O/A 10-1-84

IN THE SUPREME COURT OF FLORIDA

FILED
S'D J. WHITE
AUG 27 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

WALLACE ORR, Secretary, State of Florida, Department of Labor and Employment Security; and D. ROBERT GRAHAM, Governor of the State of Florida,

Appellants,

-vs-

CASE NO. 65,487

DAVID L. TRASK,

Appellee.

______________________________/

APPELLANTS' REPLY BRIEF

DAN F. TURNBULL, JR., ESQ.
ASSISTANT GENERAL COUNSEL

DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
131 Montgomery Building
2562 Executive Center Circle East
Tallahassee, FL 32301

COUNSEL FOR DEFENDANT WALLACE ORR, Secretary, Department of Labor and Employment Security

JIM SMITH
ATTORNEY GENERAL

KENT WEISSINGER, ESQ.
ASSISTANT ATTORNEY GENERAL

GERALD B. CURINGTON, ESQ.
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, FL 32301-8048

COUNSEL FOR DEFENDANT D. ROBERT GRAHAM, Governor of the State of Florida

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PRELIMINARY STATEMENT

With respect to the Preliminary Statement in Appellee's Answer Brief, the contentions of mootness are addressed in the Response to Appellee's Motion to Dismiss Appeal. However, appellants would submit that the reappointment of Deputy Commissioner Tomlinson in November, 1983, which allegedly created the problem of a fifth commissioner in the District K office for the seven-week period between December 31, 1983, and February 20, 1984 (the effective date of Deputy Commissioner Esquiroz' resignation), was a matter over which appellants could exercise no discretion as a matter of law. See §440.45(2), Fla. Stat., providing in pertinent part that "[i]f the judicial nominating commission votes to retain the deputy commissioner in office, then the Governor shall reappoint the deputy commissioner for a term of 4 years." (e.s.) Thus, the reappointment of Deputy Commissioner Tomlinson was a ministerial duty under the law, and the Governor was vested with no discretion to decline to reappoint. Moreover, the record-on-appeal reveals that the lower tribunal sustained an objection to testimony proffered by appellee on this issue (T 92-93), such that the question of Deputy Commissioner Tomlinson's reappointment and its effect, if any, on appellee is not properly before this Honorable Court, since appellee has not cross-appealed alleging such ruling was error.

Appellee's preliminary statement also suggests that appellants impute to the Legislature a violation of Art. II, §3, Fla. Const., which provides that no one branch of the state government "shall exercise any powers appertaining to either of the other branches unless expressly provided herein." It is difficult to understand how the Legislature's exercise of the power to appropriate monies held in the State Treasury is the exercise of a power appertaining to any other branch. See Art. VII, §1(c), Fla. Const. It is in fact the appellee who argues for upholding a judgment which has the clear effect of appropriating such monies in violation of Art. V, §14, Fla. Const., which simply defines with precision a particular action prohibited under the more general terms of Art. II, §3, Fla. Const.

I

WHETHER THE LEGISLATURE IN ABOLISHING A STATUTORY OFFICE DEPRIVES THE INCUMBENT OF ANY VESTED RIGHT AND TITLE TO THE OFFICE OR DEPRIVES THE INCUMBENT OF ANY CONSTITUTIONAL RIGHT.

Since most of appellee's response to this issue, real and substantial as it is (see Final Judgment of the lower tribunal, R-119, A-25, at ¶2), is centered on the intent, effect and constitutionality of Item 1203 of Ch. 83-300, Laws of Florida, discussion of those matters as argued by appellee will be deferred to Issue II, infra.

Appellants entirely agree that an office holder's right and title to his office "may not be unlawfully taken away or illegally infringed upon," as stated in Gilbert v. Morrow, 277 So.2d 812 (Fla. 1st DCA 1973). Appellants submit that the action of the Legislature and the implementation of that action as regards Trask are clearly lawful and legal. However, Gilbert v. Morrow, Hatton v. Joughlin, 138 So. 392 (Fla. 1931), and DuBose v. Kelly, 181 So. 11 (Fla. 1938), are all inapposite to the facts of the present case. The Hatton, DuBose and Gilbert cases simply hold that an incumbent cannot be illegally removed from an office which continues to exist. They do not hold that the incumbent retains any property right in or title to his office when the underlying office is abolished by the agency that created it.

Appellee seems to argue that the only way the Legislature could abolish the offices of the four deputy commissioners specified in Item 1203 of Ch. 83-300, Laws of Florida, is by amendment to §440.45, Fla. Stat. However, appellants are unable to find any provision of §440.45 which requires any particular number of deputy commissioners, and appellants are further at a loss to find any provision at all within Ch. 440, Fla. Stat., which conflicts in any way with the proviso language of Item 1203, nor does Appellee's Answer Brief provide any assistance in the search for such a provision.

Finally, appellants are frankly unable to understand the distinction appellee attempts to draw between an enactment which alters the form of a municipal government and effectively abolishes offices under the previous government, and an enactment which explicitly mandates the elimination of four offices as part and parcel of the appropriation of monies held in the State Treasury. Nevertheless, appellee purports to draw such a distinction to avoid the controlling holding of City of Jacksonville v. Smoot, 83 Fla. 575, 92 So. 617 (Fla. 1922). Appellants submit that any such distinction is one without significance to the present case.

II

WHETHER APPELLEE'S OFFICE HAS BEEN LAWFULLY ABOLISHED.

Appellee answers appellant's argument on this issue by posing five questions:

1. What is a deputy commissioner?

2. How do deputy commissioners relate to executive branch functionaries?

3. What is the source of funding for deputy commissioners?

4. What did Item 1203 of Ch. 83-300, Laws of Florida, purport to do?

5. What was the lawful legislative mandate, if any?

The answers to these questions are indeed important, since it is clear that the intent and the lawfulness of the enactment of the Legislature at issue in this case is central to the proper resolution of this appeal, as appellee concedes in his cursory arguments on the other issues raised by the lower tribunal's final judgment.

1. What is a deputy commissioner?

Pursuant to Ch. 79-40, Laws of Florida, the Legislature created the class of state officers known as deputy commissioners. It is interesting but beside the point to the central issue stated here that deputy commissioners are "analogous to chancellors in equity" or "akin to circuit judges" or that prior to the legislative restructuring of the workers' compensation system by Ch. 79-40 judges of industrial claims constituted "judicial tribunals." The key to the issue here--the lawfulness of the challenged legislative enactment--is the indisputable fact that a deputy commissioner is a statutory officer, not a constitutional judge or officer under Article V, Fla. Const., and, as such, the continued existence of his statutory office is within the dominion and control of the Legislature which created it. See State ex rel. Lamar v. Johnson, 30 Fla. 433, 11 So. 845 (Fla. 1892), holding that a public official has no such title to his office as prevents the power which gave it from terminating it or changing it.

2. How do deputy commissioners relate to executive branch functionaries?

The placement of deputy commissioners within the Department of Labor and Employment Security argues for the lawfulness of the actions taken by the administrators of that department to

implement the legislative mandate of Item 1203, Ch. 83-300, Laws of Florida. If the Legislature had intended in creating the class of statutory officers known as deputy commissioners to guarantee their total independence from executive administration by the department, it could have said so in enacting Ch. 79-40, Laws of Florida, which substantially revised Ch. 440, Fla. Stat.[1] Instead, the Legislature placed the Office of Chief Commissioner within the Department of Labor and Employment Security, thereby subjecting that office and the deputy commissioners within it to all the constraints otherwise applicable to administration of the department generally, including the department's administration of its annual appropriations pursuant to Ch. 216, Fla. Stat.

Appellants submit that Item 1203 of Ch. 83-300, Laws of Florida, and indeed the long-established legislative power to appropriate monies for salaries of all state employees "within" the Department of Labor and Employment Security, evidences an intent that the provisions of the General Appropriations Act with respect to deputy commissioners shall be administered in the same manner as other provisions appropriating funds to the Department of Labor and Employment Security. Moveover, such annual

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[1] See, e.g., §120.65, Fla. Stat., creating the Division of Administrative Hearings, exempting the division from the provisions of Ch. 216, Fla. Stat., and expressly providing that "[t]he division shall not be subject to control, supervision, or direction by the Department of Administration."

enactments of the Legislature, together with the provisions of Ch. 216, Fla. Stat., provide a definition of the relationship between deputy commissioners and "executive branch functionaries" which must be presumed valid and is not subject to amendment or repeal by this Honorable Court in the absence of a clear violation of organic law. See Holley v. Adams, 238 So.2d 401 (Fla. 1970).

Finally, appellants submit that the proper question to be addressed by this Honorable Court is not what the relationship is between deputy commissioners and "executive branch functionaries," but rather what the relationship is between deputy commissioners and the Legislature which created their statutory offices. That relationship is defined initially by the Florida Constitution, which grants to the Legislature the law-making power, and secondarily by the Legislature's exercise of that power in creating the class of officers known as deputy commissioners and in making an annual appropriation to fund that class of officers, as next argued.

3. What is the source of funding for deputy commissioners?

Appellee argues that the provisions of Ch. 440, Fla. Stat., provide a comprehensive scheme for the disbursement of the monies in the Workers' Compensation Administration Trust Fund which excludes any power in the Legislature to appropriate those monies

from the State Treasury. Appellee's scheme contemplates disbursement of these monies subject only to approval by the Division of Workers' Compensation and order of the Comptroller, countersigned by the Governor.[2]

Appellants would submit that a rational reading of the provisions of Ch. 440, Fla. Stat., relating to disbursement of monies from the State Treasury in the Workers' Compensation Administration Trust Fund leads to only one reasonable conclusion: those monies can be disbursed, and warrants therefor signed and countersigned, only where there is an appropriation made by law for such disbursement; and further, in the absence of a continuing appropriation in substantive law, the only way to authorize such disbursement is by lawful appropriation in the General Appropriations Act.

Appellee's citations to Lainhart v. Catts, 73 Fla. 735, 75 So. 47 (Fla. 1917), and State ex rel. Watson v. Caldwell, 156 Fla. 618, 23 So.2d 855 (Fla. 1945), are not only unhelpful but

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[2] Ironically, appellee goes on to argue that the Legislature failed to provide standards or guidelines to the Department of Labor and Employment Security with respect to implementing the legislative mandate of Item 1203 of Ch. 83-300, Laws of Florida, but conveniently fails to address this issue with respect to the "comprehensive scheme" of disbursement contended for. That is, without an appropriation made by law, how is the division to determine when disbursement of these monies from the State Treasury should be made and approved? How are the Comptroller and the Governor to determine whether such disbursement is proper and lawful for purposes of signing and countersigning the necessary state warrants?

also serve to distract this Honorable Court from the issue at hand. The legislative enactments creating the funds at issue in those cases did not place the funds in the State Treasury. The issue is not whether the funds are "state monies," but rather whether the funds are placed in the State Treasury. If they are placed in the State Treasury, as §440.50, Fla. Stat., specifies with respect to the Workers' Compensation Administration Trust Fund, then they can only be expended pursuant to an appropriation made by law, as required by Art. VII, §1(c), Fla. Const. For this reason, State v. Florida State Improvement Commission, 30 So.2d 97 (Fla. 1947), is similarly unhelpful, since this Court said in that case only that, because the Workers' Compensation Administration Trust Fund is "in a like category" with the funds administered in the Lainhart case, the monies in the fund are not "state funds" for purposes of a constitutional prohibition on the use of state funds in servicing revenue certificates. There was no appropriations issue in that case.

Moreover, the Lainhart case, which squarely presented the appropriations issue argued here, actually supports the contention that the Legislature has the power to appropriate monies in a fund which is "in a like category" with the Workers' Compensation Administration Trust Fund. This Court there concluded:

> It seems clear from the acts under consideration that the Legislature intended to, and did, appropriate the revenues derived from the special assessment to carry out the very purpose of the acts.

The court cited to, but did not quote, §24, Ch. 6456, Laws of Florida 1913, which clearly makes a continuing appropriation of monies in the special trust fund which was at issue in Lainhart v. Catts.

Appellee has yet to point to any provision of Ch. 440, Fla. Stat., which makes a continuing appropriation of the monies in the Workers' Compensation Administration Trust Fund. Even if there were a continuing appropriation, the enactment of Item 1203 of Ch. 83-300, Laws of Florida, clearly altered or revoked that elusive continuing appropriation. See §216.011(1)(h), Fla. Stat.

Appellee's citation to In re Opinion of the Justices, 199 So. 350 (Fla. 1940), is similarly distinguishable. That holding was clearly based on the finding that the Legislature must have contemplated an appropriation of funds to pay an additional Supreme Court justice when it submitted a constitutional amendment to create the additional justice to the people for approval. This Court said that the statutorily set salary of Supreme Court justices was a continuing appropriation which was altered by the contemplation of the Legislature when the amendment as submitted to the people was approved. In the present case, the Legislature clearly expressed an intent not to

appropriate funds for four deputy commissioner positions, and only the Final Judgment of the lower tribunal prevented the lawful implementation of that clearly expressed intent.

4. What did Item 1203 of Ch. 83-300, Laws of Florida, purport to do?

Appellee argues that Item 1203 of Ch. 83-300, Laws of Florida, states a condition subsequent (attrition in the ranks of the District K deputy commissioners) absent which the proviso does not come into effect at all. However, the Legislature must be presumed to know the meaning of the words used and to have expressed its intent by the use of words found in a statute. Thayer v. State, 335 So.2d 815 (Fla. 1976). Had the Legislature intended to make Item 1203 contingent on any particular event, it could have adopted the recommendation of the Governor or it could have used the words "contingent" or "if" just as it did in at least 28 other places within Ch. 83-300.[3] Clearly, the proviso language at issue here called for the elimination of three deputy commissioners from District K as of December 31, 1983, with no contingencies, and this Honorable Court has no authority to add to the statutory language matters which were considered by the

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[3] See, e.g., Ch. 83-300, at Items 65A, 73A, 181A, 317B, 426, 450A, 450B, 461, 530E, 532A, 528-538, 547-552, 611A, 674A, 947A, 968, 972, 1008-1107, 1306, 1319, 1370A, 1413, 1413A, 1422, 1423A and 1423B ("contingent"); and Items 159, 461 and 1347 ("if").

Legislature (the Governor's recommendation) but not enacted within the four corners of Ch. 83-300. See, Overman v. State Board of Control, 62 So.2d 969 (Fla. 1952), holding that the Court's function is to find ways within the terms of the act to carry out the purpose of the Legislature.

5. What was the lawful legislative mandate, if any?

Appellants have addressed this question in the Initial Brief and this Reply brief. The only argument that requires rebuttal here is the allegation that the proviso language of Item 1203, Ch. 83-300, Laws of Florida, contains no standards or guidelines and constitutes an improper delegation of legislative authority. The simple answer to this argument is a review of the provisions of Ch. 216, Fla. Stat., which provide the standards and guidelines by which administrators must proceed to implement additions and deletions of positions which the Legislature traditionally enacts within the General Appropriations Act. In fact, the use of proviso language makes the legislative mandate that much clearer, particularly when viewed in light of the legislative history documented in the record-on-appeal.

It is therefore clear that the lawful legislative mandate reduced funding for deputy commissioners' salaries and qualified the funding reduction by stating exactly where administrators must make deletions in order to eliminate the four deputy

commissioners' offices. The proviso language in Item 1203 adds specificity to that funding reduction. The lawful legislative mandate that appellants attempted to implement in this case was the deletion of three deputy commissioners in District K by December 31, 1983.

Because of the central importance of Issues I and II to this case, and since appellee's arguments on the remaining issues are adequately addressed in Appellants' Initial Brief and in the preceding response to appellee's arguments on those central issues, no further reply is here offered.

CONCLUSION

Appellee suggests that to reverse the final judgment of the lower tribunal is "to navigate upon the rocks" of settled jurisprudence, or to sail upon "a sea of which we know not the routes." Appellee's metaphors have a pleasant ring, but they should not distract this Court from the issues of the case, in which the "settled jurisprudence" was ignored by the lower tribunal in its final judgment. That "settled jurisprudence" holds that the Legislature deprives the incumbent of no vested right in or title to his statutory office when it abolishes that statutory office; that appellee's statutory office is one of four such offices lawfully abolished by the Legislature in the constitutionally valid enactment of Item 1203 of Ch. 83-300, Laws

of Florida, and proviso language therein, as lawfully implemented by the Department of Labor and Employment Security; that the lower tribunal's judgment must be reversed where there is no competent evidence to support its findings and where the lower tribunal acted in excess of its equitable jurisdiction; and that the lower tribunal's injunction violated Art. V, §14, and Art. VII, §1(c), Fla. Const. This Honorable Court should preserve our "settled jurisprudence" by reversing the final judgment below and entering judgment for defendants/appellants.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

GERALD B. CURINGTON
Assistant Attorney General

KENT WEISSINGER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, FL 32301-8048
(904) 488-1573

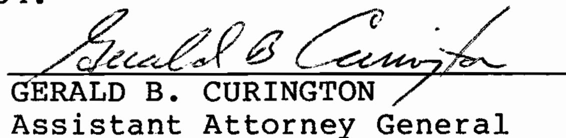
DAN F. TURNBULL
Assistant General Counsel

DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
131 Montgomery Building
2562 Executive Center Circle East
Tallahassee, FL 32301

COUNSEL FOR APPELLANTS GRAHAM
AND ORR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to ARTHUR J. ENGLAND, ESQ., Fine, Jacobson, Block, England, Klein, Colan & Simon, P.A., 2401 Douglas Road, Miami, Florida 33134; STEPHEN MARC SLEPIN, ESQ., Slepin, Slepin, Lambert & Waas, 1114 East Park Avenue, Tallahassee, Florida 32301; and to REUBIN O'D. ASKEW, ESQ., Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel, P.A., 1401 Brickell Avenue, PH-1, Miami, Florida 33131, Counsel for Appellee, and to D. STEPHEN KAHN, ESQ., 227 East Virginia Street, Tallahassee, Florida 32301; and MARK HERRON, ESQ., and CHRIS HAUGHEE, ESQ., The Florida House of Representatives, Office of the Speaker, 420- The Capitol, Tallahassee, Florida 32301, Counsel for Amicus, by U.S. Mail this 27 day of August, 1984.



GERALD B. CURINGTON
Assistant Attorney General