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IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

FILED

2005 MAR 10 A 11: 22

DIVISION OF
ADMINISTRATIVE
HEARINGS

DAVID MENKE,

Case No:

CA

L.T. No: DOAH 04-3835PL

Petitioner,

vs.

BROWARD COUNTY SCHOOL
BOARD,

Respondent.

_____ /

PETITION FOR WRIT OF PROHIBITION

Petitioner, DAVID MENKE, files this petition for a writ of prohibition (1) to prevent respondent, BROWARD COUNTY SCHOOL BOARD ("BOARD"), and Hon. Claude B. Arrington, Administrative Law Judge, Division of Administrative Hearings (DOAH) from acting further with regard to respondent's untimely filed¹ petition for formal proceedings on an administrative complaint

¹ Petitioner is cognizant that the untimely filing of petitions *by the party whose substantial interests an agency seeks to affect* uniformly has been held not to be a jurisdictional defect. See, e.g., O'Donnell's Corp. v. Ambroise, 858 So. 2d 1138, 1139 (Fla. 5th DCA 2003), citing Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla.1988) and Appel v. Fla. Dep't of State, Div. of Licensing, 734 So. 2d 1180 (Fla. 2d DCA 1999). However, those cases present different issues than when an *agency* seeking to deprive a person of a protected property right fails to act within statutorily

(continued...)

seeking the dismissal of petitioner from his position as a teacher employed by the BOARD and (2) to prevent the BOARD from taking any further action itself to terminate petitioner's employment as sought in the administrative complaint, the time within which it was required to afford petitioner a formal Chapter 120 hearing having long expired. In support of this petition, DAVID MENKE shows:

Basis for Invoking Court's Jurisdiction

This court has jurisdiction of this petition for a writ of prohibition under Article 5, Section 4(b)(3), Florida Constitution (1968 Revision) and Florida Rule of Appellate Procedure 9.100. A writ of prohibition is the appropriate procedural device to prevent an administrative agency from acting in the absence of jurisdiction. See Town of Ponce Inlet v. Dragomirecky, 884 So. 2d 408, 410 (Fla. 1st DCA 2004)(granting writ and directing DOAH to dismiss landowner's amended petition for administrative hearing where Florida Building Commission, acting through DOAH, lacked statutory authority over landowner's appeal of decision of local board of appeal). A writ of prohibition also has been granted to

¹(...continued)
prescribed time limits. No case has been located determining the issue addressed by this petition: whether an administrative agency has jurisdiction to recommend, or take, disciplinary action outside the applicable time limits imposed by mandatory statutory language against an employee who has timely requested a formal Chapter 120 hearing

review denial of a motion to dismiss predicated on an agency's failure to take action within the time prescribed by statute. In re Forfeiture of One (1) 1994 Honda Prelude, 730 So. 2d 334 (Fla. 5th DCA 1999)(granting plaintiff car owner's writ of prohibition and holding that the trial court erred in denying plaintiff's motion to dismiss because defendant Department of Highway Safety failed to promptly proceed in its forfeiture of the vehicle).

The Facts Upon Which Petitioner Relies

1. Petitioner is a high school physics teacher who was suspended without pay on September 21, 2004 pending a determination by the BOARD, his employer, of whether he should be terminated for "misconduct in office" and "immorality" for allegedly exchanging inappropriate "instant messages" with female students as alleged in an administrative complaint filed by the Broward County Superintendent of Schools, Dr. Frank Till.²

² A copy of the administrative complaint appears in the Appendix at 1.

2. On September 21, 2004, the same day as the BOARD's action, the petitioner requested a formal hearing.³ The BOARD received the petitioner's request on September 23, 2004.⁴

3. Section 1012.33(6), Florida Statutes, which governs the procedure by which a teacher can be terminated, provides in pertinent part:

6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing ***shall be conducted*** at the district school board's election in accordance with one of the following procedures:

1. A direct hearing conducted by the district school board ***within 60 days after receipt of the written appeal***. The hearing ***shall*** be conducted in accordance with the provisions of ss. 120.569 and 120.57....; or

2. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of

³ Copies of the record of BOARD action and petitioner's hearing request appear in the Appendix at 2 and 3, respectively.

⁴ A copy of a return receipt from the postal service appears in the Appendix at 4.

the Department of Management Services. *The hearing shall be conducted within 60 days after receipt of the written appeal* in accordance with chapter 120....

(Emphasis added.)

4. Chapter 120.569(2)(a), Florida Statutes provides in pertinent part:

Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. *If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request.* A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1)...

(Emphasis added.)

5. The BOARD made its election to proceed under section 1012.33(6)(a)(2), Florida Statutes, and to refer the formal hearing to which petitioner is entitled to an administrative law judge assigned by the DOAH, rather than conducting the hearing itself. However, the BOARD did not notify the DOAH of its election within fifteen days after it received petitioner's written request as required by section 120.569(2)(a). Rather, it notified the DOAH of its election by letter dated October 25, 2004 — 25 days after receipt of petitioner's

request for a formal hearing.⁵ Subsequently, the DOAH assigned Hon. Claude B. Arrington, Administrative Law Judge, to hear the administrative complaint.

6. On February 24, 2005, after the formal hearing he had requested had been continued twice over his objections on the BOARD's motions,⁶ petitioner moved to dismiss the administrative complaint on the ground that the BOARD had not made its election to defer hearing to the DOAH within fifteen days as required by section 120.569(2)(a), Florida Statutes, and that DOAH therefore was without jurisdiction in these proceedings. Petitioner noted in his motion that he also intended to challenge the jurisdiction of the BOARD to act on the administrative complaint in the event the motion to dismiss the complaint by DOAH was granted (thereby returning the administrative complaint to the BOARD).⁷

⁵ A copy of the BOARD's letter of notification appears in the Appendix at 5.

⁶ Copies of the first motion, response and order continuing the formal hearing appear in the Appendix at 6. Copies of the second motion, response, supplement to the motion and order continuing final hearing appear in the Appendix at 7.

⁷ A copy of respondent's motion to dismiss and transmittal letter appear in the Appendix at 8. The "order on computer inspection" referenced in the letter is the subject of a petition for certiorari filed contemporaneously, or as nearly contemporaneously as circumstances allow, with this petition for writ of prohibition.

7. On March 4, 2005, after further briefing by the parties,⁸ ALJ Arrington verbally denied the motion to dismiss, noting that he was uncertain whether he could reduce his ruling to a written order until after returning on March 11, 2005 from a week-long hearing commencing March 7, 2005. Due to the nature of the issue presented and relief sought, as well as the issues presented in the companion petition for certiorari⁹ that petitioner is filing as near to contemporaneously as circumstances allow, this petition is presented prior to entry of the written order.

Nature of Relief Sought

Petitioner seeks a writ of prohibition directed to the BOARD and ALJ Arrington (1) preventing Judge Arrington from acting further in this case except to

⁸ The BOARD's response to the motion to dismiss and petitioner's analysis distinguishing its cases appear in the Appendix at 9 and 10, respectively.

⁹ The petition for certiorari petitioner has filed, or imminently will file, seeks review of discovery orders, including an order requiring petitioner to produce two computers located in his home, the hard disks of which the BOARD's "computer expert" will copy in their entirety and then search for evidence to support the allegations of the administrative complaint. Petitioner contends that the orders violate his rights under the Fifth Amendment and require the disclosure to the BOARD's expert of privileged communications and information. The ALJ denied a stay of the orders and, absent relief from this court, petitioner will be required to produce the computers on March 11, 2005, at noon. Petitioner also has filed, or imminently will file, a motion to review the denial of his motion to stay.

enter an order granting the motion to dismiss the DOAH proceedings on the administrative complaint and remanding it back to the BOARD, and (2) preventing the BOARD from acting further with regard to the administrative complaint against petitioner except to enter an order dismissing it, and requiring petitioner's reinstatement and payment of his back salary in accordance with section 1012.33(6), Florida Statutes.

Argument and Citations of Authority in Support of Petition

Petitioner, faced with allegations that the BOARD contends justify his termination, has a due process right to a formal hearing held as provided in sections 1012.33(6), 120.569(2)(a) and 120.57(1), Florida Statutes. See Johnson v. School Bd., 403 So. 2d 520, 524 (Fla. 1st DCA 1981)(citing Board of Regents v. Roth, 408 U.S. 564(1972); Perry v. Sindermann, 408 U.S. 593 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Slochower v. Board of Education, 350 U.S. 551 (1956) for the proposition that a tenured teacher has a legitimate claim of entitlement to continued employment absent sufficient cause for his discharge, and therefore has a property interest in continued employment of which he could not be deprived without procedural due process meeting constitutional standards).

The Florida Supreme Court recently has affirmed that where, as here, a statute provides for the deprivation of a property right, its procedural requirements — including those requiring that some act “shall” be performed within a set period — are mandatory. DeGregorio v. Balkwill, 853 So. 2d 371, 374 (Fla.2003) (holding the requirement in section 932.704(4), Florida Statutes to “promptly proceed” with a forfeiture action is mandatory, and that under section 932.701(2)(c), “promptly proceed” means what it says: “to file the complaint within 45 days after seizure”). The DeGregorio court stated that if the seizing agency fails to file the complaint within the prescribed time, the forfeiture proceeding can be dismissed on the claimant’s motion, noting that to do otherwise would render “the statute’s mandate that such complaints be filed ‘promptly’... illusory.” 583 So.2d at 386. It expressly approved the decision in One 1994 Honda Prelude, supra at n. 1, which had granted a writ of prohibition to prevent the trial court from proceeding further on an untimely filed forfeiture complaint except to return the vehicle to its owner.

The language in both sections 1012.33(6)(a) and (b) and in section 120.569(2)(a), like that in the forfeiture statute, is mandatory: section 1012.33(6) provides that the hearing “shall be conducted” either directly by the BOARD or by

an administrative law judge assigned by DOAH within 60 days after receipt of the employee's written request for a hearing;¹⁰ section 120.569(2)(a) similarly states that if the referring agency requests an administrative law judge, it "shall so notify" the DOAH within 15 days after receipt of the petition or request. As noted in DeGregorio as rationale for holding that the time requirements of that statute were mandatory,

"Generally, where the word 'shall' refers to some required action preceding a possible deprivation of a substantive right, the word is given its literal meaning." Stanford v. State, 706 So. 2d 900, 902 (Fla. 1st DCA 1998) (relying on S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977), and Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1962)). In Neal, we explained that in its normal usage, "shall" has a mandatory connotation. Id. Only when a particular provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, orderly and prompt conduct of business is the provision generally regarded as directory. Id. (quoting Reid v. Southern Dev. Co., 52 Fla. 595, 42 So. 206 (Fla. 1906)). "Most certainly, where the statute provides for the deprivation of a property right, the procedural requirements...in question cannot be regarded as an 'immaterial matter' or a 'matter of convenience rather than substance.'" Id.

853 So. 2d at 374.

¹⁰ The main body of section 1012.33(6) refers to an instructional employee's "written request for hearing" while subsections (a) and (b) of that statute refer to the "written appeal" but it is clear that both reference the employee's written application for a hearing at which he intends to contest the charges against him.

As the DiGregorio court noted with regard to the forfeiture statute, to allow the BOARD and ALJ Arrington to ignore time constraints contained within a statute affording a due process hearing renders the limitations “illusory.” 853 So. 2d at 386. See also Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) (“It is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially meaningless ...”).¹¹

The tenet recognized in DiGregorio — that the legislature means what the legislature says — has special significance in the administrative arena.

¹¹ While no decision was found addressing whether the time limits in sections 120.569(2)(a) and 1012.33(6) are mandatory, in Johnson, 403 So.2d at 525, in construing powers of a school board under former section 231.36, the predecessor to the present section 1012.33(6), the First District Court of Appeal noted:

When the school board ... suspends a member of the instructional staff without pay, the school board must with reasonable dispatch initiate and diligently prosecute proceedings under the appropriate subsection of Section 120.57, Florida Statutes, to the end that the risk of wrongful suspension be minimized.

The court went on to note, however, that “[s]ince a prompt hearing is in the interest of the suspended employee, he would necessarily have the right to waive any objection to a delay. The time periods involved in this case are neither condoned nor condemned as that is not an issue before us.” Id. at n. 8. This observation, which was dicta, does not change the result urged in this petition.

It is black-letter administrative law that “[a]n agency has only such power as expressly or by necessary implication is granted by legislative enactment” and that “[a]n agency may not increase its own jurisdiction.” Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982), rev. den., 436 So. 2d 98 (Fla. 1983). Further, “it is held that deviations from an agency’s statutorily established sphere of action cannot be upheld because (sic) based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel.” Gulf American Corp. v. Florida Land Sales Board, 206 So. 2d 457, 462 (Fla. 2nd DCA 1968). In considering the effect of an administrative agency acting outside the parameters defined by statute, the courts have analogized to subject matter jurisdiction in courts:

Subject matter jurisdiction means the power of the court to deal with a class of cases to which the particular case belongs, Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926), and it concerns the power of the court to adjudge as to the general question involved before it. Quigley v. Cremin, 94 Fla. 104, 113 So. 892 (1927); Crill v. State Road Dept., 96 Fla. 110, 117 So. 795 (1928); Curtis v. Albritton, 101 Fla. 853, 132 So. 677 (1931). If a court has no jurisdiction over the subject matter, it has no jurisdiction to entertain questions pertaining thereto. Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927). Moreover such jurisdiction cannot be waived. Judicial proceedings which are taken without subject matter jurisdiction are void in the strictest sense of the term. Roberts v. Seaboard Surety Co., 158 Fla. 686, 29 So.2d 743 (1947).

Swebilius v. Florida Constr. Industry Licensing Board, 365 So. 2d 1069, 1071

(Fla. 1st DCA 1979). In Swebilius, the court held that under section 468.112(1), Florida Statutes, the licensing board had jurisdiction over a complaint only if there was no local board, but in the present case, such a board existed. The court also held that petitioner was not estopped from raising the issue for the first time on appeal because an administrative agency could not enlarge its jurisdiction, nor could jurisdiction be conferred upon it by agreement or consent of the parties.

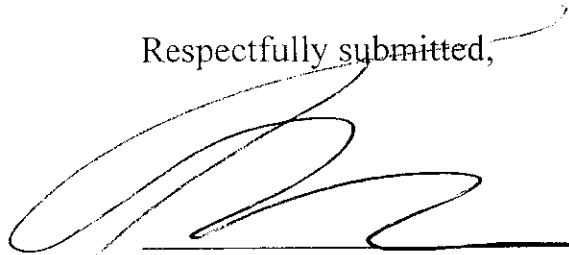
Here, the prerequisite to the exercise of jurisdiction by an administrative tribunal is not the absence of a local board as it was in Swebilius, but rather acting on the administrative complaint, including by electing which agency will provide the formal hearing and holding the formal hearing, within a statutorily prescribed period of time. Since the BOARD failed to invoke the jurisdiction of DOAH within the mandatory 15 days after petitioner requested a formal hearing, and no hearing has been held within 60 days after petitioner's request, as required by sections 120.569(2)(a) and 1012.33(6)(b), respectively, the administrative law judge is without jurisdiction to determine the issues raised by the administrative complaint and should have granted petitioner's motion to dismiss the DOAH proceeding. Likewise, since the BOARD has failed to hold a hearing on the

administrative complaint within the time mandated by section 1012.33(6)(a), the administrative complaint should be dismissed and petitioner reinstated with his back salary paid.

Conclusion

Based on the argument presented and authorities cited, petitioner prays that his petition for a writ of prohibition be granted and that this Court afford him relief as requested above.

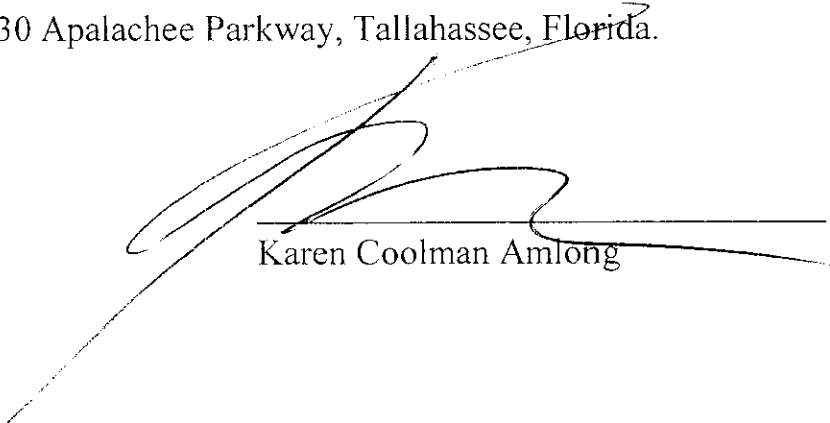
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Amlong', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 7 day of March, 2005 upon Mark Anthony Emanuele, Esquire, Panza, Maurer & Maynard, P.A. Bank Of America Building, Third Floor 3600 North Federal Highway, Fort Lauderdale, FL 33308-6225 and Hon. Claude B. Arrington, Administrative Law Judge, Division of Administrative Hearings, DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida.



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