IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO. 71,081

GROVES-WATKINS CONSTRUCTORS,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PREFACE

Groves-Watkins Constructors (Groves) was the petitioner in a formal administrative hearing before the Division of Administrative Hearings. Groves was the appellant in the First District Court of Appeal and now is the respondent before the Supreme Court of Florida. The Florida Department of Transportation (DOT) was the respondent in the administrative hearing, the appellee in the district court, and the petitioner in this Court.

The appendices to this brief contain the Opinion (dated June 11, 1987) of the First District Court of Appeal and the district court's Opinion on Motion for Rehearing (dated August 4, 1987). For ease of reference, the appendices also contain the two opinions as they appeared in the Florida Law Weekly.

All underlining in this brief has been added for emphasis, unless otherwise noted.

SUMMARY OF FACTS

The only facts which are relevant for purposes of determining jurisdiction under Article V, Section 3(b)(3), Florida Constitution, are those which appear on the face of the majority decision in this case.

> The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. . . . [W]e are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

Reaves v. State, 485 So.2d 829, 830 n.3 (Fla. 1986).

The jurisdictional brief filed by Petitioner, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION (DOT), is highly improper and in direct violation of Reaves. DOT cites "facts" and raises hypothetical "questions" which are not part of the majority's decision and which completely mischaracterize the decision in this case. DOT's improper and unsubstantiated allegations must be ignored.

The district court's decision reveals that this case concerns a statutory bid protest brought by the lowest bidder, Respondent, GROVES-WATKINS CONSTRUCTORS (Groves), when DOT rejected all of the bids on a highway construction project. Pursuant to Section 120.53(5), Florida Statutes (1985), Groves requested and received a formal administrative hearing before the Division of Administrative Hearings. See §120.57(1), Fla. Stat. (1985). The hearing officer found that DOT failed to offer any competent substantial evidence to support its preliminary

decision to reject Groves' bid. Since DOT's preliminary decision was completely unfounded, the hearing officer found that DOT acted arbitrarily and capriciously in rejecting Groves' bid. He recommended that DOT award the contract to Groves. Instead, DOT reweighed the evidence, rejected the hearing officer's findings of fact, and issued a final order which rejected Grove's bid.

On appeal, the district court held that DOT violated the dictates of Section 120.57(1)(b)9., Florida Statutes,[1] by rejecting the hearing officer's findings of fact.

> We find after a thorough review of the record below that there was competent, substantial evidence to support the hearing officer's findings of fact and that DOT erred in rejecting those findings of fact and substituting its own findings on the issues presented.

Groves-Watkins Constructors v. State, Department of Transportation, 12 F.L.W. 1465, 1467 (Fla. 1st DCA June 11, 1987) (App. A). The district court also found that DOT improperly raised new legal and factual issues for the first time in its final order, thereby violating the due process requirements of Chapter 120. Relying in part on Section 120.68(13)(a)1., Florida Statutes, which expressly authorizes a court to "order agency exercise of discretion when required by law", the district court

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[1] Section 120.57(1)(b)9., Florida Statutes, provides in pertinent part:

> The agency . . . may not reject or modify the findings of fact [in the recommended order] unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence. . . .

ordered DOT to adopt the hearing officer's recommended order and award the contract to Groves.

SUMMARY OF ARGUMENT

In the decision under review, the district court does nothing more than apply the clear statutory standards of the Florida Administrative Procedure Act (APA), Chapter 120, Florida Statutes, to a state agency, DOT. The decision simply requires DOT to comply with the provisions of Section 120.57(1)(b)9., and accept a hearing officer's findings of fact regarding a contract bid dispute, because his findings are supported by competent, substantial evidence.

The district court's straight-forward application of statutory APA standards to an agency does not create conflict with other decisions. To the contrary, it is entirely consistent with well-established case law. It does not exclusively affect a class of state officers, but merely construes general principles of administrative law.

ARGUMENT

I. The Decision Under Review Does Not Conflict With Liberty County, Wester, Rose, or Mayo

A. No Express and Direct Conflict Exists Regarding An Agency's Discretion in Awarding A Competitively Bid Contract

DOT grossly misstates the facts in this case when it alleges that the district court "specifically rejected" this Court's holding in Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982). To the contrary, the district court took extreme care to address Liberty County and to demonstrate that there was no inconsistency between decisions. See Groves-

Watkins Constructors, 12 F.L.W. at 1467-68.

In Liberty County, the issue was whether the county could waive a minor bid defect and award a contract to the low bidder. This Court upheld the trial court's finding that no unfairness had occurred in the bidding process when a contract was awarded to the lowest bidder, in spite of technical deficiencies in the bid. Id. at 507. The trier of fact (the trial court) was sustained in his finding that no unfairness had occurred.

In the instant case, the district court upheld the trier of fact (the hearing officer) in his determination that the bidding process had been unfair and arbitrary, and that the contract should have been awarded to the lowest bidder, because there was no evidence of record to support DOT's decision to reject all bids. The district court stated that:

> The issue in this case is whether DOT can reject [Groves'] bid after the hearing officer assigned to conduct a de novo administrative hearing pursuant to the applicable statute finds, based upon competent, substantial evidence in the record, that DOT's decision to reject [Groves'] bid was arbitrary and capricious, and was not based upon facts which reasonably support the conclusion to reject [Groves'] bid.

Groves-Watkins Constructors, 12 F.L.W. at 1468.

DOT's strained reading of Liberty County would give agencies unbridled discretion, in the absence of fraud or similar misconduct, to arbitrarily reject the lowest bidder in all cases. DOT's argument is flatly refuted by other cases that were decided both before and after Liberty County. If DOT's arguments were accepted, Liberty County would implicitly overturn or

substantially modify at least 59 years of established case law.

Since 1928 this Court has recognized that an agency's exercise of discretion in the bidding process will be overturned if it was based "on a misconception of law or in ignorance, through lack of inquiry, or was the result of arbitrary will or improper influence or in violation of law." Willis v. Hathaway, 95 Fla. 608, 117 So. 89, 95 (1928). In City of Pensacola v. Kirby, 47 So.2d 533, 536 (Fla. 1950), this Court ruled that:

> [T]he law does require that where discretion is vested in a public agency with respect to letting public contracts on a competitive basis, the discretion may not be exercised arbitrarily or capriciously but must be based upon facts reasonably tending to support the conclusions reached by such agency.

These fundamental principles have been consistently applied by the district courts. See, e.g., Mayes Printing Co. v. Flowers, 154 So.2d 859, 864 (Fla. 1st DCA 1963); Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662, 667-8 (Fla. 3d DCA 1980); Capelletti Brothers, Inc. v. State, Department of General Services, 432 So.2d 1359, 1363 (Fla. 1st DCA 1983).

In Baxter's Asphalt & Concrete, Inc. v. Department of Transportation, 475 So.2d 1284, 1286-87 (Fla. 1st DCA 1985), the First District Court of Appeal acknowledged DOT's discretion in awarding contracts, citing Liberty County, but stated that:

> The statutory grant of discretion in awarding contracts to responsible bidders places a heavy burden on DOT to show it did not act arbitrarily or capriciously and that its actions are based upon facts reasonably tending to support the actions.

Similarly, in Wood-Hopkins Contracting Co. v. Roger J. Au & Sons, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978), a case cited by the

Supreme Court in Liberty County, the district court noted that an agency's discretion to accept or reject competitive bids may not be exercised arbitrarily, unreasonably, or capriciously.

It is clear from these cases that an agency cannot claim an "honest exercise" of its discretion under Liberty County by asserting it merely acted arbitrarily and capriciously. If such a standard applied, the provisions of Chapter 120 would have no meaning. Substantially affected persons could not help an agency reach correct decisions or change an agency's mind. See Capelletti Brothers, 432 So.2d at 1363. The purposes of the competitive bidding process would be circumvented. See Wood-Hopkins, 354 So.2d at 450; Mariott Corp., 386 So.2d at 665.

Here, DOT cannot reasonably claim that its decision constitutes an "honest" exercise of discretion. The hearing officer's findings of fact conclusively established that DOT's decision is wrong and unfounded, yet DOT arbitrarily clings to its erroneous position. Now that the hearing officer has ruled, there is no question about whether DOT's decision "may appear erroneous." Liberty County, 421 So.2d at 507. It is erroneous and arbitrary. There is no room for disagreement between reasonable people because, pursuant to Section 120.57(1), Groves has clearly proven that DOT's decision is not supported by the facts.

DOT's citation of the dissent's version of the facts is not a proper basis for establishing conflict jurisdiction.

> In order to . . . [find conflict], it would be necessary for us either to accept the dissenter's view of the evidence and his conclusion that the statements were involuntary, or to review the record

> itself in order to resolve the disagreement in favor of the dissenter. Neither course of action is available under the jurisdiction granted by article V, section 3(b)(3) of the Florida Constitution.

Reaves, 485 So.2d at 830. Here, DOT and the dissent claim that the hearing officer created a new policy with a "corrected estimate," but the facts of record and the majority decision do not support these allegations.

Moreover, there can be no conflict between the decision under review and Liberty County because they are clearly distinguishable. The instant case involves the application of Section 120.57(1)(b)9., Florida Statutes, which prohibits an agency from rejecting a hearing officer's findings of fact if those findings are supported by competent, substantial evidence. On the other hand, Liberty County did not involve the statutory application of the APA. It predated the application of Chapter 120 to bid protests. See Chapter 81-295, Laws of Fla. Even though the cases may deal with similar legal issues, if one decision is based on the application of a statute and another is not, this Court must deny review because no direct and express conflict can arise between the two decisions. See In re The Interest of M.P., 472 So.2d 732 (Fla. 1985).

B. There is No Express and Direct Conflict With Wester

As a second basis for conflict jurisdiction, DOT argues that the case under review implicitly conflicts with Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931), by "presupposing" DOT's ability to modify a bid after submission. DOT in this argument, however, clearly ignores the limitations placed upon this Court by the

1980 amendment to the Florida Constitution:

> As we recently noted in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." In other words, inherent or so called "implied" conflict may no longer serve as a basis for this Court's jurisdiction.

Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986).

Moreover, DOT relies on dicta in the district court's decision, and DOT mischaracterizes the dicta through partial quotation. In context, the district court was addressing extraneous issues (including changed conditions) that were raised in the dissent, noting that none of these matters were asserted as defenses below and that no record evidence substantiated the dissent's reliance on them. Since there was no evidence supporting DOT's allegations, there was "no legal or factual basis" for the court to refuse to award the contract to Groves. In this light, not even implied conflict arises from the court's dicta.

C. There is No Conflict of Decisions Regarding Separation of Powers

DOT also asserts conflict with Citizens of Florida v. Mayo, 357 So.2d 731 (Fla. 1978), and State ex rel. Allen v. Rose, 123 Fla. 544, 167 So. 21 (1936), but those cases merely hold that a court cannot require an agency to adopt a specific rule. Those two cases are completely different than the case at hand which involved no effort to force DOT to adopt a specific rule.

Moreover, the district court expressly found that the

factual issues in this case are not "infused with policy considerations within the ambit" of agency expertise. 12 F.L.W. at 1467. Since the factual issues underpinning DOT's position do not involve policy considerations, the "hearing officer's findings of fact must prevail if supported by competent substantial evidence." Id. The district court unquestionably has the authority under Section 120.68(13)(a)1., Florida Statutes, to order the exercise of the agency's discretion, and properly did so in this case, because it was required by law. See Groves-Watkins Constructors, 12 F.L.W. 1869, 1870 (Fla. 1st DCA Aug. 4, 1987) (App B.).

II. The Decision Under Review Does Not Expressly and Directly Affect A Class of Constitutional or State Officers

In Spradley v. State, 293 So.2d 697 (Fla. 1974), this Court announced an extremely restrictive test for the review of a decision purportedly affecting a class of constitutional or state officers.

> A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.

Spradley, 293 So.2d at 701. A decision which only affects a single agency in an administrative proceeding does not affect a class of constitutional or state officers. Shevin v. Cenville

Communities, Inc., 338 So.2d 1281 (Fla. 1976) (England, J., concurring, noting that only two cases had been accepted under this jurisdictional test in the two years after Spradley.) More recently, the Court reaffirmed the restrictive test of Spradley by requiring an explicit decision which directly affects a class of officers. School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985 (Fla. 1985).

The decision under review does nothing more than apply the clear statutory requirements of Chapter 120 to DOT, and merely construes well-established case law affecting this agency. If this decision confers jurisdiction, every decision which affects any agency's actions under the Administrative Procedure Act would do so. The decision at hand clearly does not exclusively affect a particular class of constitutional or state officers. Rather, it construes general principles of administrative law. This decision does not meet the constitutional requirements for review under the "affecting officers" clause.

CONCLUSION

The decision under review makes a single, fundamental ruling: DOT violated Chapter 120 requirements by rejecting a hearing officer's findings of fact, because those findings were supported by competent, substantial evidence. DOT does not like the court's decision, but there is no decisional conflict, or a direct and exclusive effect on a particular class of state officers. Accordingly, the petition for review should be denied.

Respectfully submitted this 7th day of October, 1987.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Bob Scanlon, Deputy General Counsel for Department of Transportation, Haydon Burns Building, 605 Suwanee Street, Tallahassee, Florida 32399 on this 7th day of October, 1987.

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