047

IN THE SUPREME COURT OF FLORIDA

IN RE: ADVISORY OPINION TO THE GOVERNOR - SCHOOL BOARD MEMBER SUSPENSION AUTHORITY

CASE NUMBER: 81,617

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BRIEF OF THE LAKE COUNTY, FLORIDA SCHOOL BOARD

COUNSEL FOR THE LAKE COUNTY SCHOOL BOARD:

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STATEMENT OF THE CASE AND FACTS

Diane Rowden was a member of the Hernando County, Florida School Board, duly elected pursuant to Article IX, Section 4 of the Constitution of the State of Florida. As a result of her plea of nolo contendere to thirteen (13) counts of misdemeanor violations of Section 286.011, *Fla. Stat.*, she was adjudicated guilty on one (1) count and adjudication was withheld on the other twelve (12) counts.

On February 18, 1993, Florida's Governor, Lawton Chiles, by Executive Order Number 93-60, suspended and removed Ms. Rowden from her School Board position. Governor Chiles cited as his authority for this action Section 112.52, *Fla. Stat.* That section provides for the suspension and removal of public officials not otherwise provided for in the Florida Constitution or by law.

The Governor, in utilizing the provisions of Section 112.52, *Fla. Stat.* in this matter, has declared that the office of school board member is not a county office within the suspension and removal provisions of Art.IV, §7, *Fla. Const.* On April 5, 1993 the Governor, pursuant to Art. IV, § 1(c), *Fla. Const.*, requested an advisory opinion from this Court as to whether his position on the status of a school board member is correct.

The Lake County School Board is an interested party, as their status is similarly affected by the issue herein and has filed this Brief pursuant to Fla. R. App. P. 9.500(b)(2), and the Court's Press Release dated April 20, 1993.

SUMMARY OF THE ARGUMENT

The Governor's determination that a school board member is not a state or county officer subject to the provisions and protections of Art. IV, §7, *Fla. Const.* is clearly in contravention of the law and of the long standing practice and precedent concerning the suspension and removal of school board members in the State of Florida. It further fails to consider that school board members are constitutional officers and are, therefore, presumptively within the protections of Art. IV, §7, *Fla. Const.*, whether classified, for those purposes, as county officers or as state officers.

ARGUMENT

WHETHER A SCHOOL BOARD MEMBER IS A COUNTY OFFICER FOR THE PURPOSES OF SUSPENSION AND REMOVAL PURSUANT TO ARTICLE IV, SECTION 7 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Art. IV, §7, *Fla. Const.* provides for the suspension and removal of "any state officer not subject to impeachment, . . ., or any county officer, . . ." That section authorizes the officer's suspension by the governor and removal by the senate, pursuant to proceedings prescribed by law.

Section 112.52, *Fla. Stat.* allows the governor to both suspend and remove the officer.

The only issue presented pursuant to the Governor's request herein, albeit by no means the only issue raised by his actions, is whether Art. IV, §7, *Fla. Const.* or §112.52, *Fla. Stat.* controls the suspension and removal of a school board member elected to office pursuant to Art. IX, §4, *Fla. Const.* In order to properly answer this question, it is urged that the Court expand the issue, as presented by the Governor in his request, to include a consideration of the status of a school board member as a constitutional officer. As such, they are not, and should not, be subject to the whim of the governor based upon a "conviction", which includes a plea of convenience, of a misdemeanor.

The provisions of §112.52, *Fla. Stat.* were obviously intended to clarify that the governor is solely responsible for the removal of what amounts to appointees to various boards created by statutes for specific purposes. Those positions, unlike that of a school board member, have little property

interest in their "political" positions and, for all practical purposes, are "at will" employees. In fact, the provisions of §112.52, *Fla. Stat.*, in light of Ayala vs. Department of Professional Regulation, 478 So.2d 1116 (Fla. 1st DCA 1985), even as it pertain to these appointed board members, is on unstable constitutional ground.

Art. IX, §4, *Fla. Const.* provides that:

> (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 appropriately staggered terms of four years, as provided by law. (Emphasis added).

The Governor's attempt to classify the constitutional, elected office of school board member as that of a "district" office subject to §112.52, *Fla. Stat.* seems to be based, in toto, on the nomenclature used in the Constitution creating school "boards". Certainly the use of a common delineation for this entity does not shroud the governor with the unfettered power to remove a constitutional officer from an office which, by its very terms of creation, is clearly intended to be a county office. Such a position clearly interferes with the checks and balances created by Art. IV, §7, *Fla. Const.* and places those creatures of the Constitution in the untenable position of the threatened removal based strictly on political philosophy and other considerations without due process of law.

This Court has previously addressed the important distinctions between a constitutional officer and a state employee.

> An early case of some parallel distinguishing constitutional officers is State v. Hocker, 39 Fla. 477, 22 So. 721, p. 723 (1897) wherein it is stated:
>
> > "'The term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, *and not to* a merely transient, occasional, or incidental *employment*.'" (emphasis added)
>
> It is thus seen that the two categories were early distinguished in this respect as to whether the office was constitutional in nature or one of employment only. (Emphasis in original)

In re Advisory Opinion to the Governor, 298 So.2d 366, 369 (Fla. 1974).

In that case, this Court clearly stated, both in the Advisory Opinion, albeit in dicta, and in the dissenting opinion of Justices Ervin, McCain and Overton, that the school board was subject to Art. IV, §7, *Fla. Const.*

As the Governor points out in his request, heretofore all removals of school board members, both prior and subsequent to the enactment of §112.52, *Fla. Stat.* have been pursuant to Art. IV, §7, *Fla. Const.* and without any question as to the application thereof.

For this Court to find that school board members are not subject to the provisions of Art. IV, §7, *Fla. Const.* would be to place them in an untenable political position, which was surely not contemplated in the creation of the independent school districts, and to treat them differently from all other constitutional

officers, such as clerks of court, sheriffs, and others. In fact, it would place them in the category with political appointees. This is contrary to the obvious intention of the Constitution and precedents of this Court.

CONCLUSION

The clear intention of the Florida Constitution in the creation of school districts was to create county officers, accountable to the people of the county and subject to removal only by hearing before the senate pursuant to Art. IV, §7, *Fla. Const.* Therefore, the Governor is without authority to remove a school board member pursuant to §112.52, *Fla. Stat.*, even assuming that statute to be constitutional. That issue, however, is not before the Court.

Respectfully submitted,

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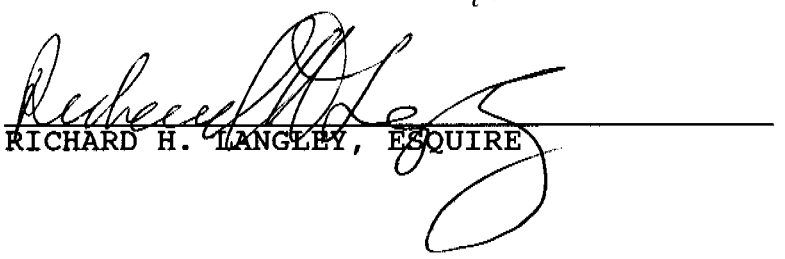
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served, via U.S. Mail delivery upon the Honorable Lawton Chiles, Governor of the State of Florida, c/o J. HARDIN PETERSON, General Counsel, The Capitol, Tallahassee, Florida 32399-0001 and JACKSON O. BROWNLEE, ESQUIRE, Attorney for Diane B. Rowden, Post Office Box 991, Orlando, Florida 32802-0991 this 19th day of May, 1993.



RICHARD H. LANGLEY, ESQUIRE