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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED

JUL 6 1983

EVELYN R. FLACK,

Petitioner,

SID J. WHITE
CLERK SUPREME COURT

By _____
Chief Deputy Clerk *[Signature]*

v.

HONORABLE BOB GRAHAM
AS GOVERNOR OF FLORIDA
AND HONORABLE GERALD
LEWIS AS COMPTROLLER
OF FLORIDA AND THEIR
RESPECTIVE SUCCESSORS
IN OFFICE,

Respondents.

PETITION FOR WRIT OF MANDAMUS

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BASIS FOR INVOKING JURISDICTION OF THE COURT

Pursuant to the provisions of Article V Section 3(b) (8) of the Florida Constitution Petitioner seeks to invoke the original jurisdiction of this Court, petitioning it to issue its Writ of Mandamus to the Respondent state officers to compel the Respondent Comptroller to issue an order, and seeking to compel the Respondent Governor to countersign such order requiring the Treasurer of the State of Florida to disburse state funds to Petitioner pursuant to the provisions of Article IV Section 4(e) of the Florida Constitution.

FACTS UPON WHICH PETITIONER RELIES

In 1974 Petitioner was appointed to fill the then unexpired term of the office of County Judge of Wakulla County, Florida. In 1974 she was elected to succeed herself in that office. In 1978 she sought reelection. Upon the canvassing of the ballots cast in the 1978 election, the canvassing board of Wakulla County declared J. Michael Carter to have been the winner in that election. Within 10 days of such certification Petitioner filed suit to contest the results of that election. That suit was dismissed by the Circuit Court and Petitioner appealed that dismissal to the First District Court of Appeal which reversed the lower Court's dismissal and reinstated the action. Flack v Carter, 192 So.2d 37 (Fla. 1st DCA 1980).

Upon remand and after numerous delays, not occasioned by Petitioner, the Circuit Court in December 1981 ruled in

Petitioner's favor, found that she had in fact been elected in the 1978 election, and that she had been the de jure County Judge of Wakulla County since January 2, 1979. The Circuit Court thereupon entered its judgment ousting J. Michael Carter from office. (Appendix 1)

Certain intervenors in the Circuit Court case, joined by the Defendant, J. Michael Carter, timely filed their notice of appeal to the First District Court of Appeal and Petitioned the District Court to stay the effect of the Circuit Court's Order. The District Court entered a stay order preventing Petitioner from assuming the duties of office of County Judge of Wakulla County. Some nine months later the District Court affirmed the Circuit Court. *Wakulla County, etc. v. Flack*, 419 So2d 1124 (Fla. 1st DCA 1982), *Pet. for Rev. Den.* 427 So2d 738 (Fla. 1983).

Following the affirmance of the Circuit Court by the District Court, the District Court dissolved its stay Order and on September 3, 1982 the Commission theretofore issued to J. Michael Carter was revoked by the Governor and on that date a Commission was issued to Petitioner commissioning her "to be Judge of the County Court in and for Wakulla County for a term of four years from the first Tuesday after the first Monday in January, A.D. 1979, in reference to the Final Judgment in Case No. 78-190 of the Second Judicial Circuit of Florida".

(Appendix 2)

In October 1982 Petitioner requested payment of the back salary which was due and unpaid to her from January 2, 1979 until September 3, 1982, the date said Commission was issued to Petitioner.

Although said back salary is due and owing to the Petitioner, the Respondents have failed to perform their ministerial and non-discretionary duty to requisition such payment from the Treasury of the State of Florida.

NATURE OF RELIEF SOUGHT

Pursuant to Constitutional authority hereinabove cited Petitioner petitions this Court to issue its Writ of Mandamus requiring the Respondents to forthwith requisition from the Treasury of the State of Florida a sum of money, to be paid to Petitioner in the amount of the salary to which she is entitled as County Judge of Wakulla County Florida from January 2, 1979 through September 2, 1982, together with such interest thereon as she may be entitled.

ARGUMENT

In state ex rel. Dresskell v. City of Miami et al, 13 So2d 707 (Fla. 1943) this Court recognized "the familiar rule of law pertaining to public officers which recognizes that if one is lawfully entitled to a public office, his right to salary attaches to the office and may be recovered in full, irrespective of any service rendered and without regard to the fact that he may have earned money elsewhere in private employment." The holding in Dresskell was that the

quoted rule is applicable to public officers but not applicable to public employees. Petitioner is, of course, a public officer.

In State ex rel. Williams v. Lee 164 So 536 (Fla. 1935), the Court had before it a petition for writ of mandamus to compel the comptroller to pay the back salary of a suspended officer who had been reinstated. The Court issued an alternative writ of mandamus to which the comptroller filed a motion to quash stating as one of his grounds:

"that the allegations of the writ failed to show that there are any funds or money in the treasury of the State of Florida appropriated for and applicable to the payment of the claim of the relator."

In its opinion the Supreme Court quoted extensively from advisory opinion to Governor Sholtz, 154 So 154 (Fla. 1934). That opinion dealt with the payment of salary to one actually occupying office, but the Court in Williams adopted its rule as applicable in the case of reinstated suspended officers seeking back salary.

Williams was, of course, decided under the provisions of the 1885 Constitution, Article IX, Section 4 of which prohibited any money from being drawn from the Treasury except in pursuance of appropriations made by law. That is the same provision contained in Article VII, Section 1(c) of the 1968 Constitution.

Article XVI, Section 3 of the 1885 Constitution provided that the salary of every officer shall be payable monthly upon his own requisition. Article II, Section 5(c) of the 1968 Constitution provides that the compensation and method of payment of State and County officers shall be fixed by law.

In Williams the Court said that the restrictions of the Constitution to the effect that no money shall be drawn from the Treasury except in pursuance of appropriations made by law must be construed in connection with the equally cogent provision requiring the payment of officers salaries. The Court said:

"The effect of Section 3 of Article XVI is to make disburseable by way of a Constitutional appropriation out of any available monies in the State treasury in the general State funds, the amounts of salaries fixed by law for State officers to receive, which salaries, after being so fixed by State Statute, then become payable. . . ."

The legislature, at all times pertinent to Judge Flack's case, has fixed the salaries of County Judges pursuant to the mandate of Article II, Section 5 of the present Constitution and under the rule in the Williams case, such fixing of salary constitutes a constitutional appropriation from any available monies in the State treasury of funds sufficient to pay all such salaries.

Twelve years after Williams the Legislature statutorily recognized this type of appropriation in enacting Chapter 57-71 Laws of Florida (Section 111.05, Florida Statutes), dealing

with the payment, from the general funds of the state, of back salaries to reinstated officers who have been suspended by the Governor.

The doctrine of equal protection of law demands the same protection for salaries of those officers who though not subject to suspension by the Governor may otherwise be improperly removed from office.

The case of Wright v. MacVicar, et al, 88 So2d 541 (Fla. 1956) dealt with a suspended Constable who was subsequently reinstated. The reinstated constable sought to recover from the County, as his compensation during suspension, an amount equal to the amount which was received by the acting Constable during the term of suspension. The Supreme Court held that the County must pay that full amount of compensation even though the same amount had been paid to the acting Constable, and even though part of the amount received by the acting Constable had come from non-governmental sources (fees).

It must also be noted that at the time of the 1978 election, Petitioner was the incumbent County Judge and the Courts have now found that no one else was duly elected in that election to succeed her.

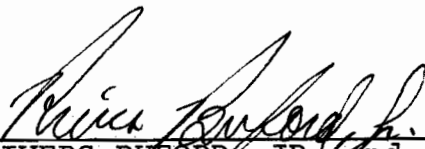
As was stated in 1978 Op. Att'y. Gen. Fla. 078-72 (May 2, 1978):

"Section 5(b), Art. II, State Const., states, in pertinent part, that "(e)ach state and county officer . . . shall . . . continue in office until his successor qualified." This section was derived from a substantially similar provision found at s. 14, Art. XVI of the 1885 constitution:

All state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified.

In State ex rel. Landis v. Bird, 163 So. 248, 264 (Fla. 1935), the Court observed that s. 14, Art XVI, "prescribes a duty as well as a substantial right of an incumbent at the expiration of his official term to continue in office until his successor is 'duly qualified.'" (Emphasis supplied.) See also State ex rel. Hodges v. Amos, 133 So. 623, 625 (Fla. 1931), noting that this section contemplates that an incumbent "shall continue in office, or perform the official duties of the office after the expiration of his official term. . . until his successor is duly qualified. . . ." ****

"In State ex rel. Landis v. Bird, at 264, the Court noted that the words "duly qualified" as used in s. 14, Art. XVI, supra, contemplated the giving of bond or the taking of the oath of office in addition to a legal election or appointment."


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