

IN THE SUPREME COURT OF FLORIDA

S.C. READ, INC. and JENNIFER
R. FINCH,

Supreme Court Case No.: SC07-744

Petitioner(s),

v.

SEMINOLE COUNTY SCHOOL BOARD,
_____ /

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

L.T. CASE NO.: 5D05-1203

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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ISSUE PRESENTED

Pursuant to Rule 9.120(d), *Fla. R. App. P.* (2007) the sole issue presented in this brief is the discretionary jurisdiction of the Supreme Court of Florida to review the case at hand. Petitioner, SC. READ, INC., contends review of the Fifth District Court of Appeal's decisions in the lower court matter are within the Supreme Court's discretionary jurisdiction as set forth in Rule 9.030(a)(2)(A)(iv), *Fl. R. App. P.* (2007), which states that Supreme Court of Florida has discretionary jurisdiction to review a "...decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law."

STATEMENT OF CASE AND FACTS

The Seminole County School Board began high school rezoning in Seminole County. Prior to commencement of the rezoning process, the School Board promulgated and enacted a valid rezoning procedure, Policy "J", that all parties agreed the School Board was required to follow in a rezoning initiative. Policy J set forth a 10-step process procedure for rezoning in Seminole County. Pursuant to the Policy J, the School Board established a committee consisting of parents, teachers, and administrative staff to formulate rezoning plans, a Core Committee,

and delegated the authority to create plans, reject and approve plans, and to submit plans for consideration and selection by the School Board. The Core Committee created potential rezoning plans for submission to the School Board. The School Board was required to meet with the Core Committee to discuss and revise plans. Subsequent to these meetings or workshops the School Board was required to select a plan offered by the Core Committee. However, midway through the process the School Board members learned of the contents of plans to be submitted, without conducting a meeting under the Sunshine Laws, and discontinued following the steps and requested a rezoning plan directly from the Superintendent of Schools. This plan was never submitted to the Core Committee for review or consideration. The plan was later adopted by the School Board without the School Board having conducted a single meeting with the appointed Core Committee on any plan submitted by either the Core Committee for the Superintendent of Schools.

Petitioner alleged that the School Board failed to follow the procedures and requirements of Policy J in adopting a rezoning plan, and, therefore, that the subsequently adopted rezoning plan was invalid and an arbitrary and capricious government act. A formal administrative hearing was held on the matter. After

the hearing, the Administrative Law Judge (“ALJ”) entered a Recommended Order denying Petitioner’s petition to invalidate the rezoning rule. See *SC. Read, Inc. et al v. Seminole County School Board*, 2005 Fl. Div. Admin Hear, LEXIS 921 (DOAH 2005). The Division of Administrative Hearing adopted the Recommended Order and entered a Final Order. In the Recommended/Final Order, the ALJ ruled that Policy J was not a controlling rule of law as to the School Board’s actions in rezoning. (Final Order at Page 34, Paragraph 60) Secondly, the ALJ found that the School Board did not fully or strictly comply with the procedures of Policy J. The ALJ specifically, and repeatedly, in at least four provisions of its order, held that the School Board did not fully comply with its enacted policies and procedures and determined that less than full compliance with the policy was sufficient. The ALJ stated: (1) the School Board “substantially complied”; (2) “...Policy J was *essentially* followed...” (Final Order, Page 32, Paragraph 56) . “Policy J was followed *as a practical matter*...” (*Id.* at Page 32, Paragraph 57); (4) “...the policy and the parameters of the policy were followed *to the extent adherence was possible and appropriate*.” (*Id.* at Page 41, Paragraph 74) The ALJ determined that *any deviation from the policy was “harmless error” or insignificant.* (*Id.* at Page 32, Paragraph 56).

Petitioner then timely filed a Notice of Appeal with the Fifth District Court of Appeal. On January 26, 2007, the Fifth District Court of Appeal entered a *per curiam* decision with a brief opinion. (Appendix “A”). In its *per curiam* decision, the Fifth District Court of Appeal held, in pertinent part, as follows:

We find no reversible error and affirm. In particular, we cannot agree with appellants’ contention that the Seminole County School Board’s policy J mandated the Board’s adoption, without change, of one of the plan alternatives selected by the core committee.

Petitioner filed a Motion for Rehearing, Rehearing en Banc and for Clarification which the Fifth District Court of Appeal summarily denied without opinion on March 21, 2007. (Appendix A) On April 20, 2007 Petitioner filed its Notice to Invoke Jurisdiction of the Supreme Court.

SUMMARY OF THE ARGUMENT

This Honorable Court has discretionary jurisdiction over the instant matter because the ruling of the Fifth District Court of Appeal is in direct conflict with the rulings of this Honorable Court and First, Third and Fourth and District Courts of Appeal. The Fifth District Court of Appeal created a conflict between the district courts of appeal in upholding a ruling by an administrative law judge that (1) an agency is not bound by its validly promulgated policies and procedures; and (2)

that a government need only “substantially or “practically” comply with procedures and may deviate from its enacted policies and procedures.

This Honorable Court has ruled that an agency’s promulgated rules and policies are binding and have the full force and effect of law. *Florida Livestock Board v. Gladden*, 76 So. 2d 291 (Fla. 1954). Additionally, the status of the law in sister courts to the Fifth District Court of Appeal is that a government entity or agency must follow its promulgated rules and policies in performing government functions. An agency’s deviation from established policy constitutes an invalid governmental act and a denial of due process to the citizens subject to the authority of the government entity. Consequently, this Honorable Court may exercise its discretionary jurisdiction to review the decision in this matter because the Fifth District Court of Appeal’s decision in the instant matter creates a conflict with other district courts of appeal.

ARGUMENT AND AUTHORITIES

Petitioner requests this Honorable Court to accept jurisdiction over the instant matter for review pursuant to its discretionary jurisdiction. Discretionary

jurisdiction is appropriate to address issues where a decision of a district court of appeal expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

The effect of the Fifth District Court of Appeal's decision of January 26, 2007 and the denial of Petitioner's Motion for Rehearing on March 21, 2007 was to affirm and adopt as correct the ALJ's rulings that a government entity is not bound to its promulgated rules and procedures and that all that is required of a government entity is essential, practical or substantial compliance with any promulgated rule. The Fifth District Court of Appeal's decisions are in direct conflict with decisions of this Honorable Court and with the decisions of the First District Court of Appeal, the Third District Court of Appeal and the Fourth District Court of Appeal. First, the Fifth District Court of Appeal adopted a ruling that the promulgated rules of a government or administrative body are not legally binding or controlling upon the government with the full force and effect of a law. Secondly, the decisions establish a new "substantial compliance" standard for construction of governmental rules and actions constraining government entities. Other appellate jurisdictions require a strict or full compliance standard. The First District Court of Appeal's holdings are in clear

and direct conflict with previous Florida district court of appeal and Supreme Court decisions on the same issues of law. Therefore, this issue is within the Florida Supreme Court's discretionary jurisdiction to consider.

The decision of the Fifth District Court of Appeal regarding the ruling of the ALJ's ruling that the promulgated policies of the Seminole County School Board were not controlling or binding law on the School Board is in direct conflict with this Honorable Court's decision in *Florida Livestock Board v. Gladden*, 76 So. 2d 291 (Fla. 1954). In *Florida Livestock*, this Court held that the validly enacted rules of an administrative agency are "rules" and have the force and effect of law.

The decision of the Fifth District Court of Appeal adopting and affirming the ALJ's creation of a "substantial compliance" standard is in express and direct conflict with the First District Court of Appeal's decisions in *Vantage Healthcare Corporation v. Agency for Health Care Administration*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997) (an agency statement that does not follow its own rules is itself an invalid rule), *Cleveland Clinic Florida Hospital v. Agency for Health Care Administration*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)(a change in procedure that is currently set forth in an adopted rule must be undertaken by rulemaking), and *Decarion v. Martinez*, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989)(until abandoned

or abrogated, an agency must honor its rules). The decisions also conflict with the Third District Court of Appeal's decision in *Frederick v. School Bd. of Monroe County*, 307 So. 2d 463 (Fla. 3rd DCA 1975), in which the Third District Court of appeal held that "... As a public agency, the School Board is bound to *fully* comply with its own rules and policies". Finally, The Fifth District Court of Appeal's decisions in this matter directly conflict with the Fourth District Court of Appeal's decision in *Riviera Beach v. Fitzgerald*, 492 So.2d 1382 at 1385 (Fla. 4th DCA 1986), in which the Fourth District Court of Appeal held that a "... failure of the Government to follow its own duly promulgated rules and published policies violates a citizen's rights to procedural due process." *Riviera Beach v. Fitzgerald*, 492 So.2d 1382 at 1385 (Fla. 4th DCA 1986) citing *Burnaman v. Bay City Independent School District*, 445 F. Supp 927, 936 (S.D. Tex. 1978).

CONCLUSION

If the Fifth District Court of Appeal's decisions in this matter are allowed to stand, there will not only exist a conflict in decisions in the State of Florida, but also, all government entities within the jurisdiction of the Fifth District Court of Appeal will have carte blanche to deviate from established laws, policies and procedures while other jurisdictions will be held to a strict compliance standard.

Citizens in the Fifth District Court of Appeal's jurisdiction subject to the power of the government entities will have no way to determine what policies, or portions thereof, are binding upon the government entity while citizens in other jurisdictions will have notice of the limits of the powers of the government by a review of promulgated and enacted rules, policies and procedures. In the Fifth District Court of Appeal's jurisdiction, who is to determine what is "substantial compliance," "essential compliance" or "compliance as a practical matter." What portions of a rule, policy or procedure must be completed with and what portion may be skipped or deleted by the government entity? Government entities in the Fifth District Court of Appeal now have a tool to interpret any portion of a policy, rule or procedure to effectuate the government goal. There will be no effective constitutional notice as to the constraints that are enforceable against a government entity in the Fifth District Court of Appeal's jurisdiction. Consequently, the citizens in this jurisdiction will be subject to arbitrary and capricious governmental acts and violations of their constitutional rights of due process because there is no rule constraining the government's actions.

This Honorable Court has discretionary jurisdiction over the matters in the instant case and should exercise that jurisdiction to ensure uniformity within the jurisprudence of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing on the ____ day of May, 2007 was served by regular U.S. Mail delivery upon Marcia K. Lippincott, Esquire, counsel for Respondent, at Post Office Box 953693, Lake Mary, FL 32795 and Ned N. Julian, Jr., Esquire at 400 E. Lake Mary Blvd., Sanford, FL 32773-7127.

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CERTIFICATE OF COMPLIANCE

The above counsel certifies in accordance with Rule 9.210, *FL. R. App. P.*
(2007) that this brief complies with the font requirement Rule 9.210, *FL. R. App. P.*
(2007) and has been computer generated in Times New Roman 14- point font.

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APPENDIX TO JURISDICTIONAL BRIEF

1. *SC. Read et al v. Seminole County School Board*,
2007 Fla. App. LEXIS 857 (Fla. 5th DCA 2007)

2. *SC. Read et al v. Seminole County School Board*,
2007 Fla. App. LEXIS 5723 (Fla. 5th DCA 2007)