IN THE SUPREME COURT OF FLORIDA

Case No. SC07-2402
Lower Tribunal Consolidated Case Nos. 4D06 2378 & 4D06-2379

THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

Petitioner,

vs.

SURVIVORS CHARTER SCHOOLS, INC.

Respondent

BRIEF ON JURISDICTION OF RESPONDENT

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND THE FACTS

I. NATURE OF THE CASE.

This case concerns the interpretation of the Administrative Procedures Act (the "APA"), Chapter 120, Fla. Stat., as it relates to the terminations of charters created pursuant to the Charter School Statute, § 1002.33, Fla., Stat. It is a case of first impression with respect to whether the APA applies to the termination of charters and what procedures are required to terminate a charter.

II. COURSE OF PROCEEDINGS BELOW.

Respondent, Survivor Charter Schools, Inc. ("Survivors") operated two charter schools, Survivors WPB and Survivors BB, pursuant to two charters (or contracts) it executed with the Petitioner, the School Board of Palm Beach County (the "School Board"). The School Board terminated the charters in January 2006.

Survivors appealed to the State Board of Education (the "SBE"). The Charter School Appeals Commission (the "CSAC") convened a meeting at which it considered Survivors and the School Board's briefs. However no new evidence was allowed. The CSAC recommended upholding one but reversing the other School Board termination decision. The SBE upheld both terminations.

Survivors appealed to the Fourth District Court of Appeals (the "Fourth DCA") which recounted the following procedural facts in rendering its decision:

> On January 13, 2006, the School District completed an audit report for both Survivors WPB and Survivors BB. The audit report included

> fourteen findings of fiscal mismanagement. On January 18, 2006, the Palm Beach County School Board considered the audit report. On January 23, 2006 . . . the School Board published a Notice of Special Meeting listing a special meeting for January 25, 2006 from 5:00-6:00 p.m. regarding Disposition of Charter Schools/Alternative Education. On January 24, 2006, the School Board hand-delivered "Notification[s] of Superintendent's Recommendation to Immediately Terminate Charter Agreement" to both Survivors WPB and Survivors BB. The notifications indicated that the recommendations for immediate termination based on good cause were "due to the severity of the Audit Findings" and that the recommendations would be considered at the noticed special meeting on January 25, 2006.
>
> On January 25, 2006, the School Board held the noticed special meeting regarding the Survivors' charters at which it heard public comments (including from some individuals affiliated with Survivors). At the special meeting, the School Board approved the termination of the Survivors WPB and Survivors BB charters.

Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County, 968 So.2d 39, 41 (Fla. 4th DCA 2007).

III. THE FOURTH DCA RULING.

> Although Survivors raises eleven issues, this appeal involves two key questions. The first is whether the Administrative Procedure Act (APA) applied to the School Board's charter termination process. The second is, if the APA did apply, what due process protections were required and whether they were provided by the School Board.

See Survivors at 42.

The Fourth DCA held that the APA applies because Survivors has a substantial interest in its charters. The Fourth DCA then held that the School Board had to follow the procedures set forth in the APA because the Charter School Statute, the APA, nor the K-12 education code exempted the School Board.

As to the second question, the Fourth DCA held that the School Board should have followed the APA procedure in § 120.569, Fla. Stat., because it was making a decision affecting a substantial interest. The Fourth DCA ruled that the School Board's noticing a meeting set for the next day is not adequate notice. Moreover, Survivors was not provided with an adequate opportunity to be heard.

The Fourth DCA also noted that Survivors could not be terminated using the APA's abbreviated procedures for emergency meetings. Importantly, the Fourth DCA noted that while the School Board may have complied with provisions for setting an emergency meeting, it did not follow hearing requirements for determining substantial interests at that meeting.

Perhaps the School Board should have complied with those emergency provisions by (a) meeting, (b) finding an emergency, (c) determining the limited action necessary to resolve it, (d) determining that it had given proper notice under the circumstances, and then (e) taking only the action necessary to resolve that found emergency. Perhaps then we would be here on a case involving the emergency APA procedures under § 120.569(2)(n), Fla. Stat. We are not, and the School Board is just grasping at straws to justify its violation of Survivors' due process rights.

The Fourth DCA reversed and remanded so that termination of Survivors' charters could be determined following proper notice and subject to the due

process protections of the APA. The Fourth DCA denied the School Board's motion for certification of a question of great public importance in this routine procedural case. However, at the School Board's request, the Fourth DCA (a) stayed issuance of its mandate pending the outcome of this appeal and (b) partially released jurisdiction to allow the School Board to conduct an evidentiary hearing in accordance with its decision.

IV. SUBSTANTIVE FACTS.

There are no substantive facts involved in this Appeal. All of the facts are procedural in nature and set forth above. The parties are precluded from citing any substantive facts because the School Board failed to hold the evidentiary hearing required by the APA where such evidence could be presented and contested. That is perhaps why the Fourth DCA gave no weight to the audit as "substantive fact." In any event the School Board wastes its time arguing facts found by its auditors:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. 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. As we explain in the text above, we 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 mischarectizations of Survivors made in the School Board audit are not stated in the decision

below and should be ignored for that reason.

SUMMARY OF ARGUMENT

The Fourth DCA's opinion does not affect a class of constitutional officers with respect to their powers and duties. The decision is purely procedural following a long line of precedent that requires agencies to follow the APA when making decisions that affect substantial interests. Moreover, the School Board admits in its briefing that this is a case of first impression. No other case has ever ruled on what procedures must be followed to terminate charters. Consequently, it cannot constitute a change in law because there is no law it is changing. It is simply interpreting an as yet tested statute. The fact that it chose to ignore agency interpretation of the statute does not mean that it is changing the law.

With respect to conflict jurisdiction, it would truly be a rare case of first impression that conflicted with another case, expressly and directly. This is not that rare case. The School Board attempts to contrive a conflict by partially quoting the Fourth DCA and taking its decision out of context. The partial quotation misleads by making it appear that the Fourth DCA ruled that there were no emergency procedures under the APA. The full quote shows that the Fourth DCA recognized the existence of emergency APA procedures. The School Board's argument is not only without merit, it is disingenuous and frivolous.

ARGUMENT

I. THERE IS NO CLASS JURISDICTION.

This Court's decision does not "affect" the powers and duties of a class of constitutional officers. The Fourth DCA's decision is purely procedural requiring the School Board to follow the Administrative Procedures Act ("APA") when exercising the power of termination.

The School Board argues that it is part of a class of constitutional officers. Survivors does not contest that *Florida State Bd. Of Health v. Lewis*, 293 So.2d 697, 701 (Fla. 1974) and *Kane v. Robbins*, 556 So.2d 1381, 1382 (Fla. 1989) support the proposition that the School Board is within a class of constitutional officers. However, the Supreme Court did not have jurisdiction in *Lewis* or *Kane* because a class of constitutional officers was affected by the decisions below. Thus, neither citation supports the proposition that the School Board posits as the basis for class jurisdiction here.

The School Board posits that the Supreme Court has discretionary jurisdiction here because the Fourth DCA's interpretation of the Charter School Statute differs from the SBE's interpretation. The School Board does not argue that the Fourth DCA's decision changes the interpretation of the statute or otherwise modifies the case law governing charter school terminations by invalidating any statute, administrative code or other validly enacted regulation.

Instead, the School Board argues simply that disagreeing with the SBE's interpretation means that a change has occurred. The School Board is wrong.

This is a case which for the first time construes a statute. As such, it is not a change in the law. Instead, it is the first precedent in the law that merely construes the law. "A decision which 'affects a class of constitutional or state officers' must be one which does more than simply . . . construe[s] . . . ." *See Spradley v. State*, 293 So.2d 697, 701 (Fla. 1974).

No change in law occurred here. The Fourth DCA held here that:

> The APA includes defined procedures for providing due process regarding decisions which determine substantial interests. Under section 120.569(2)(b), "[a]ll parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days," unless waived by consent of all parties. However, to receive such a hearing, a party is required to file a petition or request for a hearing. § 120.569(2)(a), (c), Fla. Stat. If a hearing is requested and the petition is granted, a hearing will be held and the "presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery." § 120.569(2)(f), Fla. Stat.

Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County, 968 So.2d 39, 43 (Fla. 4th DCA 2007). The decision in *Survivors* is not new. The Fourth DCA provided the same interpretation of the APA in 2001:

> Section 120.569, Florida Statutes (2000), applies in all proceedings in which the substantial interests of a party are determined by an agency. "All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days." *See* § 120.569(2)(b), Fla. Stat. (2000). As conceded by the Board, Ryan was only given four days notice of the Board's meeting in violation of section 120.569.
> In accordance with section 120.57(1)(b), all parties shall have an

> opportunity to respond, present evidence and argument on all issues involved, to submit proposed findings of fact and orders, to file exceptions to the presiding officer's recommended order and to be represented by counsel. Ryan was never afforded that opportunity.

Ryan v. Florida Department of Business and Professional Regulation, 798 So.2d 36, 38 -39 (Fla. 4th DCA 2001). The *Survivors* decision is simply another in a long line of decisions where bad government actors are told to give due process to citizens. After all, the whole point of the APA is to outline procedures that the government must follow. So, it is hard to figure how a conflict could exist.

This decision construes a provision of an agency specific statute consistently with other cases that have construed substantive agency statutes in light of APA procedural protections. The fact that the agency may not have considered the APA's procedural protections in its interpretation does not create a conflict or invoke Supreme Court jurisdiction. If that were true, then Supreme Court jurisdiction could be invoked anytime a District Court disagreed with an agency, thereby diminishing the role of the District Courts as final decision makers:

> This jurisdictional holding of *Richardson*, however, if literally followed, would mean that this Court had jurisdiction to review nearly all cases, both civil and criminal, because nearly all decisions which review the actions or rulings of trial judges impose upon other trial judges a requirement to follow the law as stated therein in similar situations. Likewise, any decision concerning the propriety of the actions of a prosecuting attorney imposes upon all prosecuting attorneys the duty to henceforth follow the law as therein decided. We are of the opinion that our jurisdictional holding in Richardson was, therefore, much too broad and inconsistent with the often-stated philosophy behind the formation of our District Courts of Appeal-that

> these courts are to be courts of final appellate jurisdiction except in a limited number of specific situations enumerated in the Constitution. We therefore recede from our jurisdictional holding in Richardson.

See Spradley v. State, 293 So.2d 697, 701 (Fla. 1974). *See also Shevin v. Cenville Communities, Inc.*, 338 So.2d 1281, 1282 (Fla. 1976) ("In *Spradley v. State* we recently contracted our jurisdiction as to matters alleged to affect a class of constitutional or state officers in an effort to stem the erosion of finality in the district courts.")(footnote omitted).

II. THERE IS NO CONFLICT JURISDICTION.

The School Board argues that a conflict exists because the Fourth DCA states that "[t]he APA does not provide for an abbreviated procedure in cases of emergency." This is a partial quotation. The complete quotation is:

> The APA does not provide for an abbreviated procedure in cases of emergency where substantial interests are to be determined by an agency; the only emergency procedure is set forth in the section governing agency meetings in general.

Survivors, 968 So.2d at 45. The full quote shows that no conflict exists.

First, the quote is limited to decisions "where substantial interests are to be determined." *Id*. Second, the quote expressly recognizes that there are other "emergency procedures" in the APA. *Id.* The Fourth DCA held that this is just not a case where such emergency procedures could be used.

The School Board must do more than say a direct and express conflict exists by quoting out of context. It bears the burden of positively showing that a direct

and express conflict actually exists. *See State v. Vickery*, 961 So.2d 309, 312 (Fla. 2007)(holding that "when a district court does not certify the conflict, our jurisdiction to review the case depends on whether the decision actually 'expressly and directly' conflicts with the decision of another court."). The one case cited by the School Board fails to show any such conflict. *See State v. Sun Gardens Citrus, LLP*, 780 So.2d 922, 927 (Fla. 2d DCA 2001)(footnoting that courts obtain jurisdiction after final agency action under § 120.68, Fla. Stat.).

CONCLUSION

This Court does not have discretionary jurisdiction to consider this case of first impression because the Fourth DCA decision does not affect a class of constitutional officers and does not conflict with any other Florida decision.

Moreover, this is not a case in which the Supreme Court should invoke its jurisdiction if it determines that this case falls within the scope of its discretionary jurisdiction. The Fourth DCA already denied the School Board's motion to certify this case as involving a question of great public importance because this involves a routine question of procedure that the School Board simply failed to recognize or honor. The Fourth DCA decided that routine procedural question correctly. Thus, the Supreme Court should decline to accept jurisdiction and let the decision of the Fourth District Court of Appeal stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Randall D. Burks, Ph.D., Esq., via U.S. Mail to P.O. Box 19239, West Palm Beach, Florida 33416-9239, counsel for School Board on January 21, 2008.

_____
Bryan J. Yarnell, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this appendix is in 14 point Times New Roman Font and thus complies with Fla. R. App. P. 9.210(a)(2).

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Bryan J. Yarnell, Esq.