

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT OF FLORIDA**

**STUDENTS FOR ONLINE VOTING,
et. al.,**

Petitioners/Appellants,

Case No. 1D08- 833W¹

Lower Court Case No. 2008-CA-833-W

vs.

**STUDENT GOVERNMENT OF THE
STUDENT BODY OF THE
UNIVERSITY OF FLORIDA, et. al.,**

APPELLANTS' INITIAL BRIEF

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This is an independent circuit court case involving the same facts and legal issues.

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NOTE AS TO RECORD

This brief is being expedited to comply with the Court's order prior to the availability of a record, which will be sparse. References to facts are made to appendixes which are a part of this brief.

STATEMENT OF FACTS AND OF THE CASE

The University of Florida (UF) is a “part of the executive branch of state government state and [is] administered by a board of trustees.” (§1004.21 Fla. Stat.; Article IX, §7(c) Florida Constitution; and §1001.71 Fla. Stat.) Pursuant to law, the Board has delegated the administration of the UF to a chief executive officer known at the “president,” as follows:

Section 4.5 UNIVERSITY PRESIDENT - The University President shall serve as the Chief Executive Officer of the University. The University President shall be responsible for the operation and administration of the University, including efficient and effective budget and program administration, leading the University to accomplish its education missions and goals, monitoring educational and financial performance, consulting with the Board in a timely manner on matters appropriate to its policy-making and fiduciary functions, and serving as the University's key spokesperson. The President shall have the authority to execute all documents on behalf of the University and the Board consistent with law, Board policies, and the best interests of the University. The specific statutory powers and duties of the President are enumerated in Section 1001.75, Florida Statutes.

Board Bylaw Article IV, Section 4.5. See also §1001.74(5)(a) Fla. Stat. Board has authorized the UF president to take final agency action for the university in

“routine administrative actions,” such as involved herein, as follows:

(3) The authority and duties presently delegated by the Board of Trustees to the President, to be exercised in accordance with the Rules of the University and the Policies and Operating Memoranda of the Board, which authority includes the following:

.....

(b) To take routine administrative actions on behalf of the University of Florida

Board of Trustees under the Florida Administrative Procedures Act, Chapter 120, Florida Statutes, which shall not include the approval of University Rules.

Board of Trustees Resolution Number R03-16. (Copy attached as Appendix 1.)

Board has also authorized the president to delegate final agency action to

subordinates, as follows:

The University of Florida Board of Trustees hereby resolves:

(1) That the authority of the President of the University of Florida under current law, including the authority to enter into contracts on behalf of the University Board of Trustees, is hereby affirmed; and

.....

The President is authorized to further delegate to University personnel the authority described as long as such delegation is in writing and a copy is filed in the General Counsel’s Office.

Board of Trustees Resolution Number R01-1. (Copy attached as Appendix 2.)

Pursuant to that authority and subsequent authority granted to the Senior Vice

President for Administration, Board has delegated final authority in regard to

student affairs to the Vice President for Student Affairs. (Board of Trustees

Resolution R07-37 with attachments. Appendix 3.)

Pursuant to §1004.26 Fla. Stat., UF has a student government that is administered by officers elected from and by the student body. Pursuant to §1004.26(3) Fla. Stat., the UF student government has adopted a student government constitution (SG Constitution). The SG Constitution provides for amendments proposed by initiative and approved by the student body electors. (Article VIII Section 2, SG Constitution.) (A copy is attached as Appendix 4.)

Petitioners proposed an amendment to the SG Constitution, known as the “Online Voting” amendment, to permit electors to vote “online” in student government elections. Petitioners obtained the requisite number of signed petitions and submitted the Online Voting amendment to the prescribed UF student government officials to be placed on the February 2008 ballot for vote.

The SG Constitution creates a student government agency known as the Supreme Court of the Student Government of the University of Florida (SG Supreme Court). (Appendix 4, Article V Section 3.) The SG Supreme Court undertakes to review proposed amendments under criteria specified in the SG Constitution and in SG statutes prior to their being placed on the ballot. The SG Supreme Court found no defect in the Online Voting amendment in regard to these criteria, but concluded that implementation of online voting would violate the Fourteenth Amendment to the United States Constitution and Article VI of the

Florida Constitution. On that grounds and only that grounds the SG Supreme Court issued a decision that denied ballot approval for the Online Voting Amendment. (SG Supreme Court's decision is attached as Appendix 5.)

Petitioners appealed the SG Supreme Court decision to the UF final decision-maker acting, which by delegation is the UF Vice President for Student Affairs. (Appendix 3.) Thereafter, the UF Vice President for Student Affairs issued a final decision letter denying relief. (Copy attached as Appendix 6.) This decision states, in part: "This court [i.e., SG Supreme Court] is the final authority, under the Student Body Statutes and Constitution, on interpreting student body law." *Id.* (Square brackets and included statement added.) The UF Vice President's denial constitutes final agency action.

Petitioners filed a Petition for Extraordinary Writ of Mandamus and for Prohibition in the Circuit Court of the Eighth Judicial Circuit of Florida in and for Alachua County seeking an order to prohibit UF and the SG Supreme court from usurping the powers of an Article V Florida Constitution court and to mandate Respondents to place the Online Voting Amendment on the ballot. (Copy attached as Appendix 7.) Respondents filed a motion to dismiss alleging lack of jurisdiction.

To guard against untimeliness claims arising from the pendency of the

circuit court litigation, Petitioners independently invoked the original jurisdiction of this Court by filing herein an Original Petition for Extraordinary Writ of Mandamus and for Prohibition. Petitioners concomitantly filed a Motion to Stay Proceedings in this Court, seeking to stay this proceedings pending resolution of the independent circuit court action. This Court entered an order to grant the stay.

Thereafter, on May 1, 2008, the circuit court dismissed the petition in that court on the on the ground that extraordinary relief would be inappropriate in the circuit court because appellate review is available in this Court. The circuit court noted that it would have transferred that case to this Court, instead of dismissing, but for the fact that the record showed that Petitioners had filed an independent petition in this Court. (The circuit court's order is attached as Appendix 8.)

On May 20, 2008, Petitioners filed a motion in this Court to lift the stay and this Court lifted the stay on June 5, 2008. On July 25, 2008 this Court converted the petition to an appeal, accorded expedited treatment, and directed Petitioners to supplement its appendix with a copy of the February 22, 2008 letter from the Vice President for Student Affairs. Petitioners complied with the Court's order on August 1, 2008.

Thereafter, on August 1, 2008 Respondents filed a docketing statement, and on October 20, 2008 Petitioners filed their Motion for Case Management

Statement. That motion requested “this Court to enter an order directing the parties to undertake whatever actions this Court deems needed to complete its expedited review.” On February 9, 2009 this Court directed Petitioners to file an initial brief and to arrange for submission of a record. In partial compliance, Petitioners file this initial brief. To complete compliance, Petitioners have previously provided the record materials from UF (the agency) and have arranged with the clerk of the Eighth Judicial Circuit in and for Alachua County to submit the record of the independent prior proceedings in that court.

SUMMARY OF ARGUMENT

The final agency action that denied ballot position to the Online Voting amendment did so on the grounds that the amendment, if adopted, would violate the Fourteenth Amendment and Article VI Florida Constitution. This decision usurped judicial powers that are not available to an administrative agency. Accordingly, the matter is to be reviewed *de novo* by this Court. Under long established jurisprudence in this state, this Court should vacate the agency action under review and should remand with directions that Respondents submit the Online Voting amendment to the UF student body for special election or as otherwise directed by this Court.

ARGUMENT

DOES THE UNIVERSITY OF FLORIDA AS AN ADMINISTRATIVE AGENCY OF THE STATE POSSESS THE POWER TO REMOVE A PROPERLY SUBMITTED INITIATIVE FROM THE BALLOT IN A STUDENT BODY ELECTION ON THE GROUNDS THAT APPLICATION OF THE INITIATIVE, IF ADOPTED, WOULD VIOLATE RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT AND ARTICLE VI, FLORIDA CONSTITUTION?

Standard of Review.

The standard of review of an agency order rendering a decision that denies a right or privilege on grounds of unconstitutionality under the United States Constitution or the Florida Constitution is *de novo*. *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004).

Merits.

The Board of Trustees of the University of Florida is an agency of the State of Florida created pursuant to the Constitution and laws of the State and is the governing board of the University of Florida. In Resolution R01-1 and Resolution 07-37, the Board of Trustees delegated authority to the executive officers of the University of Florida to take routine administrative actions on its behalf under the Florida Administrative Code. Pursuant to that authority, the UF administration has delegated authority to take final agency action in matters pertaining to the Student Government of the University of Florida to the Vice President for Student

Affairs. (Appendix 3.) Pursuant to § 1004.26 Fla. Stat. and § 6C1-4.002 FAC, the UF Student Government is subject to the ultimate authority of the UF Board of Trustees and the Administration of the University.

In regard to the obtaining an election on a proposed amendment to the SG Constitution, the SG Constitution and statutes provide:

Students may propose amendments to the constitution upon a submission of a petition to the student honor court chancellor joined by ten percent of the electorate not later than twenty-eight days before the ratification election. Each Amendment shall embrace only one subject and matter directly connected to that subject.

Article VIII, Section 2, SG Constitution, and ;

Amendments to the Student Body Constitution proposed by petition in accordance with Article VIII, Section 2 of the Student body Constitution and referendum question proposed in accordance with Student Body Statute 790.31 shall be filed with the Supreme Court no later than 28 calendar days before the beginning of a regular or special election. If all constitutional and other requirements established by law are satisfied, the Supreme Court shall certify the petition to the Supervisor of Elections for inclusion on the ballot.

Section 773.0 of SG Statutes, and;

All petitions filed with the Supreme Court as provided in Section 773.0 shall satisfy all of the following requirements:

- (a) All names must be or must be accompanied by the signature of the individual who allegedly signed the petition;
- (b) All signatures must be in non-erasable ink;
- (c) All names must be signed exactly as the person's name is recorded with the Registrar's Office;
- (d) All names must be followed by student number,

address, and phone number, if any;

(e) Each page containing signatures shall have the proposed initiative statement of intent or referendum question stated in full at the top of the page;

(f) Each page containing signatures shall include the identity and signature of the person responsible for securing signatures for that page and that person shall certify all of the following:

(1) All signatures were made by different individuals;

(2) No threats or coercive statements were made to induce a person to sign the petition;

(3) The signature of the person responsible for securing the signatures may only be counted once.

(g) Each page containing signatures shall include the statement: "If you would like to read the full text of the initiative, as the person securing your signature and he/she is required by Student Body Statute to provide it."

Section 773.1 SG Statutes, and;

A three-fifths approval vote of those voting in the spring general election is necessary to ratify all constitutional amendments. Unless otherwise specified in the amendment, a ratified amendment shall be effective at 8:00 p.m. on the first day of May following the spring general election.

Article VIII, Section 4 SG Constitution.

Prior to the spring 2008 general election, Petitioners prepared and circulated a petition, entitled "Online Voting," to amend the SG Constitution. The wording of the Online Voting amendment is:

Should the Student Body Constitution be amended so that Online Voting becomes the only method of voting in all future Student Government elections provided that:

- 1) a voter may vote from any computer connected to the World Wide Web and logged in using a Gatorlink username and password;
- 2) the connection is secure and encrypted;
- 3) voter identity is secret and untraceable;
- 4) at least one voting booth is available on campus for any voter wishing to vote in private;
- 5) provisional paper ballots are made available on a case-by-case basis for any voter with a disability, special need, or any other extenuating circumstance?

Petitioners' Online Voting amendment petition satisfied all the requirements of the SG Constitution and statutes, including the requirement that petitions be signed by ten percent of the electorate and presented to the student honor court chancellor not later than twenty-eight days before the ratification election. The Online Voting amendment was also presented to the SG Supreme Court² not less than 28 calendar days prior to the 2008 spring general election. On February 12, 2008, the SG Supreme Court issued a decision that DENIED the placement of the Online Voting amendment on the 2008 spring general election ballot. (Appendix 5.) This decision made no finding that the Online Voting amendment did not conform to all criteria for ballot placement prescribed by the SG Constitution and statutes, but based its ruling solely on the ground that "it is unconstitutional under the Fourteenth Amendment of the United States

² Which is not a court of the State of Florida under Article V, Constitution of the State of Florida.

Constitution, and Article VI, of the State of Florida Constitution.”³ *Id.*

Petitioners appealed the SG Supreme Court decision to the UF final decision-maker, and UF, acting through the vice president for student affairs, affirmed, stating:

The question of the constitutionality of the Online Voting Initiative was first raised by the Supreme Court. This court is the final authority, under the Student Body Statutes and Constitution, on interpreting student body law. When an issue is raised in this court there is no opportunity for internal appeal.

(Appendix 6.) This constituted final agency action. In obtaining that final decision, Petitioners had exhausted all avenues of relief provided by the Board of Trustees and Administration of the University of Florida. Furthermore, no further administrative relief is available because the issue raised by this petition is solely a constitutional question under the Florida Constitution. That constitutional question is: “Did the UF final agency action that denied ballot access to the Online Voting amendment on grounds that the amendment, if adopted, would violate the United States and Florida constitutions constitute an *ultra vires* usurpation of judicial powers?” The answer to this question is irrefutably “Yes!”

Article V Florida Constitution vests the entire judicial power of the State of

³Two of the five student justices dissented with opinions, one of which prefigures the jurisdictional argument advanced here.

Florida *exclusively* in the Florida state courts, as follows:

The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts.
No other courts may be established by the state, any political subdivision or any municipality.

Article V §1 Florida Constitution. (Italics added.)

As provisions cited above establish, the University Florida is an administrative agency of the State. The UF student government and the SG Supreme Court are subagencies whose acts are subject to review, approval and disapproval by the UF administration acting through the UF Vice President for Student Affairs. As an administrative agency of the State of Florida, neither UF nor any of its subagencies possesses judicial power to render any right or privilege obtained in compliance with state law and regulations unconstitutional under the United States or Florida constitutions. *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695, 699-700(Fla. 1978)(“ the administrative hearing officer lacks jurisdiction to consider constitutional issues, *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976).”) This Court acknowledged that principle in *Café Erotica v. Florida Dept. of Transp.*, 830 So.2d 181 (Fla. 1st DCA 2002), wherein it cited *Gulf Pines* for that proposition that “a party is not required to argue the facial constitutionality of a statute before the administrative agency *because the agency*

lacks the power to declare a statute unconstitutional.” Id., 830 So.2d at 182.

(Italics added.) The Supreme Court also alluded to this principle in *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla. 1968), wherein it stated:

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, *it must be held unconstitutional as attempting to grant to the administrative body the power to say What the law shall be.*

Id., 216 So.2d at 211. (Italics added.)

In addition, this Court addressed this issue in a “mirror image” context in *Rice v. Department of Health and Rehabilitative Services*, 386 So.2d 844 (Fla. 1st DCA 1980). *Rice* considered whether or not a district court possesses jurisdiction to render a decision on the constitutionality of a question that had not been ruled upon in administrative proceedings below. In reply, this Court said:

Our action in this case necessarily implies, and we here confirm, that we consider it entirely proper for a district court of appeal to pass on the constitutionality of a statute or rule when that is necessary in reviewing agency action, though there has been no agency decision on the constitutional question *nor could there have been.*

Id., 386 So.2d at 848. (Italics added.) The critical principle is embedded in the italicized clause: “nor could there have been.” Finally, the Court has jurisdiction to provide the remedy requested. As stated in *State, Dept. of Environmental Regulation v. Falls Chase Special State, Dept. of Environmental Regulation v.*

Falls Chase Special Taxing Dist., 424 So.2d 787 (Fla. 1st DCA 1982):

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.

Id., 424 So.2d at 793.

Accordingly, the University of Florida and its SG Supreme Court have power to determine only whether the Online Voting amendment satisfied the requirements of the SG Constitution and Student Government statutes, and have no power to address whether the amendment, if adopted, would be unconstitutional in application under the federal and state constitutions. If the Online voting amendment were to be adopted, questions of that nature would be properly addressed in the state courts of Florida or the federal courts. Because it is neither, the University of Florida unconstitutionally usurped judicial powers when it denied ballot access to the Online Voting amendment on the grounds that it would deny constitutional rights in application.

CONCLUSION

Petitioners respectfully submit that Respondents unconstitutionally usurped the powers of the judiciary in denying ballot access to the Online Voting

amendment and request this Court to vacate the action of the University of Florida and order Respondents to submit the Online Voting amendment to an election in a special election or as otherwise prescribed by this Court.

CERTIFICATION

The undersigned counsel certifies that this document is prepared in Times New Roman 14 font.

CERTIFICATE OF SERVICE

I certify that a copy of this petition has been provided by United States Mail to David M. Delaney, Esq., Office of Vice President and General Counsel, University of Florida, P. O. Box 113125, Gainesville, Fl. 32611 on this 25 day of February 2009.

Respectfully submitted,

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APPENDIXES

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