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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

VOLUSIA ELEMENTARY CHARTER
SCHOOL, INC., d/b/a BOSTON
AVENUE CHARTER SCHOOL,

Appellant,

v.

Case No. 5D13-0726

SCHOOL BOARD OF VOLUSIA
COUNTY, FLORIDA,

Appellee.

_____ /

**APPELLEE'S RESPONSE TO APPELLANT'S TIME SENSITIVE
MOTION FOR STAY PENDING APPEAL**

Appellee, THE SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA (hereinafter "VCSB" or "School Board"), pursuant to Florida Rules of Appellate Procedure, hereby responds to the *Time Sensitive Motion for Stay Pending Appeal*, filed by Appellant, VOLUSIA ELEMENTARY CHARTER SCHOOL, INC., d/b/a BOSTON AVENUE CHARTER SCHOOL (hereinafter "Boston Avenue" or "School") and served upon Appellee on June 6, 2013.

Legal Standard

The Court has discretion to grant or deny a stay. Fla. R. App. P. 9.190(e)(2)(A), 9.310(a) (2012). Factors which should be considered by this Court

in deciding whether to grant a stay include the likelihood of “irremediable harm” should the stay be denied and the moving party's likelihood of success on the merits. *State ex rel. Price v. McCord*, 380 So.2d 1037, 1039 (Fla. 1980). Another factor this Court may consider is whether the stay is in the public interest. *White Construction Co., Inc., v. State, Dept. of Transportation*, 526 So.2d 998, 999 (citing *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir.1968)). Because Boston Avenue has completely failed to satisfy any of these elements, its motion for stay should be denied.

1. Boston Avenue Will Not Suffer Irremediable Harm

Boston Avenue correctly states that the charter will expire on June 30, 2013. Boston Avenue alleges that this will cause “irreparable” (*sic*) harm because the School “will not be able to operate, will lose funding, and its roughly 300 students will be forced to enroll at other schools.”¹ While these events may occur, the harm is certainly not irremediable. Boston Avenue can remedy any harm simply by re-opening the School.

On the other hand, VCSB and Volusia County taxpayers will suffer harm if the stay is granted. VCSB is obligated to “require that an accurate account is kept of all funds that should be transmitted to the district school board for school purposes at various periods during the year from all sources and, if any funds are

¹As of May 31, 2013, Boston Avenue had 208 FTE (full-time enrollment) students, not “roughly 300.”

not transmitted promptly, take the necessary steps to have such funds made available.” § 1001.42(12)(d), Fla. Stat. (2012). Additionally, § 1002.33(5) requires VCSB to monitor the revenues and expenditures of the charter school. Boston Avenue has expended federal and state funds to operate the School. As taxpayer money was used to purchase Boston Avenue’s educational materials and other necessary items, VCSB needs to ensure that these items are returned to the school district for use by Volusia County students. VCSB will suffer harm if the stay is granted without a requirement to post bond or other conditions to protect these publicly-funded materials.

2. Boston Avenue Is Not Likely to Succeed on Appeal

a. The ALJ Applied the Correct Burden of Proof

Boston Avenue argues that the charter agreement constitutes a “license” under the Florida Administrative Procedure Act (“APA”), Chapter 120, Fla. Stat. (2012). The School uses this mischaracterization to argue that Administrative Law Judge Early applied the wrong standard of proof in the proceedings below. Specifically, Boston Avenue argues that the correct standard is “clear and convincing evidence” rather than “preponderance of the evidence.” VCSB first addresses the threshold issue of whether the charter agreement between the parties is a license or contractual agreement.

Boston Avenue states that “the plain language of the charter school statute and the APA state that a charter is a license.” This is most certainly incorrect. The plain language of the charter school statute, § 1002.33, does not use the term “license” at all. In fact, it specifically defines a charter in subsection (6)(h), which provides that “the terms and conditions for the operation of a charter school shall be set forth by the sponsor and the applicant in a **written contractual agreement, called a charter.**” (emphasis added). Thus, a charter is defined as a “written contractual agreement,” not a license. This is a specific legislative definition, and as Boston Avenue concedes in its motion, a specific legislative definition must be given effect. *Donato v. State*, 767 So.2d 1146, 1150 (Fla. 2000). **Significantly, the term “contract” is not included in the definition of “license” under § 120.52(10), Fla. Stat. (2012).**

The APA does not define a *charter*; it defines a *license*. Section 120.52(10) provides:

(10) “License” means a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.

Although the term “charter” does appear in § 120.52(10), it cannot be fairly said that the subsection defines a charter in any way. Rather, this provision describes a license by way of a generic list of items that may be considered

licenses, none of which are themselves defined within the APA. It is unreasonable to construe this subsection's stray reference to a charter as the very definition of a charter, and apply it instead of the specific legislative definition provided in § 1002.33(6)(h).

Furthermore, § 1002.33 outlines the process of negotiation, approval, and execution of charter contracts. Licenses, on the other hand, are not negotiated. There are no terms and conditions. The charter agreement itself shows that it not a license as contemplated by the APA; rather, the agreement is a contract governed by § 1002.33(8) and principles of contract law. Judge Early made a finding of fact that the charter agreement "was a *contract* between the parties." The fact that the APA governs the procedure for appeal of a charter non-renewal does not alter the definition of a charter under § 1002.33, Fla. Stat. (2012).

At hearing, Boston Avenue did not dispute the contractual nature of the charter agreement, and even attempted to argue frustration of performance in defense of the School's abysmal performance. Boston Avenue's attorney, Brandon Peters, explicitly advanced arguments grounded in contract law:

Now, Judge, **a charter is, after all, a contract**, and we will present evidence that shows for the entire period of my client's existence, the school district breached the **duty of good faith and fair dealing that is inherent in every Florida contract** under Florida law.

(Record, Transcript Vol. I, p. 23, lines 17-22) (emphasis added).

So, Judge, the point of this exercise is to tell you there will be evidence which will lead this forum at the conclusion of the case to ask the very important question whether the school district conducted itself as a sponsor should or did it breach the **duty of good faith and fair dealing inherent in every Florida contract, including this charter**, by making it difficult, if not impossible, for my client to focus on its core mission of educating Volusia County's children.

Now, one of your tasks, Judge, is going to be the interpretation of the meaning of **the parties' contract**.

(Record, Transcript Vol. I, p. 26, line 24 – p. 27, line 11) (emphasis added).

Given the fact that the charter is not a license, the law is clear that the preponderance of the evidence standard of review applies. The procedures delineated in § 120.57(1) apply to the proceedings below. § 120.569, Fla. Stat. Section 120.57(1)(j) specifically provides:

Findings of fact shall be based upon a **preponderance of the evidence**, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized. (emphasis added).

As argued in VCSB's Response to Appellant's previous motion for a stay, this is not a "penal or licensure disciplinary proceeding." Rather, non-renewal is tantamount to denying a new application. Florida law recognizes a distinction between the disciplinary actions of suspension and revocation and the regulatory actions of granting, denying, renewing, or declining to renew an application. See Silver Show, Inc. v. Dept. of Business & Professional Regulation, 763 So.2d 348

(Fla. 4th DCA 1998) (denying motion for stay because denial of application did not have effect of suspending or revoking license); *Terrell Oil Co. v. Dep't of Transp.*, 541 So.2d 713 (Fla. 1st DCA 1988) (*per curiam*) (finding a “qualitative difference” between an order denying renewal of a license that has expired or is about to expire and one which suspends or revokes an active license). For this reason, the case law cited by Boston Avenue is inapposite to the case at bar.

The charter is not a license, non-renewal is not a penal or disciplinary action, and no applicable statute provides for a different burden of proof in this matter. Thus, the preponderance of the evidence standard applies pursuant to the plain language of the statute. Florida case law holds that this is the applicable burden of proof as well. *M.H. v. Dept. of Child & Family Services*, 977 So.2d 755, 762 (Fla. 2d DCA 2008) (preponderance standard generally applies in administrative proceedings); *Haines v. Dept. of Children and Families*, 983 So.2d 602 (Fla. 5th DCA 2008); *Wallace Corp. v. City of Miami Beach*, 793 So.2d 1134 (Fla. 1st DCA 2001); *Fitzpatrick v. City of Miami Beach*, 328 So.2d 578 (Fla. 3d DCA 1976); *Florida Dept. of Health & Rehabilitative Services, Div. of Health v. Career Service Comm'n. of Dept. of Administration*, 289 So.2d 412 (Fla. 4th DCA 1974).

The School argues that the clear and convincing standard of review applies in this case. However, the clear and convincing standard is likely to apply only to civil actions which might deprive a party of a protected interest. For example,

clear and convincing evidence is required in cases of parental rights termination, civil commitment, and civil forfeiture. Padovano, 5 Fla. Prac., Civil Practice § 16:1 (2012 ed.). While Boston Avenue may have a property interest in the continued operation of the school, it does not have a *protected* interest that would justify a higher burden of proof. The legal arguments set forth in VCSB's Response to Appellant's previous motion for stay and VCSB's Memorandum of Law (Record at pp. 809-823) are incorporated by reference.

b. The ALJ Correctly Determined the Impact of VCSB's Non-Compliance with the Written Notice Provision of § 1002.33(8)(a)

Judge Early made a finding of fact that VCSB provided written notice of non-renewal to Boston Avenue 89 days prior to the expiration of the charter, one day short of the 90 days' notice required by § 1002.33(8)(a) and the charter contract. (Recommended Order, Appellant's Exhibit "B", at ¶¶ 26, 27) Judge Early observed that neither the statute nor the contract specified a sanction if the notice period was fewer than 90 days. (Recommended Order, Appellant's Exhibit "B", at ¶ 149). Judge Early conducted a thorough analysis of Florida case law to support his conclusion that the late delivery of the notice was nonetheless sufficient to provide fair and adequate notice of the proposed non-renewal.

As this Court noted in *Heshmati v. Dept. of Health*, 983 So.2d 632 (Fla. 5th DCA 2008), "Florida case law has long held when an agency fails to meet procedural benchmarks, the delay must cause prejudice to the party in order for the

party to obtain dismissal.” *Id.* at 634. In *Dept. of Business Regulation, Div. of Pari-Mutuel Wagering v. Hyman*, 417 So.2d 671 (Fla. 1982), for instance, the Florida Supreme Court had to determine whether the agency’s failure to enter a final order within 90 days after hearing in accordance with § 120.59(1) rendered the final order unenforceable in any proceeding in which the agency was the protagonist. Like § 1002.33(8)(b), § 120.59(1) used the term “shall” but contained no sanction for violation of the time requirement. The absence of a sanction in the statute led the Court to conclude that a violation of the notice requirement did not render the final order unenforceable. The Court found the absence of a sanction especially significant in light of the fact that other parts of Chapter 120 do provide sanctions or other consequences where an agency or party fails to act within prescribed time limits. The Court stated, “[i]f the legislature had intended that untimely orders rendered in proceedings in which the agency is the protagonist would always be unenforceable, we believe that it would have included the necessary language in section 120.59(1) to impose such sanction as it did in other parts of chapter 120.” *Hyman*, 417 So.2d at 673.

Boston Avenue may argue that the word “shall” in the statute demands that anything short of strict compliance with this provision results in insufficient notice. This is simply incorrect. Although the word “shall” usually has a mandatory connotation, it is merely directory in certain contexts. *Lomelo v. Mayo*, 204 So.2d

550 (Fla. 1st DCA 1967) (holding that the word “shall” did not require reversal of an order not rendered within the 90-day period prescribed by § 120.59(1) where statute did not include sanction).

In *Allied Fidelity Ins. Co. v. State*, 415 So.2d 109 (Fla. 3d DCA 1982), the appellant insurance company argued that the word “shall” should be interpreted to require strict compliance. The court readily rejected this argument:

Allied's simplistic view of the statute is that “shall” means shall, and the inquiry ends there. While it is true that the first rule of statutory construction is that words are to be given their normal meaning, it is equally an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or ridiculous conclusion or a result obviously not designed by the Legislature will not be adopted.

Allied, 415 So.2d at 110-111 (internal citation omitted).

In the case at bar, the interpretation advanced by Boston Avenue would result in the continued operation of a failing school for lack of one day's worth of written notice. This is precisely the unreasonable conclusion the *Allied* court cautioned against.

An examination of § 1002.33(8) as a whole demonstrates that the 90-day provision was designed to further the orderly conduct of charter school terminations and non-renewals, not to divest a school board of its authority to act. Absent a contrary legislative intent in the text of the statute, “mandatory words specifying the time within which duties of public officers are to be performed may

be construed as directory only.” *Id.* Accordingly, the 90-day provision is merely directory, and the failure to strictly comply with it does not warrant default charter renewal.

Furthermore, requiring strict compliance with the 90-day notice provision would not make any sense in the context of subsection (8) as a whole. Subsection (8) addresses termination and non-renewal of a charter without distinction between the two. Given that a charter contract comes up for *renewal* only once every few years but is always subject to *termination*, discussion of the notice provision in the non-renewal context is largely an academic exercise. A sponsor can simply initiate the charter termination process if its decision not to renew a charter is reversed. The fact that Boston Avenue advances this notice argument underscores the weakness of the School's case on the merits.

c. Boston Avenue Knowingly Violated the Charter Requirements and Florida Statutes Concerning Employment History Checks

Boston Avenue assigns error to Judge Early’s conclusion that the School’s violations of the charter and § 1002.33(12)(g)4 form a reasonable basis for non-renewal of the charter. Boston Avenue asserts that this conclusion is error, given that the ALJ did not make a finding that the deficiencies in the employment history checks were made “knowingly.”

Although Judge Early did not specifically state that Boston Avenue “knowingly” violated the charter and statutory requirements, the record evidence makes it clear that Boston Avenue acted knowingly. At the hearing, Micah Jackson, Chief Operating Officer of Boston Avenue’s management company, School Management Solutions, testified that Boston Avenue was advised of the employment history check deficiency and took action to correct the problem. (Recommended Order, Appellant’s Exhibit “B”, at ¶123; Transcript Vol. VII, p. 824, line 20 through p. 825, line 3). The testimony of Dana Paige-Pender, the District’s human resources specialist who discovered the violations, shows Boston Avenue’s knowledge of the violations and contradicts Jackson’s testimony that the problems were corrected:

In October when we reviewed the files and that documentation was missing, **we were told that they were in the process of moving and so that's why those papers weren't in the file.** We went back in the spring to see if that deficiency had been cured and found a boilerplate document in each file that listed the names of individuals. Many were neighbors or friends, and standard language on each document that said something to the effect of each person recommends that this person be hired by the company. There was no specific information or documentation, and many were not past employers as required by statute.

(Transcript, Vol. IV at p. 414, line 16 through p. 415, line 2) (emphasis added).

It is clear that the record contains competent substantial evidence to support Judge Early's conclusion that deficient employment history checks form a reasonable basis for non-renewal of the charter. Accordingly, the Final Order adopting his conclusions must be affirmed.

d. Competent Substantial Evidence Established that Boston Avenue Failed to Meet Student Performance Requirements Stated in the Charter.

Competent, substantial evidence is evidence that is "sufficiently relevant and material [such] that a reasonable mind would accept it as adequate to support the conclusion reached." *Marion County v. Priest*, 786 So.2d 623, 625 (Fla. 5th DCA 2001) (emphasis added) (quoting *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) and *Irvine v. Duval County Planning Comm'n*, 495 So.2d 167 (Fla. 1986)) (internal citations omitted). The APA prohibits the appellate court from substituting its judgment for that of the ALJ as to the weight of evidence on a disputed finding of fact if the finding is supported by competent substantial evidence. § 120.68(10), Fla. Stat. (2012); *Mullins v. Dept. of Law Enforcement*, 942 So.2d 998, 1000 (Fla. 5th DCA 2006) (refusing to reweigh record evidence and noting that ALJ was in best position to assess credibility).

Boston Avenue specifically argues that Dr. Parker's evidence was not credible and was not supported by adequate documentation. Because these

arguments are directed solely toward the weight of the evidence, the Court must affirm Judge Early's findings. *Mullins*, 942 So.2d at 1000.

Boston Avenue also argues that Dr. Parker's testimony contained conclusions of law that were inappropriately before the ALJ. However, Dr. Parker's testimony did not contain legal conclusions, but rather objective information relevant to Boston Avenue's satisfaction of performance standards stated in the charter. Even if Dr. Parker's testimony had contained legal conclusions, the record shows that Judge Early sustained Boston Avenue's objections on this issue at the hearing and limited Dr. Parker's testimony to the factual issue of whether Boston Avenue satisfied performance standards of the charter sufficient for it to continue, to which Boston Avenue did *not* object. (Transcript Vol. II, p. 223, line 10 through p. 225, line 1).

Furthermore, the case law cited in Boston Avenue's Proposed Recommended Order actually supports Judge Early's consideration of Dr. Parker's testimony on this matter. *Gross v. Department of Health*, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002) ("Florida courts have consistently held that the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge **based on the evidence and the testimony.**") (emphasis added). In addition, the record

contains no evidence that Judge Early relied on Dr. Parker's opinion as to whether the charter should be non-renewed as a matter of law.

Accordingly, VCSB's finding that Boston Avenue failed to satisfy student performance requirements of the charter is supported by competent substantial evidence and should be affirmed on appeal.

e. The ALJ Properly Excluded Boston Avenue's Expert Testimony

As stated in Boston Avenue's motion, Boston Avenue called Andrew Kantor, Esq., to testify at the hearing "to assist the ALJ in understanding the terms of the Charter School statute as well as the language found in Charters themselves." Interpretation of a statute and a contract are both questions of law. Expert testimony concerning a question of law is not admissible. *Lee County v. Barnett Banks, Inc.*, 711 So.2d 34 (Fla. 2d DCA 1997) (rejecting expert's testimony on interpretation of statute), *approved sub nom, Pierpoint v. Lee County*, 710 So.2d 958 (Fla. 1998). Stated differently, "[s]tatutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'" *Barnett Banks, Inc.*, 711 So.2d at 34 (citing *Edward J. Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So.2d 889 (Fla. 2d DCA 1990) (error to permit expert to testify regarding opinion on how building code should be interpreted) and *Devin v. City of Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976)). This principle is apparent from the language of §

90.702, Fla. Stat.: “Expert testimony is admissible if it will assist the trier of **fact** in understanding the evidence or in determining a **fact** in issue.” (emphasis added).

Although an attorney may offer an expert opinion in limited circumstances, none of those circumstances is present here. See e.g. *In re Estate of Lenahan*, 511 So.2d 365, 372 (Fla. 1st DCA 1987) (draftsman of will qualified as an expert may assist court in understanding complexities of case, but shall not be permitted to testify as to interpretation of language used in will since polestar of any will construction proceeding is the intent of the testator); *Warwick, Paul & Warwick v. Dotter*, 190 So.2d 596 (Fla. 4th DCA 1966) (in professional malpractice case based on attorney's failure to attend divorce trial, testimony by lawyer regarding substantive and procedural law is admissible). Kantor's testimony, which consists solely of legal opinion, is precisely the kind of expert testimony that must be excluded under Florida law.

Similarly, it is improper to permit an expert to express an opinion which applies a legal standard to a set of facts. *Christian v. State*, 693 So. 2d 990, 993 (Fla. 1st DCA 1996) *quashed on other grounds*, 692 So. 2d 889 (Fla. 1997) (citing *Gurganus v. State*, 451 So.2d 817, 821 (Fla.1984); *Shaw v. State*, 557 So.2d 77 (Fla. 1st DCA 1990), and Ehrhardt, *Florida Evidence* § 703.1 at 775 (2013 Edition)). As Boston Avenue admits in its motion, Kantor was specifically

retained to apply a legal standard to a set of facts. Accordingly, Judge Early properly excluded the proffered expert testimony.

3. Public Interest Weighs in Favor of Denying the Stay.

Another factor this Court may consider when deciding whether to grant a stay is whether the stay is in the public interest. *White Construction Co.*, 526 So.2d at 999. Granting a stay and allowing the School to remain open would be a disservice to both Boston Avenue students and the public at large. If the stay is granted, Boston Avenue students will continue to regress from their District peers in academic performance at an F-rated school, and taxpayer funds will continue to flow needlessly to a school that is failing Florida's children.

WHEREFORE, for all the foregoing reasons, VCSB respectfully requests that Boston Avenue's *Time Sensitive Motion for Stay Pending Appeal* be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished via electronic mail to Christopher V. Carlyle, Esq. at served@appellatelawfirm.com and Brandon S. Peters, Esq., at bpeters@peterstrialgroup.com this 12th day of June, 2013.



for Theodore R. Doran, Esq.

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