IN THE SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE
GOVERNOR - SCHOOL BOARD
MEMBER SUSPENSION AUTHORITY

CASE NUMBER: 81,617

BRIEF OF DIANE B. ROWDEN

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STATEMENT OF THE CASE AND FACTS

Prior to February 18, 1993, Diane Rowden was a duly elected member of the Hernando County School Board. On August 17, 1992, a Grand Jury presented an Indictment against Mrs. Rowden charging her with thirteen misdemeanor counts of violating the Public Meetings Law, Section 286.011, Florida Statutes. Subsequently, on December 1, 1992, Mrs. Rowden plead nolo contendere to all counts and was adjudicated guilty of one misdemeanor count of violating the Sunshine Law.

On February 18, 1993, Governor Chiles, by Executive Order Number 93-60, suspended and removed Mrs. Rowden from her position as member of the Hernando County School Board. As authority for his actions, the Governor cited Section 112.52, Florida Statutes, which provides for suspension and removal of public officers not otherwise provided for in the Florida Constitution. Following her removal from office, Mrs. Rowden filed a complaint in Hernando County Circuit Court, seeking declaratory and injunctive relief against the Governor for her removal.

Contending that the office of school board member is not a county office within the suspension and removal provisions of Art. IV, §7, Fla. Const.(1968), the Governor, on April 16, 1993, sought an advisory opinion with the Supreme Court to confirm or deny this assertion. On April 20, 1993, the Supreme Court issued an Order accepting the invitation to provide an opinion in response to the Governor's request.

SUMMARY OF ARGUMENT

The 1968 Florida Constitution provides for the suspension and removal of state and county officers in Article IV, Section 7. Under this section, an officer may only be removed after a hearing in front of the Senate. Section 112.52, Florida Statutes, provides a method by which the Governor may both suspend and remove any public official not subject to the constitutional provisions regarding the same. On February 18, 1993, Governor Chiles issued Executive Order 93-60 suspending and removing Diane Rowden, a member of the Hernando County School Board.

The office of school board member is provided for in Article IX, Section 4, Florida Const. (1968), and a member is only subject to suspension and removal under the procedures prescribed in Article IV, Section 7. A review of the relevant Legislative History clearly demonstrates that Section 112.52 was only intended to apply to special statutory districts created by the Legislature. Furthermore, relevant Attorney General opinions reveal that the term "district officers" is generally considered to refer to those persons who hold positions in special districts created by law to perform certain governmental functions. Since school boards are created by the Constitution rather than by law, their members are entitled to the protections guaranteed in Article IV, Section 7.

Under Article IX, Section 4, school boards are established to serve areas known as "school districts". The same section of the Constitution provides that each county shall constitute one school district. It is obvious, therefore, that school board members are

county officers. The Constitutional provision allowing two counties to merge into one school district upon the vote of the electors cannot be said to change, modify, or dispose of the substantive rights of school board members.

Even if this Court determines that Section 112.52 is applicable to school board members, such an application should be held to be unconstitutional or unconstitutional as applied, since it would violate both due process and equal protection of the laws. A public officer has a property right in his or her office which cannot be taken away or infringed upon without proper notice and opportunity for a hearing. Governor Chiles' Executive Order suspending and removing Diane Rowden, provided no notice or opportunity to be heard, and therefore is invalid under the due process clauses of both the Florida and United States Constitutions. Moreover, applying Section 112.52 to school board members while allowing other county officers, such as sheriffs, and county court clerks to enjoy the provisions of Article IV, Section 7, constitutes a denial of equal protection. Even under the lenient rational basis test, the state would be completely unable to justify such an invidious discrimination.

ARGUMENT

I. AN ELECTED MEMBER OF A SCHOOL BOARD IS A COUNTY CONSTITUTIONAL OFFICER ONLY SUBJECT TO SUSPENSION AND REMOVAL UNDER ARTICLE IV, SECTION 7 OF THE FLORIDA CONSTITUTION.

Article IV, Section 7 of the 1968 Florida Constitution provides for the general procedure of suspending and removing public officers of the state. Under Section 7(a), the Governor may, by executive order, suspend a public officer, not subject to impeachment, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony. Under Section 7(b), the Senate has the power to remove or reinstate the officer after the convention of a special session to hear the evidence. On its face, Section 7(a) applies to state officers, officers of the militia not in the active service of the United States, and county officers. A special rule regarding the suspension of municipal officers is provided for in Article 4, Section 7(c). Nowhere in Section 7, or the rest of the Constitution, is any provision made for the suspension or removal of so-called "district officers".

In 1980, the Legislature enacted Section 112.52, Florida Statutes. This section prescribes the methods for suspension and removal of public officers not covered by the Constitution, and was enacted in order to fill gaps created in this area under the 1968 Constitution. Under Section 112.52, the Governor may suspend an elected or appointed public official who is indicted or informed against for the commission of any felony or misdemeanor arising

directly out of his official conduct, if an alternative procedure for suspension is not provided for in the Constitution. Under subsection three of the statute, the Governor may remove the public official by executive order if the official is convicted, pleads guilty, or nolo contendere to the charge. This statute differs remarkably from Art. IV, §7, Fla. Const.(1968), in that the public official indicted or informed against has no right to a hearing before the Senate or anyone else. Rather, the Governor is given plenary power to both suspend and remove the officer upon conviction or plea of guilt.

A review of the legislative history behind §112.52, Florida Statutes, gives some indication of the purpose for which it was enacted. As stated in a Senate Staff Analysis and Economic Impact Statement of Senate Bill 1174:

> "Existing law does not address procedures for the removal of officers other than state, county, or municipal officers. Thus, this legislation attempts to fill this void.
>
> This proposal addresses the suspension of public officers which are not specifically addressed under existing law. The bill would primarily fill a void with respect to officers of "special districts". At the present time, there are in excess of 1000 such districts authorized in Florida."

The question at issue to be answered in this advisory opinion is obviously whether a member of the school board is a county officer or an officer of a "special district". If it is found that school board members are county officers, then like other county and state officers, they are entitled to a hearing before the Senate prior to removal from office.

Diane Rowden was, at all material times, a duly elected member of the Hernando County School Board. By Executive Order Number 93-60, Governor Chiles suspended and removed Mrs. Rowden from office with one stroke of the pen. This Executive Order followed a plea of Nolo Contendere to various misdemeanor charges involving violation of the Sunshine Laws during Mrs. Rowden's official duties as a School Board Member. As authority for the Executive Order, Governor Chiles cited Section 112.52, Florida Statutes, providing for suspension and removal of public officials not otherwise covered by the Constitution. Mrs. Rowden has filed suit in Hernando County Circuit Court for declaratory and injunctive relief alleging that Executive Order Number 93-60 is invalid and illegal. The Complaint seeks a declaration that a school board member may only be suspended by the Governor and removed by the Senate pursuant to Art. IV, §7, Fla. Const. (1968). The Complaint further alleges that even if §112.52 is found to apply to school board members, that section is unconstitutional or unconstitutional as applied in that it deprives the officer of due process of law under the Florida and United States Constitutions. On April 16, 1993, Governor Chiles sought an advisory opinion from this Court on the issue of his authority to suspend school board members under Section 112.52, Florida Statutes. In addition to a denial of due process, if Section 112.52, Florida Statutes, is found to apply in this case, such application would deprive Mrs. Rowden of the equal protection of the law pursuant to the 14th Amendment to the United States Constitution.

Article IX, Section 4, of the 1968 Florida Constitution, which creates school districts and school boards, provides as follows:

> "(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriate staggered terms of four years, as provided by law."

Regardless of whether school board members are referred to as state, county, municipal, or district officers, they are, without a doubt, constitutional officers. They are not, on the other hand, members of "entities created by law to perform a special governmental function", the definition of district officers as used in numerous opinions of the attorney general. See generally, Op. Att'y. Gen. 73-47 (1973) and Op. Att'y. Gen. 84-72 (1984). It is, at best, highly unlikely that the drafters of the 1968 Florida Constitution intended constitutional officers to be subject to suspension and removal at the whim of the Governor. Indeed, if school board members are found to be subject to Section 112.52, Florida Statutes, they will be the only officers created by the Constitution subject to that provision. As discussed above, the Senate history behind Section 112.52 shows that the statute was intended to apply to the multitudinous special districts which had been created by statute. Nowhere in the legislative history are school boards or any other constitutional offices mentioned.

The Governor's letter to this Court seeking an advisory opinion places great emphasis on the fact that school boards operate in areas known as "school districts". Based upon this

semantical curiosity, the Governor concludes that school board members are "district officers" subject to removal under Section 112.52. Although Article IX, Section 4 empowers two or more counties to combine into one district upon vote of the electors, it is clear in the first sentence of that section that "county" is synonymous with "school district". Any argument that the use of the term "school districts" by the drafters should be construed as representative of an intent to categorize school board members as "district officers" for purposes of suspension and removal is absurd. It is easy enough to see that the term "school district" makes more sense and sounds better than the term "school county".

Despite the existence of §112.52, a review of executive orders suspending school board members between the early and mid-1980's reflects that the statute has never been relied upon. Between 1981 and 1985, former Governor, Bob Graham, suspended three school board members by executive order under his suspension power in Article IV, Section 7(a). Each of the officers involved in those cases, including one who was charged with two counts of lewd assault upon a child under the age of 14, received an opportunity to have their case heard before the Senate prior to removal from office. Diane Rowden, on the other hand, guilty of one misdemeanor count of violating the open meetings law, has had her fate summarily sealed by Governor Lawton Chiles. Governor Chiles' Order was a sharp departure from established gubernatorial precedent. A single executive order both suspending and removing a school board member flies in the face of Article IV, Section 7. School Board members

are constitutional officers elected to serve in "districts," which are primarily defined by county line. As such, school board members should be treated as other county officers entitled to the protection of the Florida Constitution before losing their office.

In the Governor's letter to this Court, he relies most heavily upon a series of Attorney General opinions construing Article II, Section 5, of the Florida Constitution. Article II, Section 5 is the general constitutional proscription against dual office holding within the state. That section provides that no person shall hold more than one office at the same time under the government of the state or counties or municipalities therein. The Attorney General opinions cited by the Governor address questions of whether persons holding specific offices may concurrently run or be appointed to other offices at the same time. The common thread running through most all of the cited opinions is that the offices discussed are "special districts" created by statute to perform special state or county functions. See Op. Att'y. Gen. 71-324 (1971) (official of a hospital district or other special district is not a county officer); Op. Att'y. Gen. 73-47 (1973) (trustee of a junior college not a county officer); Op. Att'y. Gen. 75-153 (1975) (community college trustee not a county officer); Op. Att'y. Gen 85-24 (1985) (Mayor may serve on community development district under Article 2, Section 5(a); and Op. Att'y. Gen. 86-55 (1986) (member of Big Cypress Basin, a subdistrict of the South Florida Water Management District, can run for Mayor).

The Attorney General opinions referenced above clearly deal

with special statutory district offices created over the years by the Legislature. These offices are exemplary of the 1000 plus special districts referred to previously in the Legislative History to Section 112.52. As the Governor's letter points out, one Attorney General opinion has held school board members to be "district officers". Op. Att'y. Gen. 84-72 (1984). After recognizing that the office of school board member is created by the Constitution, that opinion goes on to define district officers as entities created by law to perform a special governmental function. Despite this apparent contradiction, the Attorney General concludes that school board members are district officers for purposes of the Constitutional prohibition against dual office holding.

In deciding the persuasive weight to be given to Attorney General Opinion 84-72, it is most important to consider the question there at issue. Specifically, the Attorney General answered affirmatively the following question:

> "Can a person serve on the Performing Arts Center Authority for Broward County and on the Broward County School Board without violating the terms of s. 5(a), Article II, State Const.?"

Concluding that a member of the district school board is a "district officer", the Attorney General essentially concluded that there was no reason to prevent a school board member from simultaneously serving on the Performing Arts Center Authority. Certainly the question at issue in that opinion was not a disputed matter involving the loss of a vested interest in a public office. To call a school board member a district officer because they serve

areas known as "districts" may be fine for purposes of Article II, Section 5. The analysis deepens significantly however, when faced with the unilateral suspension and removal of a public official by the Governor. The office of school board member is a constitutional office. Like other constitutional officers, the procedure for suspension and removal is laid out in Article IV, Section 7. The Governor's reliance on Section 112.52 for the suspension and removal of Diane Rowden, a member of the Hernando County School Board, is misplaced, and therefore, Executive Order 93-60 is invalid, illegal, and void.

Although this Court has not specifically addressed the question of whether a school board member is a county or district officer, a previous advisory opinion to the Governor does provide some guidance on the question. *In Re: Advisory Opinion to the Governor*, 298 So.2d 366 (Fla. 1974). In that case, the Justices had the occasion to consider the question of whether the district school board, the Governor, or both, had authority and responsibility for the removal of a school superintendent that had been employed, rather than elected. The Justices concluded that the school district has the sole responsibility and authority for removing such a superintendent. In dicta, however, this Court went on to state:

> "If the employer, School Board, fails to act properly in the circumstances, then such school board members as may be responsible are answerable to the electorate. Furthermore, it is *they* who are subject to suspension by the Governor and *removal by the Senate* under the terms of the section of our Constitution in question here, viz., Art. IV, §7." Id., at 370 (emphasis supplied).

Despite the enactment of Section 112.52, Florida Statutes, the language referenced above was faithfully adhered to until this year when Governor Chiles suspended and removed Diane Rowden. As previously stated, no prior member of the school board has ever been removed pursuant to Section 112.52. As constitutional officers, school board members, just as sheriffs, county court clerks, and other qualifying officers, are entitled to a Senate hearing prior to being removed from their positions.

Executive Order 93-60, predicated upon the suspension and removal power in Section 112.52, Florida Statutes, is invalid and illegal. Members of district school boards are subject to suspension by the Governor and removal by the Senate after an evidentiary hearing pursuant to Article IV, Section 7 of the 1968 Florida Constitution. Whether a school board member is labeled a state, county, municipal, or district officer, the fact remains that they are constitutional officers entitled to the protection of that document. Therefore, Diane Rowden, respectfully requests this Court to find that the office of district school board member is a county office subject to the provisions of Art. IV, §7, Fla. Const. (1968).

II. THE UNILATERAL SUSPENSION AND REMOVAL OF DIANE ROWDEN, A MEMBER OF THE HERNANDO COUNTY SCHOOL BOARD, BY EXECUTIVE ORDER OF THE GOVERNOR PURSUANT TO SECTION 112.52, FLORIDA STATUTES, CONSTITUTES A DENIAL OF DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

It is well settled that public office holders in this state have a property right in their offices which may not be taken away or infringed upon without due process of law. *Richard v Tomlinson*,

49 So.2d 798 (Fla. 1951), Gilbert v Morrow, 277 So.2d 812 (Fla. 1st DCA 1973), and Piver v Stallman, 198 So.2d 859 (Fla. 3rd DCA 1967). It is axiomatic that under traditional due process standards, a party must be given notice and an opportunity to be heard prior to the deprivation or a life, liberty, or property interest.

On February 18, 1993, Governor Lawton Chiles, with one stroke of a pen, obliterated Diane Rowden's status as a Hernando County School Board Member. Ignoring a Florida Constitutional provision requiring an evidentiary hearing to be held by the Senate, Governor Chiles took action under the perceived authority of Section 112.52, Florida Statutes. Although she was fully prepared to defend the actions which led up to her removal before a Senate hearing board, Mrs. Rowden was given no opportunity whatsoever to do so.

It should be noted that the Governor side-stepped the two-step process comprehended in a suspension and removal under Section 112.52. Under that statute, the Governor has the power by executive order to suspend an officer, not subject to constitutional provisions regarding the same, if the officer is indicted or informed against for the commission of a felony or misdemeanor. In another subsection of the same statute, the Governor has the power to remove the officer upon conviction, plea of guilty, or nolo contendere, to the charge. In Diane Rowden's case, Governor Chiles killed both birds with Executive Order 93-60. Therefore, when Diane Rowden entered her plea of guilty to the misdemeanor charges, she was not properly informed of all the

implications of such a plea.

As previously stated, the proper method for suspension and removal of a school board member is provided in Article IV, Section 7 of the Florida Constitution. Notwithstanding this fact, however, if it is determined that the Governor had authority under Section 112.52, Florida Statutes, to suspend and remove Mrs. Rowden, the statute should be held unconstitutional or unconstitutional as applied to Mrs. Rowden's case. Executive Order 93-60 purports to permanently remove Mrs. Rowden from the office of school board member without notice and the opportunity for any sort of hearing. The constitutionality of Section 112.52 is further put into doubt, both on due process and separation of powers grounds, by the Legislative History of the statute. In the Senate Staff Analysis and Economic Impact Statement of Senate Bill 1174 (codified at Section 112.52, Florida Statutes), a Senate staff analyst concluded:

> "The constitutionality of the proposal may be questionable since the statute vests both suspension and removal powers in the Governor. It has been said that,
>
> > "....the 1968 Constitution gives the Governor only the power to suspend, but vests the power to remove in the Senate. The Senate's constitutional role and duty in the suspension-removal process cannot be abrogated or renounced by statute. Accordingly, statutes that purport to authorize the Governor to "remove" an officer from office should probably be construed as declaratory of the executive power to "suspend" officers." Citing, *Barr and Karl, Executive Suspension and Removal of Public Officers under the 1968 Florida Constitution*, 23 U.Fla.L.Rev. 635, 669, 670 (1971).

III. THE SUSPENSION AND REMOVAL OF A SCHOOL BOARD MEMBER PURSUANT TO SECTION 112.52, FLORIDA STATUTES, DENIES THE REMOVED OFFICER EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Disparate treatment of similarly situated individuals under the law, absent adequate state justification, violates of the equal protection clause of the 14th Amendment. If Section 112.52, Florida Statutes, is found to be applicable to school board members such as Diane Rowden, it would assuredly result in a denial of equal protection. County officers, which include a host of positions such as court clerks, sheriffs, treasurers, et cetera, may only be removed after an evidentiary hearing by the Senate. Such a hearing provides these officers with an opportunity to explain or rebut the charges against them. The Senate then has the ultimate authority to remove or reinstate the suspended officer. An official suspended under Section 112.52 has no such opportunity. If, upon conviction or plea of guilt, the Governor wishes to remove that officer, the statute gives him free reign to do so.

The office of school board member is an elected office with a four-year term under Art. IX, §4, Fla. Const. (1968). Even if judged under the traditional rational basis test, the state, in this case, would be unable to supply any credible reason for treating school board members differently than other county officers previously referred to. While it remains the strong position of Diane Rowden that a member of a school board is a county officer, should this Court determine that Section 112.52 applies to school board members, any exercise of the power thereunder should be found to violate equal protection of the laws.

CONCLUSION

On February 18, 1993, Governor Chiles suspended and removed Hernando County School Board member, Diane Rowden, by Executive Order 93-60 pursuant to Section 112.52, Florida Statutes. Like other county officers, school board members are entitled to a hearing before the Senate under Article IV, Section 7 of the Florida Constitution prior to removal. A review of the Legislative History behind Section 112.52, as well as the relevant Attorney General Opinions on the subject, clearly demonstrate that Section 112.52 was intended to apply only to members of the hundreds of specialized statutory districts created over the years by the Legislature. Never was it the Legislature's intent to subject constitutional officers, such as school board members, to the statute.

Even if Section 112.52 is found to apply to school board members, this Court should find that such an application would deny the officer removed due process and equal protection of the laws. School Board members, like other public officers, have a property right in their office which may not be taken away without due process of law. The unilateral suspension and removal by the Governor of Diane Rowden provided neither notice or opportunity to be heard. Moreover, basic equal protection principles dictate that similarly situated individuals shall be treated similarly under the law. To deny a school board member a hearing before the Senate prior to removal, while allowing other similar officers to participate in such hearings, clearly runs afoul of the 14th

Amendment to the United States Constitution.

Based on all the foregoing, Diane Rowden requests that this Court issue an advisory opinion to the Governor stating that school board members are county officers subject to suspension and removal only under the provisions of Art. IV, §7, Fla. Const. (1968), or, in the alternative, holding that the application of Section 112.52, Florida Statutes, to school board members, results in an unconstitutional denial of due process and equal protection of the laws.

RESPECTFULLY submitted this 18th day of May, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Honorable Lawton Chiles, Governor of the State of Florida, c/o J. HARDIN PETERSON, General Counsel, The Capitol, Tallahassee, Florida 32399-0001 this 18th day of May, 1993.

Attorney