from *Medford Mail Tribune* article, 1/2001
- Ex. A22: Videotape, Rogue Valley Championships
- Ex. A28: Journal of Athletic Training article, 6/2000
- Ex. A31: *Successful Coaching* excerpt
- Ex. A32: *Coaches Guide to Excellence* excerpt
- Ex. R1: Extra Duty Assignment contract, 8/10/1999
- Ex. R6: Teacher Performance Evaluation, 6/15/2000
- Ex. R9: Teacher Performance Evaluation, 4/19/2001
- Ex. R24: Cowden Letter regarding McBee, 6/20/2002
- Ex. R25: Investigation notes
- Ex. R26: Teacher Performance Evaluation, 5/7/2002
- Ex. R29: Letter to TSPC from William Jones, 8/9/2002
- Ex. R60: OSAA ejection records, 2001-2004
- Ex. R61: OSAA ejection policies and rules

CERTIFICATE OF SERVICE

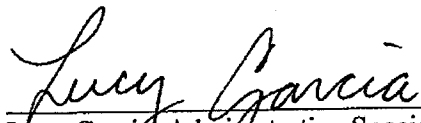
I certify that on May 5, 2005, I served the attached Proposed Order by mailing in a sealed envelope, with first class certified postage prepaid, a copy thereof addressed as follows:

BRADLEY DEAN MCBEE
225 KEYSTONE WAY
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1162 COURT ST NE
SALEM OR 97301-4096



Lucy Garcia, Administrative Specialist
Office of Administrative Hearings
Transportation Hearings Division

SETTLEMENT AGREEMENT

The parties to this agreement are the Oregon Teacher Standards and Practices Commission (Commission) and Bradley Dean McBee.

RECITALS

1. On February 1, 2, 3 & 4, 2005, the Commission conducted a contested case hearing seeking to impose discipline against Mr. McBee.
2. On May 5, 2005, Administrative Law Judge Alison Greene Webster issued a proposed order containing findings of fact, conclusions of law and imposition of a public reprimand.
3. On August 5, 2005, the Commission considered the proposed order of the administrative law judge. On August 9, 2005, the Commission issued a final order which incorporated the proposed findings of fact and conclusions of law and added an additional conclusion of law that Mr. McBee's conduct violated the statutory prohibition against corporal punishment.

AGREEMENTS

After further consideration, Mr. McBee and the Commission agree as follows:

1. The Commission agrees to withdraw its final order dated August 9, 2005, and to approve an amended order that incorporates only the findings of fact, conclusions of law, opinion and proposed order of the administrative law judge and does not contain any additional findings or conclusions.
2. In exchange for the Commission adopting its amended order, Mr. McBee agrees not to seek judicial review of the Commission's amended order or to otherwise assert any legal challenge to the amended order.

The terms of this settlement agreement are contingent upon approval and adoption by the full Commission. If the Commission does not adopt the amended order described above, it is understood that Mr. McBee would retain the right to seek judicial review of the Commission's order under ORS 183.482 or to seek any other available legal remedy.

Bradley D. McBee

Bradley Dean McBee

10/10/05

Date

Victoria Chamberlain

Victoria Chamberlain
Executive Director, TSPC

11/07/05

Date

Approved as to form:

Joe Gordon McKeever

Joe Gordon McKeever of
Attorneys for TSPC

October 31, 2005

Date

Barbara Diamond

Barbara Diamond of
Attorneys for Bradley Dean McBee

Oct 10, 05

Date

GENN7361