STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RENAISSANCE CHARTER SCHOOL, INC.,	)	
Petitioner,	)	
	)	Case No. 12-0887
vs.	)	
LEON COUNTY SCHOOL BOARD,	)	
Respondent.	)	

RECOMMENDED ORDER

A final hearing was conducted in this case on April 30, 2012, in Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephanie Alexander, Esquire
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For Respondent: Opal McKinney-Williams, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the School Board has the authority to include a provision in a charter that limits a charter school's annual capacity to the number of applications received as of a

date certain (March 1) and whether that proposed enrollment cap is legal under Florida law.

PRELIMINARY STATEMENT

On August 1, 2011, Petitioner, Renaissance Charter School, Inc. (RCA), submitted an application to open a new charter school in Leon County. The charter application was considered by the Leon County School Board (School Board) at its September 27, 2011, regular board meeting. In late November 2011, the parties began negotiating the terms of the charter. Following a series of correspondence, the parties met in January 2012 to discuss contract issues.

RCS requested mediation to resolve outstanding contract issues. Following two days of mediation, the parties were able to resolve all outstanding issues except for the issue as to an enrollment deadline of March 1. The mediator submitted a report to the Department of Education informing that the parties reached agreement on all but one issue, and an impasse was declared. Pursuant to section 1002.33(6)(h), Florida Statutes, the Department declared that the negotiation was at impasse.

On March 12, 2012, RCA filed a Notice/Request for Initiation of Proceeding with the Division of Administrative Hearings. A scheduling conference was held by telephone on March 19, 2012. Upon agreement of the parties, a Notice of

Hearing was issued scheduling the hearing for April 30, 2012. The hearing took place as scheduled.

Neither party presented the testimony of any witnesses. The parties offered Joint Exhibits 1 through 6, which were admitted into evidence.

The hearing was not transcribed. Petitioner filed an unopposed Motion for One-Day extension to File Proposed Orders, which was granted.

Petitioner timely filed a Proposed Final Order and Respondent timely filed a Proposed Recommended Order, which were considered in the preparation of this Recommended Order. Petitioner simultaneously filed Late-Filed Exhibits. Respondent filed a Motion to Strike Late-Filed Exhibits, to which Petitioner filed a reply. Upon consideration, the motion to strike is granted. All references to the Florida Statutes are to the 2011 version, unless otherwise indicated.

FINDINGS OF FACT

Stipulated Facts[1/]

1. RCA is a Florida not-for-profit corporation organized for the purpose of governing and operating charter schools.

2. The School Board is a public body corporate, organized and existing under the Florida Constitution and Florida Statutes to govern the provision of public education to students in Leon County.

3. On August 1, 2011, RCA submitted an application to replicate a high-performing charter school to the School Board, requesting approval of a start-up or new charter school in Leon County based upon a high-performing charter school already in existence.

4. On September 20, 2011, School Board staff sent written correspondence to the charter school informing them of several issues with its application, and that approval of their application would be contingent upon the fulfillment of stipulations set forth in the correspondence.

5. In paragraph 11 of the correspondence, the School Board informed the charter school that it would be required to "provide documentation to Leon County Schools by March 1, 2012, regarding the number of students who have completed official applications at the school, and this number will be utilized to set enrollment for the 2012-2013 school year."

6. RCS responded to the September 11 letter through email on September 23, 2011, stating that most of the issues outlined therein would be worked out during contract negotiations. School Board staff responded by reiterating that, for those items to be handled through the charter, the application would not be approved "as is."

7. The charter application was considered at its September 27, 2011, regular board meeting, and was unanimously approved, "contingent upon amendments to the application and compliance with deadlines as outlined in the [September 20] letter to [RCA].

8. RCS believed that, under the charter school statutes set out at sections 1002.33 and 1002.3311, Florida Statutes, and related regulations, the School Board was not legally empowered to conditionally approve a high-performing charter application, but instead could only legally approve or deny the application under limited circumstances. RCS communicated this position to the School Board during the charter negotiation process at the parties' meeting to negotiate the charter in January 2012.

9. In late November 2011, the parties began negotiating the terms of the charter and were ultimately able to reach agreement on all issues except the March 1 enrollment cap issue that is the subject of this proceeding.

10. On December 19, 2011, the School Board received a response from RCS to the correspondence of September 20 which stated "[t]he school's board will either have documentation that 862 students have enrolled in the school and in Genesis by August 1, 2012, or will provide documentation of available funding and an approved budget that will fully support the program described in the school's application at the number of

students enrolled in the school and in Genesis by August 1, 2012. The school will provide documentation to Leon County Schools by March 1, 2012, regarding the number of students who have completed official applications to the school, and this number will be utilized to set enrollment for the 2012-2013 school year." However, at no time did RCS agree to cap the enrollment for the proposed school as of the number of applications received by March 1 of any given year.

11. In January 2012, representatives for the parties met to work through specific terms in the proposed charter. The parties were unable to reach agreement on the March 1 enrollment deadline language.

12. The language in the proposed charter relating to the disputed issue states in pertinent part, "[t]otal annual enrollment for each year shall be determined by the total number of applications received by March 1 of each year."

13. RCS submitted a request for mediation in accordance with section 1002.33(6)(h). The parties participated in two days of mediation, assisted by Thomas Bateman, Supreme Court Certified Circuit Court Mediator, and were able to resolve all outstanding issues except for the issue relating to the March 1 enrollment deadline. Mr. Bateman submitted a mediation report to the Florida Department of Education declaring impasse as to this one issue.

14. On March 12, 2012, RCS filed a Notice/Request for Initiation of Proceedings with the Division of Administrative Hearings (DOAH).

15. RCS has broken ground on, and is currently in the process of constructing, a multi-million-dollar school facility in Leon County to house the school. Construction is currently scheduled to be completed as of late summer 2012.

16. RCS operates a number of other charter schools throughout the state and no other school district in which it owns and operates charter schools is enrollment limited to a March 1 deadline.

17. The School Board has granted charters to a number of other charter schools in Leon County. Currently, there are five charter schools operating in Leon County. All current charters contain the enrollment deadline provision at issue in this matter.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to section 1002.33(6)(h), Florida Statutes. The conditions precedent under section 1002.33(6)(h) for invoking DOAH jurisdiction have been met.

19. The Florida Legislature authorized the creation of charter schools as part of the state's program of public education in 1996. Ch. 96-185, Laws of Fla.

20. The current law concerning charter schools is found in chapter 1002, Florida Statutes. Section 1002.33(6), which governs this proceeding, reads in pertinent part:

> (6) APPLICATION PROCESS AND REVIEW.- Charter school applications are subject to the following requirements:
>
> (h) The terms and conditions for the operation of a charter school shall be set forth by the sponsor and the applicant in a written contractual agreement, called a charter. The sponsor shall not impose unreasonable rules or regulations that violate the intent of giving charter schools flexibility to meet educational goals. The sponsor shall have 60 days to provide an initial proposed charter contract to the charter school. The applicant and the sponsor shall have 75 days thereafter to negotiate and notice the charter contract for final approval by the sponsor unless both parties agree to an extension.
>
> The proposed charter contract shall be provided to the charter school at least 7 calendar days prior to the date of the meeting at which the charter is scheduled to be voted upon by the sponsor. The Department of Education shall provide mediation services for any dispute regarding this section subsequent to the approval of a charter application and for any dispute relating to the approved charter, except disputes regarding charter school application denials. If the Commissioner of Education determines that the dispute cannot be settled through mediation, the dispute may be appealed to an administrative law

> judge appointed by the Division of Administrative Hearings. The administrative law judge may rule on issues of equitable treatment of the charter school as a public school, whether proposed provisions of the charter violate the intended flexibility granted charter schools by statute, or on any other matter regarding this section except a charter school application denial, a charter termination, or a charter nonrenewal and shall award the prevailing party reasonable attorney's fees and costs incurred to be paid by the losing party. The costs of the administrative hearing shall be paid by the party whom the administrative law judge rules against. (emphasis added).

Whether a final or recommended order is contemplated

21. A threshold issue addressed by the parties is whether or not the above-quoted language confers final order authority on administrative law judges in this proceeding. Petitioner argues that a final order is appropriate, whereas the School Board argues that a recommended order is appropriate. The statute does not specify whether the order of the administrative law judge is a final or a recommended order.

22. The legislature has expressly conferred final order authority to administrative law judges in other contexts. See § 1003.57(1)(b). (In due process hearings concerning school boards and exceptional students, the decision of the administrative law judge is final, subject to further referenced review); and § 120.56(1)(e) (The administrative law judge's order shall be final agency action in challenges to agency

rules). In another subsection of section 1002.33, the legislature clearly describes the State Board of Education's decision to approve or reject the sponsor's denial of an application as final, and states, "The State Board of Education's decision is a final action subject to judicial review in the district court of appeal." § 1002.33(6)(d), Fla. Stat. The legislature did not similarly confer authority on the administrative law judge in section 1002.33(6)(h). Moreover, the word "final" is used in section 1002.33(6)(h) only in reference to the school board's final approval following a 75-day period of negotiation.

23. The School Board argues, and the undersigned agrees, that the doctrine of statutory construction, expressio unius est exclusio alterius, applies. "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." Young v. Progressive Southeastern Ins. Co., 753 So. 2d 80, 85 (Fla. 2000) (quoting Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996)).

24. In determining the legislative intent of authorizing an appeal to DOAH, it is helpful to examine the legislature's use of the term "appealed" contextually within the charter school statute. Section 1002.33(6) provides "an appeal" process to the State Board of Education concerning the denial of a

charter application, a termination, or nonrenewal. Section 1002.33(6) sets out the "appeal" procedure and provides that the dispute is forwarded to an independent fact finder, the Charter School Appeal Commission, to provide written recommendations to the State Board of Education. The State Board may then either accept or reject the written recommendation. The State Board will in turn issue a written decision which must be implemented by the sponsor. The State Board's decision is a "final action subject to judicial review in the district court of appeal." § 1002.33(6)(d). In essence, these procedures set out by the legislature for an appeal of a sponsor's decision to deny a charter mirror the APA procedures when a person challenges an agency decision that affects that person's substantial interests. See §§ 120.569 and 120.57(1), Fla. Stat.

25. In both instances, the dispute is forwarded to an independent trier of fact, who gathers the facts and makes a written recommendation to the agency. Like the Charter School Appeal Commission's recommendations to the State Board of Education, an administrative law judge renders a recommended order to the agency, and the agency will either accept or reject the recommended order or portions thereof. The agency will then enter a final order which is subject to review in the district court of appeal.

26. After careful consideration of the parties' arguments and a careful review of the statutes, the undersigned has concluded that, in the absence of an express grant of final order authority, the statute contemplates the entry of a recommended order by the administrative law judge.[2/]

27. Harmonizing the charter school statute and the Administrative Procedure Act (APA), the undersigned concludes that any recommended order entered pursuant to section 1002.33(6)(h) is directed to the school board which is an agency under section 120.52 and is responsible for the operation of the public school system, including charter schools. Consistent with the APA, the school board will then have final authority that may be subject to judicial review.

Nature of the Dispute

28. This dispute centers on a provision in the proposed charter which states that "total annual enrollment for each year shall be determined by the total number of applications received by March 1 of each year." RCS contends that the School Board is not permitted under Florida law to require such a provision in the charter and that the proposed provision limits charter school flexibility and choice contrary to the charter school statute. Petitioner further argues that the proposed March 1 deadline constitutes an unadopted rule.

29. The School Board argues that the March 1 deadline is a permissible use of its home rule power pursuant to section 4(b), Article IX of the Florida Constitution and section 1001.32(2), and that the deadline is reasonably designed to help the School Board appropriately plan for staffing at affected schools. The home rule power referenced by the School Board codified in section 1001.32(2), Florida Statutes, provides, "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law."

30. Section 1002.33(6)(h) prohibits school boards from imposing unreasonable rules or regulations that violate the "intent of giving charter schools greater flexibility to meet educational goals." This language is not an express prohibition to the inclusion of an enrollment deadline.[3/]

31. Under the charter school law, the capacity of a charter school is determined annually by the governing board of the charter school in conjunction with the sponsoring school board. § 1002.33(10)(h). It is noted that in section 1002.33(10)(i), relating to the capacity of high-performing charter schools, the school must inform the sponsor of "any

increase in enrollment" by March 1 of the school year preceding the increase in enrollment. § 1002.33(10)(i).[4/]

32. The charter school statute affords the parties the opportunity to negotiate terms of the charter or contract. The statute does not require that all school districts agree to identical terms. The enrollment deadline is one element of the contract to be negotiated. The undersigned concludes that the inclusion of a March 1 enrollment deadline in the proposed charter is not unreasonable.

33. Further, this enrollment deadline does not violate the intended flexibility granted charter schools in meeting educational goals. Educational goals include reading proficiency, testing scores, promotion, etc. See §§ 1002.33(5)(b)1.e. and 1000.03(5), Fla. Stat. The enrollment deadline provides a number from which both parties are able to plan staffing requirements. All current charter schools in Leon County contain the March 1 deadline.

34. Petitioner further argues that the School Board's imposition of the enrollment deadline violates section 1002.33(5)(b)1.d., which states that the "sponsor's policies shall not apply to a charter school unless mutually agreed to by both the sponsor and the charter school." This provision[5/] has been interpreted by the Fourth District Court of Appeal in Imhoptep-Nguzo Saba Charter School v. Department of Education

and Palm Beach County School Board, 947 So. 2d 1279, 1282 (Fla. 4th DCA 2007), as follows:

> While the subject provision was clearly aimed at giving charter schools some measure of academic and administrative freedom, we do not read this provision to prohibit the School Board from adopting and enforcing policies related to the creation, renewal or termination of the charter schools they sponsor. This is true because the legislature has delegated primary decision-making authority to the school boards over these basic decisions.

35. The court in Imhotep-Nguzo used as an example of a school board "policy" its sick leave policy for teachers, not matters concerning the creation of charter schools. The current wording of section 1002.33(5)(b)1.d., states that the school board policies shall not apply to a charter school unless mutually agreed to by both parties. Applying the reasoning of the court, the undersigned is not persuaded that the enrollment deadline is a school board policy as contemplated by section 1002.33(5). Even if it were, in typical contract negotiations, if two parties cannot agree to terms of a contract, they continue to negotiate or they walk away if no agreement can be reached.

36. Finally, RCA argues that the School Board's imposition of a March 1 enrollment deadline constitutes an unadopted rule. This argument becomes circular in that, as RCA points out, the School Board's policies shall not apply to a charter school

unless mutually agreed to by both the sponsor and the charter school." § 1002.33(5)(b)1.d. Therefore, by law, any rule adopted by the School Board regarding enrollment deadlines would not apply to the applicant charter school unless it is agreed to by the parties.

37. Section 120.52(1)(16) defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency. . . ."

38. Because the parties stipulated to all facts presented, there are few facts in the record on which to base a conclusion that this contractual provision constitutes an agency statement defined as rule. Without further evidence, the undersigned will not equate routine practice with an unadopted rule. While noting that the parties stipulated that all current charter schools in Leon County have a March 1 enrollment deadline, that evidence is insufficient to establish that this is a policy of general applicability that cannot be negotiated. See generally Ag. for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984 (Fla. 1DCA 2008) (court discusses what constitutes an agency statement of general applicability).

39. Based on the foregoing, the undersigned finds that the School Board's requirement that the charter contain a March 1 enrollment deadline does not violate the charter school's

flexibility or equitable treatment as contemplated by section 1002.33(6) and does not constitute an unadopted rule. This case comes to DOAH in an unusual procedural posture. That is, the parties are in the midst of a contract negotiation that has not been resolved. Consequently, the undersigned recommends that the School Board may include a March 1 enrollment deadline for RCS in the charter. Of course, RCS, as a party to any contract negotiation, is free to reject the charter contract, if it chooses not to become a charter school in Leon County. And, the parties may choose to continue to negotiate this issue.

40. Section 1002.33(6)(h) provides that the administrative law judge shall award reasonable attorneys' fees and costs to the prevailing party, and administrative costs. Because this is a Recommended Order, there is no prevailing party at this time. Jurisdiction is retained to determine the award of fees and costs at the appropriate time.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Leon County School Board issue a final order finding that the School Board's proposed contractual provision proposing a March 1 enrollment deadline does not violate the charter school law and does not constitute an unadopted rule.

DONE AND ENTERED this 1st day of June, 2012, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2012.

ENDNOTES

[1/] In this case, the parties have stipulated that there are no disputed issues of material fact, which would ordinarily result in the administrative law judge relinquishing jurisdiction to the agency. See s. 120.57(1)(i), Fla. Stat. However, in light of the express grant of jurisdiction set forth in section 1002.33(6)(h) and the fact that the parties did not dispute the review by DOAH despite the lack of a factual dispute, relinquishment is not appropriate here.

[2/] It is noted that in another case held pursuant to section 1002.33(6)(h), the administrative law judge issued a Final Order. Tampa School Development Corp., d/b/a Trinity School for Children, Case No. 11-2183 (Fla. DOAH Oct. 25, 2011). This case is currently on appeal to the Second District Court of Appeal, Case No. 2D11-5811.

[3/] This conclusion is based solely on the language of section 1001.32. Any action taken by the School Board pursuant to its constitutional power is beyond the scope of matters on which an administrative law judge may base a decision. See Decker v. Univ. of West Florida, No. 1D11-5021 (Fla. 1st DCA Apr. 24, 2012) ("The [Administrative Procedure] Act limits the definition of an agency to persons or entities "acting pursuant to powers

other than those derived from the constitution. § 120.52(1), Fla. Stat. The significance of this limitation is clear: when an officer or agency is exercising power derived from the constitution, the resulting decision is not one that is made by an agency as defined in the Administrative Procedure Act.") Thus, this order will not address the issue of whether the action by the School Board comports with its constitutionally derived powers.

[4/] In this case, the proposed charter school does not meet the definition of a high performing charter school as contemplated by section 1002.331(1)(a), Fla. Stat. Rather, it is an effort to replicate a high performing charter school currently in operation in another part of the state.

[5/] The court's opinion references section 1002.33(5)(b)4, Florida Statutes (2005), which at that time read, "The sponsor's policies shall not apply to a charter school."

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.