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IN THE SUPREME COURT OF FLORIDA

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IN RE:

ADVISORY OPINION TO THE
GOVERNOR - SCHOOL BOARD
MEMBER SUSPENSION AUTHORITY

CASE NO. 81,617

BRIEF OF GOVERNOR LAWTON CHILES

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STATEMENT OF THE CASE AND FACTS

On August 17, 1992, a Grand Jury presented an indictment charging Diane B. Rowden (hereinafter "Rowden") with thirteen misdemeanor counts and two noncriminal infraction counts of violating Florida's public meetings law on numerous occasions beginning in November 1990 through July 1992. State v. Rowden, No. 92-1336-MMA, Grand Jury Indictment (Fla. 5th Cir. Ct. Aug. 17, 1992). Rowden pled nolo contendere to all of the charges. Subsequently, the judge found her guilty of one misdemeanor count and withheld adjudication on the remaining counts. She was ordered to pay a fine, court costs, and a share of the investigation costs. During the time of her indictment and conviction, Rowden was a member of the District School Board of Hernando County, Florida.

On February 18, 1993, Governor Lawton Chiles filed an executive order suspending and removing Rowden from her district school board office. (Executive Order 93-60). The executive order was based on the fact that Rowden committed and was convicted of misdemeanor offenses directly related to her official duties. Id. Article IV, section 7 of the State Constitution provides a suspension and removal scheme for certain state, county and municipal officers, but not for district officers. District officers are generally suspended and removed pursuant to section 112.52, Florida Statutes, which applies to

all public officers for whom no other method of removal from office is provided by the state constitution or by law. Under this provision, the legislature vested the governor with discretionary authority to suspend and remove certain officers for the specified grounds, including a misdemeanor conviction for an offense arising directly out of their official conduct or duties. Because Rowden was a district school board member, Governor Chiles relied upon section 112.52 when he exercised his discretion to suspend and remove her from office.

Shortly thereafter, Rowden filed an action in the Circuit Court of Hernando County alleging, among other issues, that she was improperly removed from office by the governor. In the complaint, she asserted that she was a "county" officer subject to removal by the Florida Senate rather than the governor. Rowden's lawsuit prompted Governor Chiles to request an advisory opinion from this Court regarding whether a district school board member is a district school officer or a county officer. The lawsuit has since been transferred to the Circuit Court in Leon County and has been set for trial in October. Governor Chiles submits this brief in support of his decision to suspend and remove Rowden from office pursuant section 112.52, Florida Statutes.

SUMMARY OF ARGUMENT

Article IV, section 7 of the State Constitution provides for the suspension and removal of state, county, and municipal officers. Because neither this nor any other removal provision applies specifically to school board members, Governor Chiles relied upon section 112.52, Florida Statutes, relating to all public officers for whom no other method of removal from office is provided by the state constitution or by law. An abundance of authorities demonstrates that a district school board member is not a county officer.

First, school districts and counties are separate and distinct governmental entities created in distinct articles of the constitution. Article VIII specifically designates the county officers and makes no mention of district school board members. Likewise, with only one noteworthy exception, none of the other thirteen county charters makes any mention of district school board members. Additionally, the constitution mandates that education must be provided through a uniform system of free public schools. In furtherance of this mandate, district school systems are governed by the State Board of Education pursuant to the Florida School Code rather than by county governments.

Second, based on the Attorney General's opinion that district school board members are not county officers, governors have appointed district school board members to state offices,

and the Senate has confirmed these appointments. If they were county officers, such appointments will have caused violations of the dual office holding prohibitions.

Third, the Florida Election Code and the Florida School Code distinguish school districts from counties. Rowden ran for office under a code that clearly set out the school district as a discrete governmental unit, and the code under which Rowden served did likewise.

Finally, the fact that school districts have boundaries contiguous with county boundaries does not change the status of school board members' offices. Many special districts have contiguous boundaries with a county, and those officers do not become county officers because of the geographic boundaries.

Rowden has also challenged the constitutionality of section 112.52 of the Florida Statutes, in which the legislature carefully authorized removal of public officers only after the full accordance of due process by the judicial branch. The officer has an opportunity to defend against the charges in the criminal action, and the legislature has determined a second trial to be superfluous. The removal scheme affords due process of law. Additionally, section 112.52 does not deny a public officer equal protection of the law because all similarly situated public officers are subject to the same suspension and removal scheme.

ARGUMENT

I. THE GOVERNOR WAS CORRECT IN SUSPENDING AND REMOVING ROWDEN FROM OFFICE PURSUANT TO SECTION 112.52, FLORIDA STATUTES.

The Governor's decision in suspending and removing Rowden pursuant to section 112.52 of the Florida Statutes is supported by an abundance of authority, as set forth in the following discussion.

A. Article IV, section 7 of the Florida Constitution does not apply to district officers.

Article IV, section 7 of the Florida Constitution is not a suspension procedure for "public officers," or a suspension procedure for "constitutional officers." Unlike the 1885 Florida Constitution which provided for a gubernatorial suspension power over all elected or appointed officers not subject to impeachment, Art. IV, § 15, Fla. Const. (1885), the current suspension clause of the constitution sets out particular levels of government and the grounds upon which the governor may suspend officers of those governmental units. Art. IV, § 7(a), Fla. Const. (1968)(state and county), and Art. IV, § 7(c), Fla. Const. (1968)(municipalities). The pertinent provisions state:

> (a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, ... or any county officer, for malfeasance,

> misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony....
>
> (c) By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted....

Whether or not the officer is elected or appointed is irrelevant; and whether or not the officer has the status of a constitutional officer is likewise irrelevant. The determining factor as to which suspension scheme is applicable depends upon the level of government in which the officer serves. State, county, and, in some instances, municipal officers may be suspended pursuant to Article IV, section 7 of the Florida Constitution (1968). In circumstances other than one in which a municipal official is indicted for crime, a municipal official may be suspended by the governor pursuant to a statutory scheme found in section 112.51 of the Florida Statutes. (Some city charters provide yet another means of suspension and removal).

B. Section 112.52, Florida Statutes, is the removal scheme that applies to district officers.

As to district officers and special district officers, a suspension scheme may be found in general or special acts relating to the district. Finally, in 1980, the legislature enacted section 112.52 of the Florida Statutes, which provides a

procedure for removal when a method is not otherwise provided by the constitution or by law. This law provides:

> (1) When a method for removal from office is not otherwise provided by the State Constitution or by law, the Governor may by executive order suspend from office an elected or appointed public official, by whatever title known, who is indicted or informed against for commission of any felony, or for any misdemeanor arising directly out of his official conduct or duties....
>
> (3) If convicted, the public official may be removed from office by executive order of the Governor. For the purpose of this section, any person who pleads guilty or nolo contendere or who is found guilty shall be deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication.
>
> (4) If the public official is acquitted or found not guilty, or the charges are otherwise dismissed, the Governor shall by executive order revoke the suspension....

It is unclear from the records of the 1968 Constitution Revision Commission why a change was made in the governor's suspension powers and why district and special district officers were not mentioned. However, only two conclusions are possible: either (1) the drafters intended that special district and district officers be suspended as provided by law; or (2) the drafters forgot about district officers, in which case, district officers may be suspended as provided by law. In neither event

would district officers mystically be transformed into county officers.

C. A district school board member is an officer of the district school board, not of the county.

1. The state constitution treats school districts and counties as separate and distinct governmental entities.

Article IX, section 4 of the Florida Constitution establishes school districts and provides that each school district be operated, controlled and supervised by a district school board. This article is separate and distinct from Article VIII, section 1 of the Florida Constitution, which describes county government and which specifically designates the county officers as "a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court." Art. VIII, § 1(d), Fla. Const.

The state constitution provides that charter counties may provide some other method of choosing the county officers (sheriff, tax collector, property appraiser, supervisor of elections and clerk of the circuit court), or may abolish a county office and transfer the duties to another office. Art. VIII, § 1(d), Fla. Const. Like the Florida Constitution and Florida Statutes, thirteen of the fourteen county charters do not mention district school board members in the listings of county officers. See, Home Rule Charters of Alachua, Broward,

Charlotte, Clay, Dade, Hillsborough, Orange, Osceola, Palm Beach, Pinellas, Sarasota, Seminole and Volusia Counties.[1]

Education in this state must be provided through a uniform system of free public schools, which system is to be developed and coordinated by the State Board of Education. Art. IX, §§ 1 and 2, Fla. Const.; §§ 228.04 and 229.053, Fla. Stat. Local school districts and their boards are established to ensure the operation and administration of schools in conformity with state regulations and standards prescribed by the state. § 230.01, Fla. Stat.

The sovereign powers exercised by district school board members have been delegated directly from the state to the district school boards through Article IX, section 2 of the Florida Constitution and section 230.01 of the Florida Statutes.

On the other hand, counties are subdivisions of the state established to carry on different local governmental responsibilities. Delegation of sovereign power to counties is made by Article VIII, sections 1(f) and (g) of the Florida Constitution and section 125.01 of the Florida Statutes. Except with regard to prohibiting a patchwork of non-charter, county-

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[1]The Duval County charter does not follow suit. It makes substantial laws relating to school districts and district school board members. In fact, in contradiction to § 230.19, Fla. Stat., the charter provides a method for filling a vacancy by special election, implying that Duval has transformed district school board members from district officers to county officers to city officers. See also § 112.51(3), Fla. Stat.

by-county differences in the election, jurisdiction and duties of county offices, there is no general requirement for uniformity among county governments. In fact, counties may choose whether or not to operate pursuant to a charter. Art. VIII, § 1(f) and (g), Fla. Const.

A charter county cannot assume sovereign powers otherwise delegated to another government.

> A basic principle of county "home rule" is that it is a ***redistribution*** between the state and the counties of the state's sovereign powers; it is not an enlargement of the functions of government. Section 125.63, F. S., recognizes this basic principle in providing that the charter commission shall "conduct a comprehensive study of the operation of ***county*** government and of the ways in which the conduct of ***county*** government might be improved or reorganized." (Emphasis supplied.) When the legislature has delegated to a public corporation, such as a development authority or a road district or other special district, a governmental or public function that could have been delegated to a county to perform, it has, in effect, reserved to the state the power to control this particular function or service until such time as the legislature itself may decide in its wisdom to relinquish to the county the right to do so. This being so, there is nothing for the county's "home rule" power to operate upon insofar as this particular governmental or public function is concerned.

Op. Att'y Gen. Fla. 71-102 (1971).

In the case of district school boards, the Constitution delegates sovereign powers directly to district school boards, removing from the Legislature any determination of whether state

powers relating to the subject of public education could be delegated in some other manner, including delegation to a county. Art. IX, § 4(b), Fla. Const.

County officers are paid from the county funds; school board members are paid from district school funds. §§ 145.022, 230.201, and 230.202, Fla. Stat. The county may levy and collect taxes for county purposes; district school board members independently fix the district school tax levy to implement the school program. §§ 125.01(1)(r) and 230.23(10), Fla. Stat.

2. District school board members have been regarded as district officers for purposes of dual office holding.

The prohibitions against dual office holding set out in Article II, section 5 of the Florida Constitution have been determined by the Attorney General to be inapplicable to district school board members. Op. Att'y Gen. Fla. 84-73 (1984). In reliance on the opinion of the Attorney General, governors have felt unrestrained to appoint district school board members to state offices and most certainly, a number of district school board members serve as county and municipal officers. Likewise, the Florida Senate has made its confirmation determinations based upon its belief that school boards are district offices not subject to dual office holding restraints. Currently there may well be many district school board members who, if their office

of district school board member is determined to be a county office, will be deemed to have forfeited their first-held office.

A public agency cannot be considered a chameleon-like entity which assumes a different legal character depending on the constitutional or statutory provision being applied. At any one time, an agency and the public office or offices associated with the operation of the agency, are within a discrete level of government. For example, the office of district school board member must be a state office, a county office, a municipal office, a special district office, or a district office. Under our previous constitution, it is possible that the county board of public instruction was a county agency; however, under the 1968 Constitution, the system of education was substantially revised, (compare Art. XII, Fla. Const. (1885) and Art. IX, Fla. Const. (1968)).

3. <u>District school board members have been regarded as district officers for purposes of the Florida Election Code and the Florida School Code.</u>

For purposes of the Florida Election Code, (Chapters 97-106, Florida Statutes), the term "public office" is defined to mean "any federal, state, county, municipal, school, or other district office." § 97.012(22), Fla. Stat.

The very Code pursuant to which a school board member runs for office delineates the levels of government in a manner so as to distinguish school districts from counties. Again, in the campaign financing section of the Code, the term is defined in the same way. § 106.011(10), Fla. Stat.

According to the Florida School Code, the state system of education is comprised of two parts - the state system and the district system. See e.g., §§ 228.041(2), (3) and (8), Fla. Stat. District school board members are officers of the district system, and are governed by the State Board of Education, not by the county.

4. This Court has previously considered related issues concerning district school board members.

Article III, section 11(a)(1) of the Florida Constitution prohibits special laws pertaining to the election, jurisdiction or duties of officers, except that there may be special acts pertaining to these subjects as regards "officers of municipalities, chartered counties, special districts or local governmental agencies." In Kane v. Robbins, 556 So. 2d 1381 (Fla. 1989), a special act was challenged which provided for the nonpartisan election of district school board members in Martin County. This Court determined that district school board members were officers subject to the prohibition and that the law was

therefore invalid. In his opinion, Justice Grimes analyzed and determined the issues of whether district school board members are "officers;" and, whether the district school board is a special district.

In determining that a district school board is not a special district, reference was made to three provisions of the state constitution which specifically set out levels of state governments for various purposes. In each instance, the Constitution lists counties, municipalities, school districts and special districts as unique levels of government. Art. VII, § 9(a), Fla. Const. (authority to levy ad valorem taxes); Art. VII, § 10, Fla. Const. (authority to issue bonds); and Art. VII, § 12, Fla. Const., (prohibition against pledging the credit of the government). The Court noted this same circumstance in statutory listings. See e.g., School Bd. of Escambia County v. State, 353 So. 2d 834, 839 (Fla. 1977).

Kane exemplifies the fact that there is no requirement that the levels of local government are limited to three round holes labeled "counties," "municipalities" and "special districts" into which we must somehow put the square peg called "school districts." School boards are another level of local government discrete and independent from the others.

Justice Grimes quite cogently concluded that school boards were left out of Article III, section 11(a)(1) of the Florida

Constitution in order to fully effectuate the provision for a "uniform system of public schools." Kane, 556 So. 2d at 1384. If different election and jurisdictional terms were allowed for district school board members in the various districts, there would not be a uniform system of public schools.

In a later case, the Court addressed the same issue with regard to district school board members of a school district located within a charter county. School Bd. of Palm Beach County v. Winchester, 565 So. 2d 1350 (Fla. 1990). The Court held that the special act providing for nonpartisan elections in Palm Beach County was valid because the special act was not challenged prior to adoption of the charter. Id. While the implication is that the Court construed the district school board members to be county officers (or, more accurately, charter county officers), it appears evident that the court abandoned its inquiry as to the type of officer a district school board member might be and instead focused on the issue of whether a previously unchallenged unconstitutional act could become constitutional with the passage of a county charter. In his dissent, Justice Ehrlich, joined by Justice Grimes, predicted the potential harm the decision would bring to bear in its effort to "make things easier for the county and the school board". Winchester, 565 So. 2d at 1352-1353.

School district boundaries being contiguous with county boundaries creates the illusion that the school district is a part of the county government. This, however, need not always be the case. Article IX, section 4(a) of the Florida Constitution provides that the citizens of two or more contiguous counties may combine into one school district. In any event, there are currently many special districts or other districts having boundaries contiguous with county boundaries. See, e.g., Tampa Port Authority, Ch. 63-1400, Laws of Florida; Brevard Technological Research & Development Authority, Ch. 87-455, Laws of Florida. Officers of these districts are not county officers nor do they become county officers by virtue of the enactment of a county charter. See, Op. Att'y Gen. Fla. 71-102 (1971).

Having identical geographic jurisdiction does not transform a district into a county or a district agency into a county agency. Similarly, the Seventeenth Judicial Circuit of Florida is contained within the same geographic area as Broward County. That fact does not make either the state attorney or the public defender of the Seventeenth Circuit, a county officer. Charter county or not, Broward County could not be permitted to alter the election or jurisdiction these officers.

II. SECTION 112.52, FLORIDA STATUTES, IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO ROWDEN.

It is within the context of the governor's authority to ask the opinion of this Court on issues touching upon his

constitutional powers and duties in office, that this brief is offered. Should the Court conclude, however, that the question posed by the governor cannot be completely answered without an analysis of the statute respecting the suspended officer's rights to due process and equal protection of law, the governor offers the following considerations for the Court's determination.

A. Section 112.52, Florida Statutes, provides for due process of law.

A public office is not considered a property right in the constitutional sense. William M. Barr and Frederick B. Karl, Executive Suspension and Removal of Public Officers Under the 1968 Florida Constitution, 23 U. Fla. L. Rev. 635, 644 (1971), citing City of Jacksonville v. Smoot, 92 So. 617 (Fla. 1922). A public office is a public trust which belongs to the citizens and is entrusted in the public officer: "[i]t is a right that cannot be bartered or sold, but that is held by the officer for the benefit of society." Barr and Karl at 645.

Still further,

> A public officer's rights in his office are conditional. He accepts and holds his office subject to the terms and conditions established by law.... His removal from office in accordance with applicable constitutional and statutory provisions does not improperly deprive him of his property or rights any more than does the normal expiration of his term of office.

Id. at 645.

The grounds for suspension of a district officer are limited to indictment or information for the commission of a felony or a misdemeanor arising directly out of official conduct or duties. § 112.52(1), Fla. Stat. The statute is very specific in its requirement that the governor reinstate the official upon acquittal or dismissal of the charges. § 112.52(4), Fla. Stat. The governor may remove the official upon conviction, which is defined to include a plea of guilty or nolo contendere and is considered a conviction whether or not adjudication is withheld or the sentence is suspended. § 112.52(3), Fla. Stat.

Because the only ground for removal under section 112.52 is conviction of a charge upon which the official was suspended, and, the only ground for suspension is a charge by indictment or information for a felony or misdemeanor directly relating to the duties of office, it necessarily follows that the official has had the opportunity to take advantage of the full panoply of due process available to one who is accused of a crime.

Each charge in the suspension order will be identical to a charge in the indictment or information. Since the standard of proof in the criminal proceeding is greater than required for removal, there is simply no point in retrying the case. The statute for the removal of a district officer properly focuses the determination of removal on conviction within the criminal

process, and not on a retrial of the issues already disposed of by a judge or jury.

An analogy can fairly be made to the provisions of Florida law which allow for license revocation or removal upon the finding of conviction of a crime. In Calhoun v. Department of Health and Rehabilitative Services, 500 So. 2d 674 (Fla. 3d DCA 1987), the court found unpersuasive the licenseholder's argument that due process protections had been violated when the department relied on the felony conviction alone to deny a license. See also, Grantham v. Gunter, 498 So. 2d 1328 (Fla. 4th DCA 1987) (bail bondsman); and Bowen v. Department of Health and Rehabilitative Services, 486 So. 2d 48 (Fla. 5th DCA 1986) (misdemeanor).

B. Section 112.52, Florida Statutes, provides for equal protection of the laws.

All officers for whom no other means of suspension is provided by the constitution or by law are similarly situated and are treated in the same way. This class includes, principally, officers of special districts.

The state constitution itself, treats state and county officers differently from the way it treats municipal officers. Art. IV, §§ 7(a) and (c), Fla. Const. It treats removal of judges differently than it treats removal of members of the Legislature. Art. V, § 12, and Art. III, § 2, Fla. Const. The

statutory suspension schemes treat municipal officers differently from officers for whom a method for removal is not otherwise provided. In fact, the latter category is subject to far fewer grounds for suspension than municipal officers face. §§ 112.51 and 112.52, Fla. Stat.

The law is clear that an officer takes the office with all its restraints and conditions. Jones v. Board of Control, 131 So. 2d 713, (Fla. 1961). A public officer's rights in the office are conditional, and no one has the right to hold public office on his or her own terms. It makes little sense to claim that the law provides a different method for removal from office for public officers other than district school board members, and therefore, a suspended district school board officer should be entitled to the removal provisions established for members of the Board of Medicine, or, for that matter, members of the Legislature.

CONCLUSION

Based on the foregoing, Governor Chiles respectfully suggests that a school board member is a district officer, not a county officer, and he requests that this Court issue an advisory opinion advising him of its conclusions. If the Court determines it appropriate to rule on the issues of due process and equal protection of the suspension scheme found in section 112.52 of the Florida Statutes, Governor Chiles requests that this Court find the statute constitutional.

Respectfully submitted this 24th day of August, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by ~~U.S. Mail~~ federal express to Jackson O. Brownlee, Esq., Brownlee, Hoffman & Jacobs, P.A., Post Office Box 991, Orlando, Florida 32802-0991, Counsel for Diane B. Rowden and to Richard H. Langley, Post Office Box 120188, Clermont, Florida 34712, Counsel for the Lake County District School Board, this 24th day of August, 1993.

Deborah K. Kearney