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IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

JAMES H. MOORE, JR.,

Petitioner,

First DCA No.:
DOAH CASE NO.: 00-1056

vs.

SFD

ESCAMBIA COUNTY SCHOOL
BOARD,

Respondent.

**PETITION FOR JUDICIAL REVIEW OF NON-FINAL AGENCY
ORDER OR, IN THE ALTERNATIVE,
PETITION FOR CERTIORARI**

Pursuant to Fla.R.Civ.P. 9.100, Petitioner, JAMES H. MOORE, JR. ("Petitioner" or "Moore"), respectfully petitions this Court for judicial review under Section 120.68(1), Florida Statutes, or, alternatively, for a Writ of Certiorari, to review and set aside a non-final order entered by the Administrative Law Judge ("ALJ"), Honorable Stephen F. Dean, in a proceeding currently pending before the State of Florida Division of Administrative Hearings ("DOAH"). The Order for which review is sought denies two motions filed by Mr. Moore, both of which seek to compel discovery in the administrative proceeding. The ALJ's Order has not been reduced to writing, but was rendered during a motion hearing held on August 8, 2000. A true and exact copy of the transcript from the hearing is attached hereto and is incorporated as Exhibit "A".

I. BASES FOR INVOKING JURISDICTION

This Court has jurisdiction to review nonfinal orders of agencies, including interlocutory orders of the Division of Administrative Hearings, pursuant to Section 120.68(1), Florida Statutes. Further, this Court also has jurisdiction to issue a Writ of Certiorari under Art. IV, §4(b) Fla. Const., and Fla.R.Civ.P. 9.030(b)(2)(A). Corry v. Meggs, 498 So.2d 508 (Fla. 1st DCA 1986); Williston v. Roadlander, 425 So.2d 1175 (Fla. 1st DCA 1983)(certiorari lies to review an interlocutory order compelling discovery).

Mr. Moore contends that the ALJ's Order denying his motions to compel, in effect denies him the ability to conduct meaningful discovery absolutely essential to preparing and presenting his defenses to the charges leveled against him in this proceeding. As such, the ALJ's Order causes Mr. Moore immediate, irreparable harm, for which review of final action by the School Board will not constitute an adequate remedy. Under these circumstances, the Court is authorized to grant relief via judicial review of the ALJ's nonfinal Order, pursuant to Section 120.68(1), Florida Statutes, or by Writ of Certiorari, and by quashing the ALJ's Order.

II. STATEMENT OF THE FACTS

Mr. Moore was employed as the Principal at Pensacola Pine Forest High School for the -1999-2000 school year under an Administrative Contract. (A true and exact copy of Petitioner's Administrative Contract is attached hereto and incorporated herein as Exhibit "B"). During the 1999-2000 school year, and while Moore's Administrative Contract was still in effect, the Escambia County School District Superintendent

recommended the termination of Moore's Administrative Contract based upon allegations of misconduct. The Escambia County School Board ("Board"), adopted the Superintendent's recommendation at its February 16, 2000 meeting. At that meeting, the Superintendent recommended that Moore be placed in a teaching position pursuant to his underlying continuing contract, which Moore has held since 1977.¹ During the February Board meeting, the Superintendent was directed to come back to the Board at its March 21, 2000 meeting with a recommendation that Moore's continuing contract be terminated as well, thus rejecting the Superintendent's recommendation that Moore be reassigned to a teaching position.² The Superintendent heeded the Board's directive and returned a recommendation to terminate Moore's continuing contract during the March 21, 2000 Board meeting. Mr. Moore contends in the action below that procedural irregularities occurred during these Board meetings.

The underlying action before DOAH was initiated through a request by Moore for the conduct of an administrative hearing following the termination of his administrative contract. The School Board referred Moore's hearing request to DOAH and, thereafter, filed its petition to terminate Moore's Administrative Contract. (A true and exact copy of Respondent's petition is attached hereto and incorporated herein as Exhibit "C"). Moore

¹A teacher holds a "Continuing Contract" pursuant to §231.36 Florida Statutes (1999). An "Administrative Contract" is held pursuant to §231.36, Florida Statutes, (1999).

²The proceeding initiated before DOAH solely involves Moore's termination from employment pursuant to his administrative contract. The action to terminate Moore's continuing contract is the subject of an ongoing arbitration proceeding. However, the termination of Moore's continuing contract is relevant for present purposes based upon some of the defenses Moore has raised.

filed an answer to the petition on May 2, 2000. (A true and exact copy of said answer is attached hereto and incorporated herein as Exhibit "D").

Among the defenses Moore has raised in the underlying administrative action are that the School Board did not have proper cause to terminate his Administrative Contract; that the School Board was biased when it considered the recommendation of the Superintendent to terminate Moore's Administrative Contract; that administrative "double jeopardy" bars the termination of Moore; that Moore's due process rights under the Federal and Florida Constitutions have been violated; and that procedural irregularities led to the termination of Moore's contract.

During the course of the litigation before DOAH, Moore served his first set of Interrogatories on the School Board. On or about May 1, 2000, the School Board filed its response to the first set of Interrogatories.³ The Board objected to two of the Interrogatories (Interrogatories #14 and #15), which seek information regarding the manner in which the Board has treated similarly situated individuals who have been alleged to have engaged in wrongdoing. Thereafter, Mr. Moore sought to take the depositions of several School District officials, including School Board members. The Board objected to the conduct of the depositions of School Board members.

In response to the Board's failure to fully answer all interrogatories, Mr. Moore filed a Motion to Compel and Motion for Sanctions on or about May 10, 2000. In

³Copies of the First Set of Interrogatories and Responses thereto are included as exhibits to the Motions to Compel which form the basis of the instant petition. They have not been included as separate exhibits for the Court's convenience.

response to the Board's failure to produce School Board members for deposition, Mr. Moore filed a Motion to Compel the Taking of Depositions on July 12, 2000. (True and exact copies of both motions, with attachments, are attached hereto and incorporated herein as Exhibits "E" and "F", respectively).

During a case management conference held on August 3, 2000, the issue of Mr. Moore's Motions to Compel was raised. During that unrecorded proceeding, the ALJ indicated that he was not inclined to grant Moore's motions. However, a motion hearing was scheduled for August 8, 2000, which was reported and transcribed. (See Exhibit "A"). During the hearing, the ALJ granted in part and denied in part Mr. Moore's Motion to Compel directed to the failure of School Board to provide full and complete answers to Interrogatories #14 and #15. The ALJ granted Mr. Moore's motion to the extent the subject interrogatories requested information regarding information about similarly situated employees who have been terminated from employment, but would not allow Mr. Moore to discover information regarding the manner in which discipline has been meted out to similarly situated employees who have not been terminated, but who have been given some form of punishment short of termination. The ALJ's ruling on that Motion is one of the subjects of this Petition. (See Exhibit A at pp. 12 - 16)

With respect to Moore's Motion to Compel the Taking of Depositions, the ALJ ruled that the motion should be denied. (See Exhibit A at pp. 70 - 72). The ALJ's ruling in this regard is also the subject of this Petition.

III. NATURE OF RELIEF SOUGHT

Mr. Moore seeks an Order of this Court granting judicial review of, and quashing, the ALJ's Order which denies in part his Motion to Compel directed to the Interrogatories and which denies, in toto, his Motion to Compel the Taking of Depositions of members of the Escambia County School Board.

IV. ARGUMENT

Pursuant to Section 120.68(1), Florida Statutes, a preliminary, procedural, or intermediate order of an agency or an administrative law judge of the Division of Administrative Hearings is subject to immediate judicial review, if review of the final agency action would not provide an adequate remedy. §120.68(1), Florida Statutes, (1999). Interpretive case law holds that judicial review of an agency's nonfinal order is available and appropriate when that order has immediate and adverse consequences, for which review of final agency action will not provide an adequate remedy. Prudential Property & Casualty Ins. Co. v. Dep't of Insurance, 626 So. 2d 772 (Fla. 1st DCA 1993); Department of Community Affairs v. Division of Administrative Hearings, 588 So. 2d 272 (Fla. 1st DCA 199). Case law further provides that discovery orders in the administrative context are subject to judicial review under Section 120.68(1), Florida Statutes, when they may result in irreparable harm that cannot be remedied by appeal of final agency action. Id. at 773; Medivision of East Broward County, Inc. v. Dep't of Health and Rehabilitative Services, 488 So. 2d 886 (Fla. 1st DCA 1986).

Granting certiorari is appropriate when the administrative order to be reviewed

departs from the essential requirements of law, and the order causes material injury to the person seeking the writ such that there is no adequate remedy on appeal.⁴ Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995). Certiorari also is an appropriate vehicle for challenging the correctness of orders concerning discovery procedures. Malt v. Simmons, 405 So. 2d 1018 (Fla. 4th DCA 1981); Everglades Protective Syndicate v. Makinney, 391 So. 2d 262 (Fla. 4th DCA 1980).

As discussed herein, in this case both the statutory standard for judicial review under Section 120.68(1), Florida Statutes, and the standard for grant of certiorari are met. Accordingly, this Court should review the ALJ's Order denying Mr. Moore's Motions to Compel in this proceeding, and should quash that Order.

1. Mr. Moore will suffer immediate adverse consequences due to the ALJ's Order, which cannot be remedied by appeal of the School Board's final order.

Among the defenses Mr. Moore raised in this case to the School Board's action to terminate his employment were that the School Board did not have proper cause to terminate his administrative contract. To this end, Mr. Moore served Interrogatories on the Board, seeking information regarding the manner in which similarly-situated individuals, alleged to have engaged in similar conduct, have been disciplined by the Board. The purpose of that inquiry was to determine whether under School Board policy,

⁴ In Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1084 (Fla. 1st DCA 1985), the court looked to the Committee Notes to Florida Rule of Appellate Procedure 9.100 in noting that the statutory authority to review administrative nonfinal orders under Section 120.68, Florida Statutes, is analogous to and no broader than the right of review by common law certiorari.

proper cause has been established justifying the termination of Mr. Moore's contract. Importantly, in order to be able to determine whether other employees who engaged in similar conduct to Mr. Moore's were similarly treated — a key element in determining "proper cause", --- Mr. Moore needed to have access to the disciplinary records of all such persons, including those whose discipline fell short of termination, not just records for those who were terminated.

Nonetheless, the ALJ, in his ruling at the August 8 hearing, limited the scope of the response required to the Interrogatories to only those employees who had been terminated, thereby denying Mr. Moore his only means of determining whether he was treated similarly to others purported to have engaged in similar conduct — information essential to Mr. Moore to enable him to glean Board disciplinary policies for purposes of asserting his "no proper cause" defense to his termination. (Exhibit A, pp. 12 - 16)

The consequences of denying Mr. Moore the ability to obtain Board disciplinary policy key to his "lack of proper cause" defense are immediate and adverse. Mr. Moore simply cannot adequately prepare for the administrative hearing on his termination without the information he seeks through his Motion to Compel responses to his Interrogatories. There are no other means or sources through which Mr. Moore can obtain this information.

Moreover, because the information Mr. Moore seeks is factual information that he intends to proffer for admission into evidence at the hearing, denying him the opportunity to seek to enter that factual information in the record of the administrative hearing, but then allowing him to raise that issue on appeal of the School Board's final order simply is

not an adequate remedy. Pursuant to Section 120.57(1)(l), Florida Statutes, the Board in its final order cannot modify or reject the ALJ's findings of fact unless the Board first determines, from a review of the entire administrative record, that the ALJ's findings of fact were not supported by competent substantial evidence in the record. Moreover and importantly, the Board is not free to make its own supplemental findings of fact in its final order. This Court instructed in Florida Power & Light Co. v. Siting Board, 693 So. 2d 1025, 1027 (Fla. 1st DCA 1997) that it is not proper for an agency to make supplemental findings of fact about which the hearing officer made no findings.

Thus, if Mr. Moore is not permitted to obtain the factual information he seeks through Interrogatories Nos. 14 and 15 -- information that is key to his "lack of proper cause" defense -- and is not afforded an opportunity to have that information made a part of the record in the DOAH proceeding, then as a matter of law that information cannot be considered by the Board in its final order, nor can it be considered on appeal of the Board's final order to this Court. Siegel v. Career Service Comm'n, 413 So. 2d 796 (Fla. 1st DCA 1982)(a reviewing court may not substitute its judgment for that of the fact finder with respect to any disputed finding of fact). In other words, Mr. Moore's one and only opportunity in this proceeding to have that essential factual information entered into the administrative record is at the DOAH hearing. If Mr. Moore is denied that opportunity, he has no others. Clearly, then, appeal of the final order in this case is not an adequate remedy for Mr. Moore.

Similarly, Mr. Moore also argues in the DOAH proceeding that the School Board was biased in considering the recommendation of the Superintendent to terminate his

contract. Whether the Board members were biased is a crucial issue in this proceeding because due process and Section 120.665, Florida Statutes⁵, dictate that the decision whether to terminate Mr. Moore or subject him to less drastic disciplinary measures must be made by impartial decisionmakers. State ex rel. Allen v. Board of Public Instruction of Broward County, 214 So.2d 7, 9 (Fla. 4th DCA 1968). Moreover, Mr. Moore contends that the Board members lacked certain vital information when it made its decision to terminate him, and that deliberations regarding his termination were quite possibly made out of the Sunshine. To be able to ascertain factual information about Board member bias, any procedural irregularities in the deliberation process, or any substantive deficiencies in the Board's decision, Mr. Moore has sought to depose the School Board members who considered the Superintendent's recommendation and agreed with that recommendation that Mr. Moore's contract should be terminated. As with the Interrogatories, the ALJ's Order denied Mr. Moore his only means of access to this factual information which is vital to his defense in this case. Accordingly, for the reasons previously discussed with respect to the Interrogatories, the ALJ's Order has immediate, adverse consequences to Mr. Moore, which are not adequately remedied on appeal of the Board's Final Order.

Mr. Moore's reasons for obtaining the depositions of School Board Members is the same with respect to the defenses he has raised regarding due process violations and "administrative double jeopardy." Simply put, Mr. Moore will not be able to fully and

⁵ Section 120.665, F.S.(1), Florida Statutes, provides in pertinent part: "...any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable time prior to the agency proceeding...."

fairly litigate this case if he cannot depose the School Board Members to determine whether such violations occurred. In essence, in order to show that the Board's decision was flawed, Mr. Moore must be able to inquire from the School Board Members themselves, what they knew about the case prior to considering the Superintendent's recommendation regarding the termination of his administrative contract and the reassignment to a teaching position pursuant to his continuing contract (e.g., the decision made at the February, 2000 School Board meeting).

Any argument by the School Board that it is an "administrative body" and that, like members of the judiciary, it should be immune from deposition, should be rejected out of hand, especially given the fact that this case has been transferred under statutory procedures to DOAH for adjudication. It is well settled that "an administrative agency is not a judicial body or a court although its proceedings may be quasi-judicial in nature. Administrative tribunals are designed to fulfill purposes for which Courts are not designated." 1 Fla.Jur. 2d, *Administrative Law*, Section 16; see also, *Id.* at Section 70 ("an administrative agency is not a court; and as its adjudicating powers are administrative or quasi-judicial in nature rather than judicial, so are its proceedings in the exercise of such powers"), Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1977) (explaining the combination of investigative, prosecutorial and adjudicative functions of an administrative agency). In fact, this Court has disagreed with such a proposition. As illustrated in Lewis v. Life Savings & Loan Ass'n., 342 So.2d 1031 (Fla. 1st DCA 1977), cert. den., 354 So.2d 982 (Fla. 1977) an agency head may be subjected to a deposition in order to ascertain the manner in which he arrived at a final decision. Though in Lewis,

the purpose of the deposition was to ascertain the facts surrounding a rulemaking proceeding, the same principles apply with equal force in the instant case.

It is equally well-settled that unlike courts, administrative agencies are responsible for performing multiple statutory functions, among them, administrative and investigative duties relative to personnel decisions. Accordingly, an administrative body may decide a particular issue relating to personnel, and then be required by statute to put its proverbial "quasi-judicial hat" on and issue a final order following a DOAH hearing (as the School Board must do in the instant case). The request for depositions made by Mr. Moore relates to the administrative personnel decision made by the School Board Members in this case, not its decision relevant to any Final Order (which, of course, has not yet occurred). If Moore were to request the depositions of School Board Members following the issuance of the Final Order to delve in the quasi-judicial nature of its decision, any point raised by the School Board in this regard would be well-taken. The fact remains, however, that the School Board may raise traditional means of objection during any deposition and will be able to argue in any proposed findings of fact and conclusions of law to the ALJ that certain testimony should be given no weight or is simply inadmissible. However, to couch Mr. Moore's desire to depose the School Board Members as an attempt to remove them from any consideration in adjudicating the Final Order (as argued by the Board below) is simply an attempt to march a parade of horrors before this Court. Because of the different "hats" administrative bodies such as School Board Members wear, and because the School Board in the underlying DOAH hearing will be able to raise any arguments it deems relevant regarding the testimony given at deposition, this Court is respectfully

requested to reject any such argument.

For these reasons, the ALJ's Order effects immediate, adverse consequences on Mr. Moore, which cannot be adequately remedied on appeal of the final order. Accordingly, it is appropriate for this Court to grant judicial review under Section 120.68(1), Florida Statutes.

2. Nothing Insulates the School Board from Being Deposed in this Proceeding.

It is axiomatic that the scope of discovery under the Florida Rules of Civil Procedure is exceedingly broad. "The parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the parties seeking discovery or the claim or defense of any other party. . ." Fla.R.Civ.P. 1.280. Except in connection with work product, privilege refers to those recognized by the Law of Evidence. Tibado v. Brees, 212 So.2d 61 (Fla. 2d DCA 1968).

There is no recognized privilege in the Law of Evidence that would shield the School Board Members in the instant case from being deposed. Indeed, "no person in a legal proceeding has a privilege to: (1) refuse to be a witness. . ." unless a privilege set forth in the Florida or Federal Constitution, the Florida Evidence Code or some other Florida Statute allows them to so refuse. §90.501, Florida Statutes, (1999). Here, neither the Florida or Federal Constitutions, the Florida Evidence Code or Chapter 120, Florida Statutes recognizes any such privilege that would allow the School Board Members to

refuse to be deposed.

The District conceded as much in responding to the Motion to Compel the Taking of Depositions filed by Mr. Moore in the proceedings below. (A true and exact copy of the School Board's Response is attached hereto and incorporated herein as Exhibit G). As noted in its Response, "the objection to depositions of School Board Members is not based upon any privilege. It is based upon the lack of relevance and the ability of [Moore], through such depositions to create circumstances that would subvert the administrative procedures of the Florida Administrative Code." See, Exhibit G at p. 4.

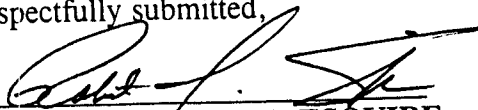
The Board's response below is mere folly. Moore has raised defenses to the termination action, which he is entitled to pursue. It is his livelihood that is at issue. Thus, the depositions of the School Board Members is "discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, [relating to the] defense of the party seeking discovery. . ." Fla.R.Civ.P. 1.280, and cannot be arbitrarily thwarted.

CONCLUSION

For these reasons, the Petitioner respectfully submits that this Court should grant judicial relief under §120.68(1), Florida Statutes, or, in the alternative, issue a Writ of Common Law Certiorari quashing the order of the ALJ denying Moore the opportunity to discovery comparable situations in which the Respondent has meted out discipline short of termination and quashing the ALJ's order denying Moore the opportunity to take the depositions of School Board members.

Dated this 7th day of September, 2000.

Respectfully submitted,



ROBERT J. SNIFFEN, ESQUIRE

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been furnished via U.S. Mail to: Joseph L. Hammons, Esquire, Hammons & Whittaker, P.A., 17 West Cervantes Street, Pensacola, Florida 32501 this 7th day of September, 2000.



ROBERT J. SNIFFEN

State of Florida
Division of Administrative Hearings

Sharyn L. Smith
Director and Chief Judge
Ann Cole
Clerk of the Division



The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
32399-3060

N O T I C E

FROM: *Ann Cole*
ANN COLE
Clerk of the Division

THE EXHIBITS TO THIS PETITION

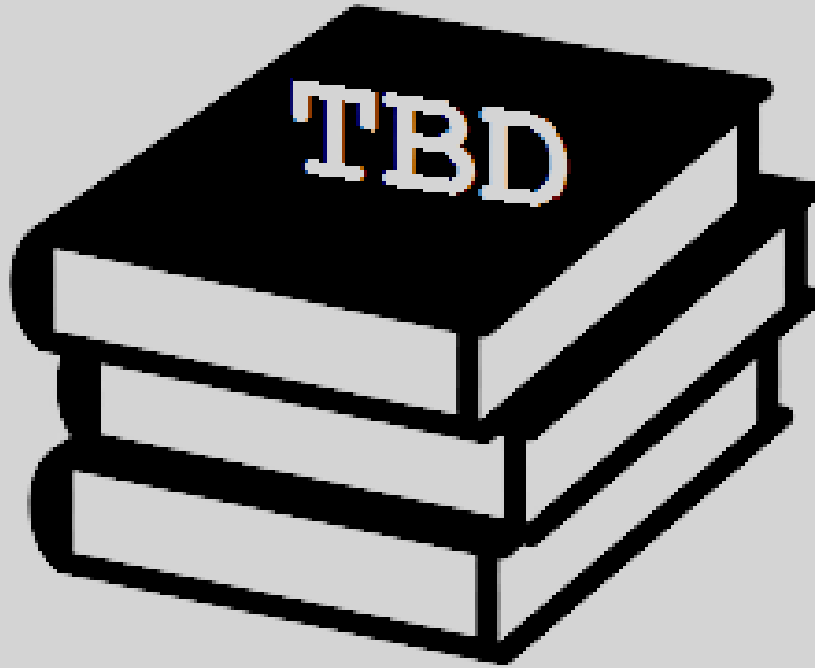
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