IN THE SUPREME COURT OF FLORIDA

Case No. SC05-426

L.T. Case No. 4D03-4489

LOUIS TOTH

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Respondent.

RESPONDENT'S, SOUTH FLORIDA WATER MANAGEMENT DISTRICT, BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Before this Court is Louis Toth's ("Petitioner") Jurisdictional Brief. Petitioner requests that this Court exercise its discretionary review of the opinion of the Fourth District Court of Appeal. (Appendix A1). The Petitioner asserts two bases on which this Court should invoke its discretionary jurisdiction: (1) the opinion directly and expressly conflicts with a decision of another district court of appeal; and (2) the opinion expressly affects a class of state officers. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. Proc. 9.030(a)(2)(A)(iii) and (iv).

Petitioner is an "at-will" employee of the South Florida Water Management District ("Respondent"). Petitioner was employed by the Respondent as a Chief Environmental Scientist in the Kissimmee Division. On October 29, 2003, Petitioner received a written reprimand and was demoted and redirected to another Division within the Respondent's organization. Petitioner filed a petition for administrative hearing pursuant to § 120.57(1), Fla. Stat. Respondent dismissed the petition because it concluded that Petitioner, as an "at-will" employee, did not have standing to initiate proceedings pursuant to §120.57, Fla. Stat. Petitioner appealed the Respondent's Final Order to the Fourth District Court of Appeal.

The Fourth District Court of Appeal affirmed Respondent's dismissal of Petitioner's request for an administrative hearing. The court held that because Petitioner was an "at-will" employee and there is no statute or rule which would

give him substantial interest, he was not entitled to an administrative hearing. (Appendix A1).

SUMMARY OF THE ARGUMENT

Petitioner fails to prevail on either of his two assertions. First, Petitioner fails to show that the case under review "directly and expressly" conflicts with a decision in another district or this Court. The case relied on by Petitioner, Hasper v. Dep't of Labor & Employment Sec., 459 So. 2d 400 (Fla. 1st DCA 1984) is distinguished by the Fourth District in its opinion. More importantly, the court relied on more recent cases in the First and Third Districts whose facts and law are in complete alignment with the case under review. See Sickon v. Sch. Bd. of Alachua County, Fla., 719 So. 2d 360 (Fla. 1st DCA 1998); Fertally v. Miami-Dade Cmty. Coll., 651 So. 2d 1283 (Fla. 3d DCA 1995), *review denied by* 660 So. 2d 713 (Fla. 1995). Consequently, Petitioner fails to establish that this Court has discretionary jurisdiction to review this case based on a direct and express conflict.

Petitioner also argues that this Court has discretionary jurisdiction to review this case based on the fact that the case expressly affects a class of state officers. However, Petitioner is not a state officer. Petitioner works for the South Florida Water Management District, which is a "political subdivision," not a state agency. Furthermore, although Petitioner puts forth this argument about affecting a class of state officers, Petitioner completely fails to cite to any law to support his argument.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH ANY DECISION IN ANY OTHER DISTRICT OR THE SUPREME COURT

There is no basis for Petitioner's assertion that the case under review "expressly and directly" conflicts with a decision of another district court on the same point of law. Petitioner's jurisdictional brief in large measure re-argues the merits of its case below.

In order to establish conflict resolution jurisdiction, Petitioner must show that the case under review directly conflicts with a decision of another court of appeal or of the Supreme Court on the same question of law. Art. V, § 3(b)(3), Fla. Const. Additionally, the conflict must appear within the four corners of the district court's majority opinion. Thus the Supreme Court is limited to the facts on the face of the opinion. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Hardee v. State, 534 So. 2d 706, 708 (Fla. 1988).

Petitioner completely fails to present a direct and express conflict between the case under review and a decision of another court of appeal or of the Supreme Court on the same question of law. Petitioner relies exclusively on Hasper v. Dep't of Labor and Employment Sec., 459 So. 2d 400, 402 (Fla. 1st DCA 1984) as a case in direct conflict with the decision under review. The Fourth District's decision under review states on its face that Petitioner failed to distinguish the facts of

Hasper from the facts of the case under review. Toth v. S. Fla. Water Mgmt. Dist., 895 So. 2d 482 (Fla. 4th DCA 2005). The Fourth District however, distinguished the facts in Hasper from the facts of the case under review. In the instant case, Petitioner is an "at-will" employee. Petitioner has no contract with Respondent nor is there a policy or statute that provides Petitioner with a substantial interest in his job that would give him standing for an administrative hearing. In Hasper, the employee was in a Senior Management Service Position. At the time of the employee's severance, § 110.403(1)(c), Fla. Stat. (1983), provided a method for removing people in senior management service positions whose job performance was inadequate. Therefore, the employee had an express legal entitlement for an administrative hearing under § 120.57, Fla. Stat. This was not the case in Toth.

More importantly, the Fourth District essentially relied on two cases in its holding in Toth. The Court relied on a more recent case in the First District Court of Appeal (the Hasper court) to support the argument that "substantial interests" under § 120.57, Fla. Stat., are legally recognizable interests. See Sickon v. Sch. Bd. of Alachua County, Fla., 719 So. 2d 360 (Fla. 1st DCA 1998). In Sickon, a teacher requested an administrative hearing after she was demoted from band director to assistant band director. The First District Court of Appeal recognized that Ms. Sickon lacked substantial interests because she had no statutory right to a hearing, nor did the school provide any policies or rules that would entitle her to a

hearing. Finally, she had no contractual right to remain in the position as band director. The court in Sickon held that Ms. Sickon was not entitled to an administrative hearing.

In addition to Sickon, the Fourth District also relied on the Fertally v. Miami-Dade Cmty. Coll., 651 So. 2d 1283 (Fla. 3d DCA 1995), *review denied by* 660 So. 2d 713 (Fla. 1995)[1]. In Fertally, the Third District held that Petitioner was not entitled to an administrative hearing to review the Community College's decision not to renew Ms. Fertally's contract with the college. Ms. Fertally had a contract with the college, but after it expired, the college chose not to renew it. The college specifically had a rule that stated if the college chose not to renew a professor's contract; the individual professor had no legal right to challenge the college's decision. Ms. Fertally may have been entitled to an administrative hearing during her contractual period, but not after it expired. The court held that the annual contract status was analogous to the status of a probationary employee who can be discharged without cause. The court found that Ms. Fertally could not point to any statute, rule, policy or contract that bestowed on her the right to continued employment with the college; making her employment with the college at-will. Therefore, Ms. Fertally had no legally recognizable interest in her

[1] This Court declined to accept jurisdiction over Fertally; determining that the facts in Hasper are distinguishable from the facts in Fertally.

continued employment; and therefore, no substantial interests under § 120.57, Fla. Stat., entitling her to an administrative hearing.

The facts in Sickon and Fertally are very similar to those in Toth and the law is exactly on point. The Fourth District's case under review is not in conflict with any case in another district or in the Supreme Court. The Fourth District did not rely on Hasper in deciding the Toth case. The court did however, distinguish the facts and law in Hasper from the facts surrounding Petitioner's demotion on the four corners of its opinion in Toth.

A conflict must "result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof." Trustees of the Internal Improvement Fund v. Lobean, 127 So. 2d 98, 101 (Fla. 1961). As the Fourth District clearly pointed out in Toth, the facts in the case under review and the facts in Hasper are distinguishable. Petitioner fails to establish discretionary review by this Court based on an "express and direct" conflict with another district court. In Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988), this Court expressed the constitutional limitation that it must adhere to in refusing to exercise its discretionary review: "where the opinion below establishes no point of law contrary to a decision of this Court or another district court." Id. at 288.

II. **THE FOURTH DISTRICT'S DECSISION DOES NOT EXPRESSLY AFFECT A CLASS OF STATE OFFICERS; AND THEREFORE, THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW THIS CASE**

Petitioner cites to no law for the proposition that Petitioner is a state officer. Petitioner is employed by the Respondent, which is alternatively referred to as a special district, or a political subdivision. Respondent is not a state agency. In Town of Palm Beach v. City of West Palm Beach, 55 So. 2d 566 (Fla. 1951), this Court determined that the officers of a city sanitary district "are neither state nor county officers. They are 'district officers' and it is not necessary that they be elected by the people or appointed by the Governor." Id. at 569.

In 1994, this Court provided an advisory opinion to Governor Chiles regarding the constitutional prohibition of dual office holding. In re Advisory Opinion to the Governor-Dual Office-Holding, 630 So. 2d 1055 (Fla. 1994). The Court was asked to determine whether a member of a community college board of trustees is a state officer or a district officer. The State Constitution prohibits a state, county or municipal officer from simultaneously holding another state, county or municipal office. The Court looked at several Attorney General opinions and agreeing with them, concluded that a member of a community college board of trustees is a "district officer," so the dual office-holding prohibition did not apply. Id. at 1056, 1057.

In opinion 84-21, the Attorney General responded to the question of how to distinguish whether an officer is a state officer or a district officer. The opinion states:

> A state office is an agency of and component part of state government whose jurisdiction extends to every part of the state; a county office is an agency of and component part of county government whose jurisdiction is limited to the county; *a district is a defined portion or subdivision of the state for special and limited governmental purposes and the district and its officers, unless legislatively declared to be or designated as agencies of the state or county, are separate and apart from and are not agencies of the state or county government.* (emphasis added)

Op. Att'y Gen. Fla. 84-21 (1984).

The Attorney General concluded that officers of special districts or quasi political corporations are not state officers unless the Legislature declares or designates them as such. Op. Att'y Gen. Fla. 84-21 (1984).

In two other Attorney General opinions, the issue of whether water management districts were state agencies or special districts was addressed. In opinion 86-55, the Attorney General determined that a governing board member of the Big Cypress Basin (a sub-district of the water management district) is a "district officer," not a state officer, and therefore, the constitutional prohibition on dual office-holding did not apply to the governing board member. Op. Att'y Gen. Fla. 86-55 (1986).

Finally, in opinion 90-66, the Attorney General once again addressed the issue of whether water management districts are state agencies. The Attorney General pointed out that based on previous Attorney General opinions, "[w]ater management districts would more accurately be characterized as districts, special districts or political subdivisions." Op. Att'y Gen. Fla. 90-66 (1990). The Attorney General determined that:

> Based upon the preceding discussion, it is my opinion that water management districts, created pursuant to Ch. 373, F.S., as districts within the definition of 'political subdivisions' of this state, are not state agencies within the purview of s. 253.025 (8) (e), F.S.

With no law cited to show that Petitioner is a member of a class of state officers, Petitioner makes the leap that Petitioner is a state officer. Petitioner then states that based on that fact this Court has discretionary jurisdiction to review the Toth opinion. Based on the law, Petitioner is not a state officer, but rather a "district employee." Therefore, the discretionary review that Petitioner seeks is not applicable.

CONCLUSION

Petitioner fails to make a case for discretionary review based on conflict resolution or based on the case under review affecting a class of state officers. This court does not have discretionary jurisdiction to review Toth. This Court, therefore, should deny Petitioner's request for the Court to exercise its discretionary review.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Answer Brief was served via U.S. mail this 13th day of May 2005, on M. Kate Boehringer, Esquire; Boehringer Law Office, P.A.; 1515 N. Federal Highway, Suite 300; Boca Raton, Florida 33432.

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CERTIFICATE OF COMPLIANCE

I certify that the ANSWER BRIEF OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT is printed in Times New Roman 14-point font and complies with Fla. R. App. P. 9.100(1) and 9.210(a)(2).

____

CATHERINE LINTON