

IN THE SUPREME COURT OF FLORIDA

SCHOOL BOARD OF OSCEOLA
COUNTY,

Petitioner

CASE NO.: SC05-1273

Lower Tribunal Case No.: 5D04-1140

v.

DOE Case No.: 2003-947

UCP OF CENTRAL FLORIDA,

Respondent.

**RESPONDENT UCP OF CENTRAL FLORIDA'S
JURISDICTIONAL ANSWER BRIEF**

On Review from the District Court of Appeal of the State of Florida, Fifth District

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STATEMENT OF THE CASE AND FACTS

Petitioner asserts that this Court has discretionary jurisdiction to review a decision by the Florida Fifth District Court of Appeal, affirming an order by the Florida State Board of Education directing approval of a single charter school application. That order directed Petitioner, the Osceola County School Board (the “School Board”), to approve a charter school application submitted by United Cerebral Palsy Central Florida (“UCP”) to open a pre-school for children with developmental delays/disabilities and eligible exceptional education children.

To the extent that Petitioner’s Statement of the Case and Facts is incomplete or disputed by UCP, Respondent provides the following additional information as a supplement. FLORIDA RULE OF APPELLATE PROCEDURE 9.210(c).

The School Board cited two interrelated reasons for denying UCP’s charter school application: 1) the Board felt it would be fiscally irresponsible to approve any new charter school applications in the face of a perceived lack of sufficient capital outlay funding for existing and proposed charter schools within the County and State, and 2) the Board was concerned UCP might use operating funds to pay for capital expenses, as other existing charter schools in Osceola County have done. Other than the fiscal concerns cited, UCP’s application was approved.

UCP timely appealed the denial of its application to the State Board of Education. The School Board filed a comprehensive written response. Pursuant to

the Charter School statute, Florida Statute § 1002.33, oral argument on the appeal was held before the Charter School Appeal Commission. There were two days of argument on the issue of whether the cited fiscal concerns were “good cause” sufficient to deny a charter school application. The Commission unanimously found that a perceived inadequacy in capital outlay funding by the State does not constitute statutory “good cause” for denying charter school applications. The Commission issued a recommendation that the State Board order the School Board to approve UCP’s application. The State Board unanimously adopted the Commission’s recommendation and ordered the application be approved.

Petitioner appealed the State Board’s decision and the Fifth District Court of Appeal issued an opinion affirming the administrative decision. The court concluded that the School Board had not demonstrated that it had good cause to deny UCP’s charter school application and held that the State Board’s decision was “supported by competent, substantial evidence in the record.” The court noted that “[t]he comments contained in the record suggest that the School Board denied the application in an effort to prompt the Florida Legislature to commence reform of the current charter school funding scheme. A court is not the proper forum to consider such policy issues.” *School Board of Osceola County v. UCP of Central Florida*, No. 5D04-1140, 2005 WL 924317 (Fla. 5th DCA April 22, 2005) (Appendix, p. 13). Petitioner moved for rehearing, rehearing *en banc*, certification,

and clarification, which was denied. In its Motion for Rehearing, Petitioner first raised a constitutional challenge to the statute itself and the fact that it empowers the State Board to direct the School Board to grant a charter school application. Prior to that motion, Petitioner's argument was that under-funding of a district was "good cause" sufficient to deny an application. Petitioner is precluded from raising a new argument regarding the constitutionality of the statute on a motion for rehearing of an appellate opinion.

Petitioner is now attempting to again improperly broaden the scope of this matter to implicate a class of constitutional officers in a request to this Court that it exercise jurisdiction and reverse the Fifth District Court of Appeal's affirmance of the State Board's unanimous opinion.

SUMMARY OF THE ARGUMENT

Petitioner contends that school board members across the state, as a class of constitutional officers, will be impacted by the Fifth District's decision in this case. That is a mischaracterization of the implications of this decision. Its scope is limited to a finding that the District Courts of Appeal have jurisdiction over charter school application appeals from the State Board and that under the facts of this case, good cause did not exist for denial. As such, the decision in no way limits the rights and duties of school board members to oversee and control their respective districts.

Additionally, Petitioner is attempting to attack the constitutionality of the Florida charter school statute, which was improperly raised for the first time in its Motion for Rehearing, after the Fifth District had issued its order. To the extent Petitioner is attempting to implicate a class of constitutional officers as a basis for jurisdiction in this Court by altering and adding to the claims raised on appeal, that is disallowed.

Since the only basis for which discretionary jurisdiction was sought in this Court is improper and there is no other grounds for jurisdiction in this Court, the petition for review must be denied.

ARGUMENT

THE SCHOOL BOARD'S PETITION FOR REVIEW MUST BE DENIED BECAUSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EFFECT A CLASS OF CONSTITUTIONAL OFFICERS

This case involves the denial of a single charter school application by the School Board because of a perceived under-funding of schools throughout Florida, but especially within the Osceola school district¹. The School Board considered this to be “good cause” sufficient to justify denial under Florida Statute § 1002.33,

¹ As Petitioner notes, this case was consolidated with two other cases involving a different charter applicant, Academies of Excellence, Inc. (“Academies”), because the grounds for denial were similar. The Fifth District issued its opinion in that case after Petitioner filed its Jurisdictional Brief here. The Fifth District again affirmed the State Board’s similar decision as relates to the Academies applications and cited the reasons set forth in the opinion issued in this case.

of an otherwise acceptable application from a highly qualified applicant. The State Board disagreed, as did the Fifth District Court of Appeal.

1. This opinion is specific to the facts of this case and does not implicate a class of constitutional officers in a general manner unrelated to the specific facts.

Petitioner is asserting that the Supreme Court has discretionary jurisdiction of this matter under Florida Appellate Rule of Civil Procedure 9.030(a)(2)(A)(iii), for “decisions of district courts of appeal that expressly affect a class of constitutional or state officers.” According to Petitioner, this decision by the Fifth District infringes the power and authority of all school board members throughout the state of Florida to exercise their constitutional rights and obligations to operate and control the public schools within their respective districts. In truth, this decision held only that 1) the District Courts of Appeal have jurisdiction over appeals from the State Board’s decisions regarding charter school applications, 2) based on the evidence presented in this case, “good cause” did not exist to deny UCP’s application, and 3) the State Board’s decision in this case was supported by competent, substantial evidence in the record. None of these holdings implicates the rights and responsibilities of all school board members across the state.

The issue on appeal was: whether the State Board’s decision was not clearly erroneous and supported by competent substantial evidence. That issue requires a factual determination. It is case-specific: The issue involves whether the State

Board acted legally under these circumstances with these parties. The Fifth District recognized that this issue required a factual analysis, and the lengthy opinion reflects a review and analysis of the facts in the record. Moreover, the opinion notes the absence of other facts that might have affected its decision. The opinion further states expressly: “Under these facts it appears that lack of capital funding or use of operational dollars to fund capital expenses does not constitute good cause to deny a charter school application.” Appendix at p. 12 (emphasis added). The ultimate holding of the case is: “Because the State Board’s action is supported by competent, substantial evidence in the record, we affirm the final order.” Id. at p. 12. That holding is limited to the findings in this case that “good cause” for denial did not exist.

The Fifth District did not opine on the legality of any other decision rendered by the State Board as regards any other charter application dispute, either presently existing or in the future with this or another local school board. The Fifth District affirmed the State Board’s decision in this case, which, by action of law, requires that that decision be implemented, *i.e.*, that the application be approved by the School Board and a charter agreement issued. Again, that does not implicate a “class of constitutional officers.” To implicate such a class would require a decision addressing the constitutionality of the charter school provision permitting the State Board to order the district school board to approve a charter application—

Fifth District did not render such a decision in this case, nor was the issue raised prior to the Motion for Rehearing.

For discretionary jurisdiction in this Court to arise under Rule 9.030(a)(2)(A)(iii), the decision being appealed must generally affect an entire class of constitutional officers “in some way unrelated to the specific facts of that case.” *Spradley v. State*, 293 So.2d 697, 701 (Fla. 1974). As explained *supra*, that is not the present case—the decision is specific to the facts of this case, as expressly stated by the Fifth District. In fact, the only issue that this Court would be considering on appeal is the Fifth District’s determination that the record supported the State Board’s decision, and that that decision was not clearly erroneous—that issue does not qualify for discretionary jurisdiction. Moreover, as this Court has held, the use of the term “expressly” in Rule 9.030(a)(2)(A)(iii) “means within the written district court opinion.” *School Bd. of Pinellas County v. District Court of Appeal*, 467 So.2d 985, 986 (Fla. 1985) (holding language in district court decision did not affect other school board members as constitutional officers). Just as the Court held in *School Bd. of Pinellas County v. District Court of Appeal*, the present opinion is devoid of express implications of the rights and duties of other school board members, in fact, to the contrary, the opinion specifies that it is based on the facts of this case. Therefore, as in the *Pinellas County* case, the School Board’s petition for discretionary jurisdiction should be denied.

2. Petitioner is barred from asserting claims attacking the constitutionality of the Florida charter school statute since those claims were first asserted in the Motion for Rehearing, after the Fifth District had issued its opinion.

A party may not raise a claim for the first time on appeal, including an attack on the constitutionality of a statute, unless it goes to fundamental error. *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970). Petitioner does not and cannot allege fundamental error in this case, in Petitioner advocated in its briefs the standard of review applied by the Fifth District.

What Petitioner is improperly attempting to argue by implication here, is the unconstitutionality of Florida Statute § 1002.33(6)(c). That statute authorizes the State Board to override a district school board's denial of a charter application when "good cause" does not exist for the denial. According to Petitioner, that provision results in an abrogation of the district school boards' constitutional rights and responsibilities to oversee their local public schools. However, while Petitioner cited in its briefs constitutional provisions in support of its position that the School Board had good cause for denying UCP's charter application, Petitioner first raised the constitutionality of the charter school statute itself in its Motion for Rehearing before the Fifth District, which was improper and denied by the Court.

Now, Petitioner is attempting to again improperly broaden the scope of the issues in this case by asserting that not only does the charter school statute abrogate the Osceola County School Board's constitutional rights, but the Fifth District's

decision affirms the constitutionality of the charter school statute, which implicates the constitutional rights of all school board members across the state.

The Fifth District did not opine on the constitutionality of the charter school statute as a whole, or the provision providing the State Board the authority to review local school district denials and to order the local board to approve a charter school application. That issue was not before the court. In fact, the only mention of the Constitution in the Initial and Reply Briefs were references to the School Board's powers as support for the argument that "good cause" existed to deny UCP's application. Regardless, Petitioner attempted to bring the constitutionality of the charter statute before the Fifth District for the first time in its Motion for Rehearing, which the court denied. Petitioner is again improperly attempting to attack the constitutionality of the charter school statute, despite the fact that that issue was not raised or briefed in this case. Now petitioner has cloaked its improper new argument in the guise of a decision implicating a class of constitutional officers.

CONCLUSION

This matter does not impact a class of constitutional officers and Petitioner did not raise the issue of the constitutionality of the charter school statute in its appeal, and therefore, this Court's discretionary jurisdiction under Rule

9.030(a)(2)(A)(iii), or other any other basis, is not implicated. The Court should deny the School Board's petition for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Facsimile and U.S. Mail to **Erin J. O'Leary, Esq.**, Brown, Garganese, Weiss & D'Agresta, P.A., Counsel for Petitioner, 225 East Robinson St., Suite 660, P.O. Box 2873, Orlando, FL 32802-2873 and **Jennifer S. Blohm, Esq.**, Meyers & Brooks, P.A., Attorney for *Amicus Curiae* Florida School Boards Ass'n, Inc., P.O. Box 1547, Tallahassee, FL 32302, this 29th day of August, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2) of the Florida Rules of Appellate Procedure.

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