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FILED

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

OCT 3 1983 ✓
SUD J. WHITE
CLERK SUPREME COURT
Chief Deputy Clerk *ph*

EVELYN R. FLACK,
Petitioner,

v.

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

Respondents.

RESPONSE TO RESPONDENTS' RESPONSE
TO PETITION FOR WRIT OF MANDAMUS

RIVERS BUFORD, JR. AND
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Attorneys for Petitioner

In State ex rel Hatton v. Joughin, 103 Fla. 877, 138 So 392 (Fla. 1931) this Court held that one's right to office and the emoluments thereof is protected by the Fourteenth Amendment to the United States Constitution. The Court went on to say that this right is a species of property which the law will protect and will also redress if one is wrongfully deprived thereof. (at 395)

Black's Law Dictionary, Fourth Edition, defines "emolument" as "[t]he profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites;***".

Black defines "redress" as "[t]he receiving satisfaction for an injury sustained."

The Courts have ruled that Petitioner was duly elected to the office of Wakulla County Judge for a term of four years beginning January 2, 1979.

The Governor has issued, to her, a Commission for that term (Petition Appendix 2) which Commission declares her right to the emoluments of that office for that term.

From January 2, 1979 until September 3, 1982 Petitioner was wrongfully deprived of the emoluments of that office and it is redress for that deprivation which she seeks in this proceeding.

Petitioner does not question the fact that a salary was paid to the de facto County Judge during the term for which Petitioner was elected. Such payment, however, in no way affords Petitioner redress for the loss of salary to which she was entitled.

On page 4 of their Response, Respondents pose the question, "If no money may be drawn from the treasury except in pursuance of appropriations made by law, how can Respondents be deemed to have a duty to pay Petitioner when the moneys appropriated have already been lawfully expended?"

This premise that the moneys appropriated have already been lawfully expended was apparently taken from the second paragraph of Mr. Conn's letter (Respondents' Appendix 8).

There is, of course, no appropriation for "Salary of County Judge, Wakulla County." The appropriation for such purpose is contained in the line-item appropriation "County Courts = Salaries and Benefits" contained in each appropriations Act. For the periods in question, such line-items were as follows:

<u>Laws of Florida</u>	<u>Item</u>	<u>Fiscal Year</u>	<u>Amount</u>
78-401	804	1978-1979	\$10,278,883
79-212	797	1979-1980	11,752,834
		1980-1981	11,851,396
80-411	92T	1980-1981	(- 34,351)
81-206	901	1981-1982	14,409,603
82-215	892	1982-1983	15,747,072

As will be seen from the Affidavit of Paula Patronis (Appendix "A" hereto) not once during the years in question were all the monies appropriated to pay salaries and benefits for County Judges, and certain other County Court employees, expended.

That does not even take into consideration the ability of the Chief Justice to initiate Judiciary intra-budget transfers of appropriated funds when necessary.

Not only is Respondents' question not relevant to the issue of Petitioner's entitlement to redress, it is based on the mistaken premise that all appropriations for the payment of County Judges' salaries were spent.

In addition to the line-items enumerated above, there is yet another appropriation from which Petitioner may be afforded redress.

By the sections of the several Appropriations Acts cited on page 3 of Respondents' Response, the Legislature "fixed" the salaries of County Judges. By the provisions of the line-items set out herein, the Legislature appropriated funds to pay the salaries so "fixed".

In Williams v. Lee, 164 So 536 (Fla. 1935) this Court dealt with the question of the source of funds to redress the deprivation of office when the Comptroller denied the availability of "funds or money in the treasury of the State of Florida appropriated for and applicable to the payment of the claim of the relator".

After noting the Constitutional prohibition against drawing money from the Treasury except in pursuance to an appropriation made by law (same in the 1968 Constitution), the Court held that Section 3 of Article XVI of the 1885 Constitution requiring the monthly payment of officers' salaries upon requisition, constituted a constitutional appropriation from any available monies in the treasury of the amounts of salaries "fixed" by law for officers to receive.

By Article XII Section 10 of the 1968 Constitution, Section 3 of Article XVI of the 1885 Constitution has become a statute, subject to modification or repeal by the legislature. Petitioner submits that it has not been modified or repealed and, therefore, it now constitutes an appropriation made by law as required by Article VII, Section 1(c) of the 1968 Constitution.

The redress Petitioner seeks is not without factual precedent. Prior to 1977 Monroe W. Treiman was County Judge of Hernando County. In 1976 Edwin W. Malmquist challenged him and apparently won the election by six votes. Judge Treiman filed suit challenging Judge Malmquist's qualifications to run. The trial court, holding a qualification statute unconstitutional, held that Judge Malmquist was the winner but entered an order allowing Judge Treiman to hold office pending appeal.

On February 17, 1977 this Court in Treiman v. Malmquist 342 So 2d 972 (Fla. 1977) ruled ("without privilege of filing

rehearing" (at 977)) that Judge Malmquist had won the election. Judge Malmquist, therefore, assumed office on February 17, 1977.

As will be seen by the Affidavit of Jane Flynn (Appendix "B" hereto), Judge Treiman was paid the salary of that office, as fixed by law, from January 1, 1977 to February 17, 1977 (the date of this Court's opinion). On March 3, 1977 the former Governor and the present Respondent Comptroller granted redress to Judge Malmquist by paying him the entire back salary to which he was entitled from January 4, 1977 to February 17, 1977, the period for which Judge Treiman was paid for occupying his office.

Respondents, on page 5 of their Response, seek comfort for their position from Ball et al v. State ex rel Harvey, 108 Fla. 163, 146 So 830 (1933).

In that case, Harvey was removed from office, he surrendered same and made no claim thereto until after the term to which he had been elected by the City Council had expired. He then, without having gotten a prior adjudication of his entitlement to office, filed a petition seeking to mandamus the payment of back salary.


The holding in Ball was that one may not compel the payment of back salary appurtenant to an office without first having established his title to the office.

Such is not the case here. Within days after the disputed election Petitioner filed suit to establish her

title to the office. That suit ultimately established her title to office and serves as Ball's essential prerequisite to the bringing of this Mandamus proceeding.

Petitioner has proceeded with diligence and her election to office for the term beginning January 2, 1979 has been established and is no longer in dispute. She was denied the emoluments of that office until September 3, 1982. That denial should be now redressed by this Court.

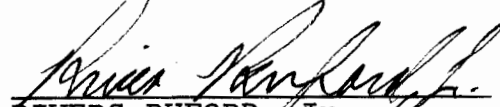
Respectfully submitted


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response has been furnished by U.S. Mail this 3rd day of October, 1983 to Honorable Jim Smith, Attorney General and Walter M. Meginnis, Esquire, Assistant Attorney General, Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32301.


RIVERS BUFORD, Jr.