

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

WILLIAM F. HORD, JONATHAN  
BUSH & JOHN LEE,

Petitioners,

v.

Case No. 1D19-0561

L.T. Case No.: 2018-CA-3509 F

LARRY ASHLEY, individually and in his  
official capacity as SHERIFF OF  
OKALOOSA COUNTY & WESTERN  
SURETY Company, as surety of Larry  
Ashley, in his official capacity as  
SHERIFF OF OKALOOSA COUNTY,

Respondents.

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**RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI**

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## **RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI**

In their petition for writ of certiorari, Petitioners assert that the circuit court exceeded its authority by requiring the Respondent Sheriff to convene the Personnel Standards and Review Board (“Board”) because the Special Act, chapter 81-442, Laws of Fla., (“Act”) had been repealed. As a result of the Act’s repeal, Petitioners maintain that the administrative mechanism for review of the Petitioners’ dismissals was eliminated and could no longer be available.

Petitioners’ arguments are unavailing because the trial court was afforded substantial authority, including supplemental relief, in granting the declaratory judgment. The reconstitution of the Board fell within the court’s authority to grant declaratory relief.

Significantly, Petitioners requested supplemental relief in their Amended Complaint to include a hearing under the Special Act. In short, Petitioners were provided what they asked for, but simply cannot accept the unfavorable outcomes in the Board proceedings.

### **I. JURISDICTION**

Respondents concede that this Court has jurisdiction to entertain the petition in this case. However, as more fully discussed *infra* Petitioners have failed to establish a basis upon which a writ of certiorari would be appropriate.

## II. FACTS UPON WHICH THE RESPONDENTS RELY

In 2010, Larry Ashley served as chief deputy of the Okaloosa County Sheriff's Office ("OCSO" or "Sheriff's Office"). Following the arrest of Sheriff Charlie Morris in February 2009, Ed Spooner was appointed interim sheriff until a new sheriff could be elected in November 2010. *App.*<sup>1</sup> 51-54 The candidates for the office of Sheriff of Okaloosa County in 2010 included, among others, Ashley, Petitioner Hord, and Steven Menchel. *App.* 2

Hord and Menchel lost in the primary election to Ashley. Following the primary, Sheriff Spooner reassigned Hord, who had previously worked as a sergeant in road patrol, to the position of evidence supervisor. *App.* 2

Ashley prevailed in the general election. He assumed his duties as Sheriff of Okaloosa County on November 8, 2010. *App.* 5

On November 9, 2010, Petitioners were informed that they would not be reappointed by Sheriff Ashley as deputy sheriffs in his Administration. *App.* 5 Including the three Petitioners, Ashley decided not to retain Sgt. Keith Van Dyke, Cpl. Mark Hafner, and Human Resources Specialist Sarah Irish. *App.* 55-59

Ashley did not reappoint Hord because he was known to be indecisive and fearful when he was a road patrol sergeant, and he lacked the respect of his subordinates. *App.* 59-60, 66-74, 142-144 Also, during the campaign, Hord

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<sup>1</sup> References to the Appendix are denoted by *App.* followed by the page number(s).

disparaged Ashley's integrity by likening him to a criminal because Ashley would not resign to run for office under the Hatch Act.<sup>2</sup> *App. 59-60, 65-66*

Additionally, Hord had undermined the authority of the public information officer on two occasions in which he promoted his candidacy at the expense of the agency. *App. 99-101* He was also dismissive of accreditation for the agency, which Ashley had supported as chief deputy to restore public trust of the OCSO following Morris' arrest. *App. 59-63*

Lee was not retained because he was deceptive to Ashley. Prior to the election, Lee initiated a conversation with Ashley and represented that he was not engaging in political activity. In fact, he was encouraging subordinates while on duty to support Steven Menchel. *App. 76-83*

Ashley was also critical of Lee's leadership skills. He had not recommended Lee for promotion earlier in Lee's career and was aware that Lee had been reassigned from a road patrol sergeant's position due to morale problems in his shift. *App. 88-94*

Bush had been previously disciplined for insubordination as a result of profanity directed toward his supervisor, suspended without pay for misusing his authority by conducting a sale of his boat at an OCSO substation, and counseled for improper maintenance of agency boats for which he was responsible when he

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<sup>2</sup> 5 U.S.C. §§ 1501-1508.

supervised the marine unit. Ashley viewed Bush as being lazy and having an entitlement mentality. In addition, a deputy under his supervision committed an unlawful arrest. *App. 103-111*

For these reasons, Ashley lacked confidence in Petitioners' ability to represent him. Ashley characterized his decision not to retain them as "no cause" dismissals, because he considered the totality of the issues concerning each of the Petitioners in deciding that he would not retain them. *App. 126-127, 140-141*

On November 19, 2010, Petitioners' counsel submitted a written request for an administrative hearing under sections 30.075, 30.076, Florida Statutes, to contest their terminations. *App. 5, 152-156* This review board was never convened. Shortly after the Sheriff received the Petitioners' request for a hearing, he was made aware of the Special Act, which established the Board to review OCSO employee dismissals. *App. 101, 114, 152* Petitioners' counsel was then notified of the Special Act. *App. 101*

The Special Act, unlike the *ad hoc* board contemplated under chapter 30, Florida Statutes, required a standing board comprised of five members: two members were to be elected by the employees of the Sheriff's Office, two members chosen by the Sheriff, and the fifth member selected by agreement of the other four

members. The Act established terms of office for the members and required the Sheriff to provide at least one part-time staff person.<sup>3</sup>

However, the Board was not in existence. It had not met in 20 years, when Larry Gilbert was Sheriff of Okaloosa County. *App. 114-116, 140-141*

Rather than incurring the time and expense of holding elections and convening the Board, Ashley decided to reinstate the Petitioners, albeit to the reduced rank of deputy sheriff. In separate letters from Undersheriff Don Adams dated November 29, 2010, Petitioners were notified of their reinstatement, placed on administrative leave with pay from the date of their initial separation on November 9, 2010, and directed to report to Sheriff Ashley's office on December 3, 2010 to be sworn in as deputies. *App. 99-103, 147-148, 152-153, 157-159*

Without giving any explanation to the Sheriff, Petitioners failed to appear on December 3, 2010 to be sworn in as deputies. Consequently, in letters dated December 7, 2010, Ashley informed Petitioners that they were considered to have resigned their positions. *App. 153, 160-162*

Due to the redundancy of the Special Act to the chapter 30 administrative hearing, as well as the time and expense of convening the Board, Ashley sought the repeal of the Special Act. A bill was introduced in the 2011 legislative session to

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<sup>3</sup> Ch. 81-442 §1(2), Laws of Fla.

effect the act's repeal. The bill passed the legislature and the Special Act was repealed on June 21, 2011. *App. 128-130, 164-167*

### **III. PROCEDURAL HISTORY OF THE CASE**

On the whole, Petitioners correctly state the case history, but they omit any mention that they raised the same jurisdictional argument arising from the repeal of the Special Act in their Petition for Mandamus, or in the Alternative Petition for Writ of Prohibition.<sup>4</sup> After this issue was fully briefed by the parties, the Court denied their Petition.

### **IV. STANDARD OF REVIEW**

When a district court of appeal considers a petition for second-tier certiorari review, inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law or in other words departed from the essential requirements of law. The departure from the essential requirements of law necessary to grant the writ is something more than mere legal error. *Custer Medical Center v. United Automobile Ins. Co.*, 62 So. 3d 1086, 1092 (Fla. 2010); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Rather, a departure from the essential requirements of the law occurs “*only* when there has been a violation of a clearly established principle of law resulting in a

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<sup>4</sup> *Hord v. Ashley*, 202 So. 3d 410 (Fla. 1st DCA 2016) (Table), Case No. 1D16-1077 (“Hord I”).

miscarriage of justice.” *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). Therefore, where there is no controlling precedent mandating a specific outcome in a case, certiorari relief is unavailable. *See Russ v. Philip Morris USA, Inc.*, 254 So. 3d 1146, 1148 (Fla. 1st DCA 2018) (citing *Kaklamanos*, 843 So. 2d at 889).

A district court’s exercise of its discretionary certiorari jurisdiction should depend on the court’s assessment of the gravity of the error and the adequacy of relief. The appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy but will preserve the function of this writ of review as a backstop to correct grievous errors that are not otherwise effectively subject to review. *Heggs*, 658 So. 2d at 531 n. 14.

**V. ARGUMENT: THE CIRCUIT COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY REQUIRING THE BOARD TO BE RECONVENED.**

In the case at bar, Petitioners contend that as a result of the repeal of the Special Act, the circuit court could not request the Board to reconvene. This argument ignores the underlying purpose of the declaratory judgment and the substantial authority granted to the court in effecting a declaratory decree, including supplemental relief and the court’s equitable powers. Furthermore, Petitioners cannot point to any binding precedent which directly speaks to the issues presented

in this case. Therefore, Petitioners cannot establish that the trial court departed from the essential requirements of the law. *See Russ*, 254 So. 3d at 1148.

**A. The circuit court acted within its authority to declare the rights of the parties and grant relief pursuant to the declaratory judgment.**

The jurisdiction of a county or circuit court to enter declaratory judgment is codified in section 86.011, Florida Statutes. Courts may declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. The declaration of the court may be affirmative or negative in form and effect, and a declaration has the force and effect of a final judgment. *See May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952). As the Florida Supreme Court commented, “It is difficult to find broader words or express a broader scope of jurisdiction.” *Id.*

The purpose of a declaratory judgment is to afford relief from uncertainty with respect to the rights, status, and other equitable or legal relations and is to be liberally construed. *Kelner v. Woody*, 399 So.2d 35, 37 (Fla. 3d DCA 1981). In view of this liberal construction, the boundaries of declaratory judgments are considered “elastic.” *Jackson v. Federal Ins. Co.*, 643 So. 2d 56, 58 (Fla. 4th DCA 1994).

Moreover, in a declaratory judgment action, the court has the power to provide as full and complete equitable relief as it would have had if such proceeding had been initiated as an equitable action. *See* § 86.111, Fla. Stat.; *Price v. Tyler*, 890 So.

2d 246, 252 n.4 (Fla. 2004). The court’s ruling is accorded great deference and a party must show clear error for reversal. *Kelner*, 399 So.2d at 38.

Trial courts also have the discretion to provide supplemental relief in a declaratory suit. *Dep’t. of Revenue v. Air Jamaica Ltd.*, 522 So. 2d 446, 448 (Fla. 1st DCA 1988). Section 86.011(2) permits a party seeking declaratory judgment to demand supplemental relief in the same action. Pursuant to section 86.061, supplemental relief based on a declaratory judgment may be granted when “necessary or proper.” *Id.*

Petitioners demanded supplemental relief pursuant to section 86.011(2) in Count II of their Amended Complaint. In particular, Petitioners represented that they were entitled to “an order for writ of mandamus compelling the process hearings which they are due” as well as back wages, reinstatement, and other relief. *App. 9* Petitioners specifically requested “an order mandating the review proceedings required by Chapter 30, Florida Statutes,<sup>5</sup> and the Special Act governing the Sheriff’s Office of Okaloosa County ...” *App. 10* Importantly, the Petitioners

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<sup>5</sup> Pursuant to § 30.071(1), Fla. Stat., the chapter 30 administrative hearing would not have been available because the Special Act established rights and procedures that were equivalent to or greater than those provided prescribed by chapter 30 proceedings. Petitioners’ motion for partial summary judgment did not assert a denial of a chapter 30 hearing as the basis for their due process claim but

acknowledged the apparent repeal of the Special Act in their Amended Complaint yet continued to request a hearing under the Act.<sup>6</sup> *App. 6*

Given the substantial authority provided to the circuit court in the declaratory judgment to address Petitioners' procedural due process rights and to provide "necessary and proper" supplemental relief, the court properly exercised equitable powers by requiring the Board to be convened to review Petitioners' dismissals. The hearings by the Board were the appropriate remedy for Petitioners' claim that they were denied procedural due process.

Petitioners' premise that the repeal of the Act negated the court's authority to reconstitute the Board for this limited purpose is completely at odds with the underlying purpose of declaratory judgments, their liberal construction, and the expansive powers accorded to the courts to effect their purpose. Because the declaratory judgment action centered on procedural due process violations, the court fully and completely exercised its authority in requiring the Board to be convened. As apparent from established decisional law, the remedy for a violation of Petitioners' rights was an evidentiary hearing before the Board.

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challenged only the lack of a hearing under the Special Act. *App. 25-31*

<sup>6</sup> Ironically, the Amended Complaint is dated June 21, 2010, the same date the Governor signed House Bill No. 4197 into law, thereby effecting the repeal of the Special Act. *App. 14, 164-167*

**B. The trial court correctly held that to remedy denial of Petitioners' rights to procedural due process, they were entitled to a hearing before the Board.**

When the trial court granted Petitioners' motion for partial summary judgment, the order was silent as to the relief to be provided. *App.* 32-35 The parties presented contrasting views as to the remedy to which the Petitioners were entitled. Petitioners, relying upon *West v. Board of County Commissioners, Monroe County*, 373 So. 2d 83 (Fla. 3d DCA 1979), requested back pay, damages and reinstatement. *App.* 40-44 Sheriff Ashley, citing the Third District Court of Appeal's later decision in *Metropolitan Dade County v. Sokolowski*, 439 So. 2d 932 (Fla. 3d DCA 1983), asserted that a hearing before the Board was appropriate. *App.* 36-39

Citing *Sokolowski*, the circuit court rejected Petitioners' position, holding that the remedy for the procedural due process violation hearing was a hearing before the Board. *App.* 45-47 In view of the factual similarities with the present case, *Sokolowski* is directly on point.

In *Sokolowski*, Metro-Dade police officers brought actions against the county for deprivations of their due process rights. The officers complained that although they had filed written appeal notices challenging disciplinary suspensions, the county had unduly delayed their hearings. The trial court rescinded their suspensions and required the county to reimburse the officers for their back wages. 439 So. 2d at 933-34.

On appeal, the Third District reversed, holding that the circuit court erred in rescinding the suspensions and awarding back pay. Relying on Supreme Court precedent<sup>7</sup> as well as the opinion of the Fifth Circuit Court of Appeals in *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981), the court held that awards of back wages for procedural due process violations were improper. 439 So. 2d at 935. The officers, concluded the court, were entitled to immediate hearings. Their claims for damages depended on whether their suspensions were finally deemed to be justified (at the hearings). *Id.* at 935.

Notably, the Third District cited *West* in its opinion, but only for the proposition that an “interminable delay is intolerable.” 439 So. 2d at 934. This Court has followed *Sokolowski* in at least two cases, holding that awarding back wages is not a proper remedy for violation of procedural due process. *See Miles v. Florida A&M University*, 813 So. 2d 242, 247 (Fla. 1st DCA 2002); *Simmons v. Dep’t. of Natural Resources*, 513 So. 2d 723, 724 (Fla. 1st DCA 1987).

In light of *Sokolowski* and the cases following its lead, it is readily apparent that Petitioners’ remedy for the procedural due process violations was an evidentiary hearing before the Board that would permit them to challenge just cause for their

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<sup>7</sup> *Carey v. Piphus*, 435 U.S. 247 (1978) (holding that damages in a case of justified termination may only be recovered for procedural defects). In *West*, *Carey* is not discussed, which may account for the court’s opinion that reinstatement and back pay would serve the “high purpose” of remedying a procedural due process violation arising from a delayed hearing. *See West*, 373 So. 2d at 87.

dismissals. “Fundamentally, due process requirements are satisfied if an opportunity for a meaningful hearing is provided prior to the final deprivation of a property interest.” *Rucker v. City of Ocala*, 684 So. 2d 836, 841(Fla. 1st DCA 1997) (quoting *Tauber v. State Bd. of Osteopathic Medical Examiners*, 362 So. 2d 90, 92 (Fla.4th DCA 1978)), *cert. denied* 368 So. 2d 1374 (Fla. 1979).

The trial court was fully exercising its authority under sections 86.011 and 86.061, therefore, in providing Petitioners a meaningful opportunity to be heard when it directed the Sheriff to convene the Board. In requiring the Board to review Petitioners’ dismissals, the court could rely upon its broad jurisdictional authority to address the rights of the parties, including the supplemental relief requested by Petitioners, and its considerable equitable powers.

**C. The repeal of the Special Act did not preclude the trial court from requiring the Board to be reconstituted.**

To succeed in their argument that as a result of the repeal of the Act the circuit court could not reconstitute the Board, Petitioners must show that the Act’s repeal divested the court of its equitable and statutory authority to grant this relief. Ironically, the principal case upon which they rely, *Florida Beverage Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 503 So. 2d 396, 399 (Fla. 1st DCA 1987), expressly recognizes a court’s authority to exercise its equitable powers notwithstanding the repeal of a statute which provided an administrative remedy to the parties.

In *Florida Beverage*, a wine distributor sued for breach of contract and declaratory judgment, alleging that the withdrawal of a brand of wine by the supplier was unsupported by good cause. However, the statute<sup>8</sup> prohibiting withdrawal of a brand of wine without good cause and authorizing the Division of Alcoholic Beverages to determine whether withdrawing of a brand was supported by good cause was repealed. When the Division of Alcoholic Beverages declined to hear the distributor's petition for declaratory statement, the distributor added the Division as a party. The trial court dismissed the complaint with prejudice based on the repeal of the statute. *Id.* at 397-98.

In reversing the dismissal of the complaint, this Court acknowledged the equitable authority of a trial court to adjudicate substantive rights of the parties notwithstanding the repeal of the statute which provided an administrative mechanism. Courts are available "to adjudicate the rights and obligations of the parties including where appropriate, reliance upon declaratory, injunctive and/or other remedial action." *Id.* at 399. The substantive right created by the repealed statute, the right to continue a brand unless good cause exists for discontinuing it, was held to be separable from the statute, which merely defined the remedies formerly available to the distributor. *Id.*

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<sup>8</sup> §564.045, Fla. Stat. (1979)

*Florida Beverage* does not support Petitioners' argument that upon repeal of the Act, the circuit court could not ensure that Petitioners were afforded a hearing to satisfy their due process rights by requiring the Board to be reconvened. In *Florida Beverage* the Court preserved the distributor's substantive right to continue a brand unless good cause was shown by the supplier, notwithstanding the repeal of the statute. In the case *sub judice*, the due process rights of the Petitioners, *i.e.* their right to a hearing to determine just cause for their dismissals, survived the repeal of the Act.

It was incumbent upon the circuit court, therefore, to fashion a remedy to fit the constitutional violation. The court gave the Petitioners precisely what they requested – a hearing before the Personnel Standards and Review Board. The repeal of the Act did not diminish the circuit court's authority to provide necessary and proper supplemental relief. In this case, the court reasonably concluded that Petitioners were entitled to a hearing by the Board to determine if they were removed for reasons other than just cause.

To effect this remedy, the court held that the Board would act according to the procedures set forth in the Special Act prior to its repeal. Again, the repeal of the Act did not undermine the trial court's authority to decide how the Board should be comprised and the procedures to be followed. By requiring the Board to abide by the Act's provisions, the court acted reasonably in accordance with its equitable and

statutory powers to ensure that the Petitioners were provided a meaningful and fair opportunity to be heard. Notably, Petitioners have not challenged the Board's findings or the circuit's decision as a denial of due process, an avenue available to them on second-tier certiorari review. *See Custer*, 62 So.3d at 1092.

Thus, by requiring the Board to be reconvened to hear Petitioners' dismissals, the circuit court did not ground its authority upon the Special Act, but rather upon its considerable equitable and statutory authority. The court did not defer fact-finding to the Board, but rather it created the remedy best-suited to meet the violations of their rights to procedural due process. Accordingly, the Board was lawfully constituted.

## **CONCLUSION**

In view of the record in this case and the applicable case and statutory authority, Petitioners have failed to establish that the trial court departed from the essential requirements of law. Petitioners have not shown that repeal of the Special Act divested the trial court of its equitable and statutory authority to reconstitute the Board as a remedy for deprivation of their due process rights.

Certainly, Petitioners have not met the exacting standard of a violation of a "clearly established principle of law resulting in a miscarriage of justice." *Custer*, 62 So.2d at 1092. In their Amended Complaint they requested a hearing before the Board as a remedy for the alleged due process violations. Ultimately, each Petitioner

was afforded an evidentiary hearing by the Board to challenge his termination. In each case, the Board made detailed findings of facts supporting its decision which have not been contested. Petitioners have offered no compelling authority for this Court to disturb such a result. The Petition should be denied.

Respectfully submitted:

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**CERTIFICATE OF COMPLYING WITH FONT REQUIREMENTS**

I HEARBY CERTIFY that the foregoing has been prepared in Times New Roman 14-point font as required by the Florida Rules of Appellate Procedure.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to: George R. Mead, II, Moore, Hill & Westmoreland, Maritime Place, Suite 100, 350 West Cedar Street, Pensacola, FL 32502 on this 5th day of April, 2019.

/s/ R. W. Evans  
Attorney