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FAX NO. : 727-824-6367

Apr. 14 2004 03:29PM P1

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
Case No. 04-0403PL
EPC Case # 03-3016-RT
PPS Case # 012-2333-S

FLB

Jim Horne, as Commissioner
of Education,
Petitioner,
vs.
Ivan G. Wansley,
Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR COSTS and
ATTORNEY'S FEES AND OBJECTION TO VOLUNTARY DISMISSAL

Petitioner, Jim Horne, as Commissioner of Education, hereby responds to Respondent's Motions for Costs and Attorney's fees, and Objection to Voluntary Dismissal as follows:

1. Petitioner having voluntarily dismissed the administrative complaint without prejudice, there is no jurisdiction in the Division of Administrative Hearings to enter any order other than a closing of the file, cf. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2nd 68 (Fla. 1978). Without waiving said argument, Petitioner also responds as follows:
2. Although in some cases, following a voluntary dismissal, the court retains jurisdiction to award attorney's fees and costs, where appropriate, Froman v. Kirland, 746 So. 2nd 1120 (Fla. 4th DCA 1999), that is not the case in an administrative proceeding where there was no motion for attorney's fees or costs pending before the end of the case, Sellers v. Broward County School Board, DOAH Case # 97-3540F, 20 FALR 613 (1998).
3. Furthermore, any award of attorney's fees and costs must be based on a factual

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determination that the cause was initiated or maintained for an improper purpose, H.R.S. v. S.G., 613 So. 2nd 1380 (Fla. 1st DCA 1993). That determination must be supported by evidence in the record, Dalia v. Duda, 576 So. 2nd 868 (Fla. 3rd DCA 1991). There is no evidence in the record to support such a determination. Respondent's motion is conclusory and unsworn, and is not evidence. A voluntary dismissal by itself is not a sufficient basis to conclude the action was initiated for an improper purpose, Executive Centers of America v. Durability Seating and Interiors, 402 So. 2nd 24 (Fla. 3rd DCA 1981). In fact, there was evidence to support the filing of the administrative complaint filed in this cause, as shown by the written statement of J.J. attached hereto.

4. Finally, as to the request for costs and attorney's fees, it has been held that a governmental agency can not be considered a non-prevailing adverse party, Sellers, supra. and Crist v. Pringle, DOAH Case # 02-4430.

5. As to Respondent's objection to the voluntary dismissal, and request for an order directing Petitioner to immediately issue a permanent certificate, without waiving the point that the Division of Administrative hearings lacks jurisdiction to enter such an order at this time, Petitioner would point out he has the right to refile the administrative complaint, Crist v. McMullen, DOAH case # 03-1122PL, at which time the issues originally alleged in the administrative complaint, as well as those Petitioner previously sought to amend the complaint to include can be litigated. Those issues include but are not limited to allegations set forth in the written statements of Milla Voellinger, Brandi Packard, and David and Jodi West, attached hereto.

6. furthermore, as with the request for costs and attorney's fees, there is no evidence on the record to show Respondent is entitled to a certificate. As with the motion for costs and fees, his objection and request is conclusory and unsworn. If in fact he believes the Department of Education has no discretion but to award him a certificate at this time, his proper remedy is to file a petition for writ of mandamus in the appropriate circuit court

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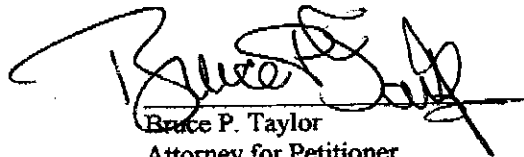
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under Art V. Sec. 5 of the Constitution of the State of Florida.

I hereby certify that a copy of the foregoing was served on Robert Coleman, Esq., Counsel for Respondent, at 2300 McGregor Blvd., Ft. Myers, Fl. 33901 on this the 14th Day of April, 2004 by telefax.



Bruce P. Taylor
Attorney for Petitioner
P.O. Box 131
St. Petersburg, Fl. 33731-0131
(850)878-5212
Fla. Bar # 224936

(Counsel for Petitioner apologizes for not attaching copies of cited authorities, but as he was concluding his research for this pleading in the Law Library of the Judicial Building in St. Petersburg, the fire alarm sounded, and he was required to evacuate the building)
CC: Ron Stowers, Esq.

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Page Number 1

STATEMENT

1. Jennifer Jacobs 6/14/85 12th grade
 NAME DATE OF BIRTH POSITION
16020 Dublin Ln #4 FL Myers FL 33908
 ADDRESS: STREET CITY STATE ZIP CODE
(239) 432-0781 9/12/02 TIME
 (AREA) TELEPHONE DATE

having been advised that I need not make this statement, declare that the following statement is given freely and voluntarily, without promise to benefit, or threat or use of force or duress, do proceed to state as follows:

Around June 14th of last year I was involved with Tampa Bay Thunder Drum and Bugle Corps as a member of the color guard. I was given this opportunity as a result of Mr. Dwan Wandy, who was a program consultant for the Corps, asking me to come and audition. The Corps was rehearsing at Seligh High School for two weeks, before leaving to go on tour. Mr. Wandy was present at rehearsals, always going out of his way to be present at the color guard's sectionals. The time when the guard practiced without the instrumentalists. His presence at these sectionals was completely unwarranted as he is a musician and would offer little to the instruction of a guard. He was very friendly with the girls of the color guard. Many hugs, kisses on the cheek, and other touches were prevalent with the guard. Mr. Wandy when he was with the girls. Around June 14th or so, Mr. Wandy pulled

I have read each page of this statement, consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials and certify that the facts contained herein are true and correct to the best of my knowledge.

Shelli N. White
 Witnessed by: Shelli N. White

Signature of person giving statement

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STATEMENT

me aside to ask how I was doing, tell me how proud of me he was, and to tell me he "loved" me. After this, he put his arm around me, pulled me close, bent down to "kiss me on the cheek," when he instead put his tongue in my ear. This same event occurred at least two other times while we were on tour. At the school, Cypress Lake High School, he was the band director. I ~~was~~ a student at this school, and was in his marching band last year as the captain of the color guard. Once again, he was very friendly towards the girls, giving many hugs and kisses on the cheek. Also, going out of his way to attend color guard rehearsal and even inviting himself to the dance room during the school day to sit and watch the dancers (who happened to be wearing leotards and tights). He did very little to contribute to Marching Pride rehearsals after turning his back from the band as they performed. In addition to all this, his poor treatment of his colleagues was unacceptable. Mrs. Patty Cook, the dance instructor, was the main victim of this. He constantly treated her poorly, undermining her, and finally, screaming at her at a competition causing her to stop down as instructor of the dance line.

I have read each page of this statement consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials. I certify that the facts contained herein are true and correct to the best of my knowledge.

Shelia N. White
Witnessed by: Shelia N. White

Signature of person giving statement

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STATEMENT

1. Brandi Packard March 9th 1987 10th Grader
NAME DATE OF BIRTH POSITION
115 Shaw Blvd. Ft. Myers FL 33905
ADDRESS: STREET CITY STATE ZIP CODE
(239) 694-3599 September 12, 2002 12:31
(AREA) TELEPHONE DATE TIME

having been advised that I need not make this statement, declare that the following statement is given freely and voluntarily, without promise to benefit, or threat or use of force or duress, do proceed to state as follows:

I was at Lehigh Sr. High School getting ready for the jazz band FBA and my friend and I were walking around and Mr. Wangley came up to us and said congratulations to us because we had done Solo-n-Ensemble and I got a superior and Renee got a fair or poor and he gave his hand out and she shook it and he kissed her ear and then he did the same to me. He kissed me on my ear at the ^{temp} near the back of my head. We walked away after he did that. We were both in disgust. We said to each other that we wanted to go home and bleach our ears.

I have read each page of this statement consisting of ____ page(s), each page of which bears my signature, and corrections, if any, bear my initials and certify that the facts contained herein are true and correct to the best of my knowledge.

Brandi Packard
Signature of person giving statement:

Shelli N. White
Witnessed by: Shelli N. White

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STATEMENT

1. Milla Rose Voellinger	4-10-86	11
NAME	DATE OF BIRTH	POSITION
821 Sunset Vista dr	Ft. Myers	FL
ADDRESS: STREET	CITY	STATE
(391) 482-2550	9-12-02	1:56
(AREA) TELEPHONE	DATE	TIME
		33919
		ZIP CODE

having been advised that I need not make this statement, declare that the following statement is given freely and voluntarily, without promise to benefit, or threat or use of force or duress, do proceed to state as follows:

I am a junior at Cypress Lake High School. I always thought that being at school ^{m.v.} ~~was~~ was suppose to be fun and educational. I have played trumpet for 7 years now and have loved every minute of it. But last year, Mr Wansley basically ruined that experience for me. I was my first year playing in the CLCA top band & I figured it would be quite fun. Well, not exactly. Mr Wansley would yell at us while we were playing. I can't remember a time that he gave a positive remark to an individual; he simply told us what we did wrong and how we should do it differently. In marching band, he was the same way. He would yell & scream at us if we weren't making time. ^{m.v.} ~~participated~~ He made me hate band and playing and I was always upset and mad after getting out of his class. I also participated in the Dance part of Winter Guard. He would come and watch us during practice even if he didn't

I have read each page of this statement consisting of _____ page(s), each page of which bears my signature, and corrections, if any, bear my initials and certify that the facts contained herein are true and correct to the best of my knowledge.

Shelli N. White
 Witnessed by: Shelli N. White

Milla Rose Voellinger
 Signature of person giving statement

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STATEMENT

have anything to say. None of us like him being in there when we were dancing. Most of the girls, including me, didn't want him around period. We all felt very uncomfortable around him because he would hug or even kiss us. To me, that is totally unacceptable and was very angry when it was brought to our principal's attention and nothing was done. I, myself, was getting my trumpet out of the locker room when he came and started talking to me. My locker is behind everything and not visible by either door. When he leaned over to kiss my cheek, I just wanted to run. Ever since, I would not talk to or make eye contact with him. Many of us here were put into uncomfortable situations more than once. It should never have happened at all.

I have read each page of this statement consisting of _____ page(s), each page of which bears my signature, and corrections, if any, bear my initials and certify that the facts contained herein are true and correct to the best of my knowledge.

Shelli White
Witnessed by: Shelli N. White

[Signature]
Signature of person giving statement

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STATEMENT

I, Jodie West / David West ^{Jodie} 1/7/60 ^{10/2/59 / David}
NAME DATE OF BIRTH POSITION
1435 Acelye Dr Ft Myers Ha 33919
ADDRESS STREET CITY STATE ZIP CODE
941-481-3060 9/12/02 9/15/0 9:15
(AREA) TELEPHONE DATE TIME

having been advised that I need not make this statement, declare that the following statement is given freely and voluntarily, without promise to benefit, or threat or use of force or duress, do proceed to state as follows:

Jodie personally witnessed Mr Wansky removing his shirt during outdoor marching band practices, kissing female students (on the head not mouth) at the solo ensemble contest despite the obvious discomfort displayed by students. Jodie received a kiss of this nature, Did not address it but was shocked. Subsequent attempt to speak w school administration was met with no success.

I have read each page of this statement consisting of _____ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and certify that the facts contained herein are true and correct to the best of my knowledge.

Shellie N. White
Witnessed by: Shellie N. White

Jodie West
Signature of person giving statement

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