O/a 8-28-86 orig 23

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DEPARTMENT OF ADMINISTRATION,

Appellants,
Cross-Appellees

vs. CASE NO. 68,986

FLORIDA NURSES ASSOCIATION,

Appellee,
Cross-Appellant

_____/

Appeal taken from the Circuit Court
of the Second Judicial Circuit,
in and for Leon County, Florida

APPELLANTS'-CROSS-APPELLEES' REPLY BRIEF

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EXPLANATORY NOTE

Citations to the Record-on-Appeal are designated (R____, A____). The R____ portion of the designation refers to the page number which the Clerk of the Circuit Court has assigned to each page of the Record-on-Appeal. However, the exhibits introduced at the trial on January 8, 1986, have all been assigned the number 313.

The A____ portion of the designation is keyed to the listing of documents from the Record-on-Appeal contained in Appellants'-Cross-Appellees' Appendix. Exhibits referred to in the brief may be more esily referred to in the Appendix rather than under the single number 313 in the Record-on-Appeal.

PRELIMINARY STATEMENT

Appellee accepted Appellants' Statement of the case but added an exception as to Chapter 85-318, Laws of Florida, requiring greater pay and benefits for the members of the Selected Professional Service. However, Appellee incorrectly asserts that the statute did not require greater pay and benefits. Appellants state that greater pay and benefits overall are required for the Selected Professional Service than are required for the Career Service. (R-313, A-8).

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I.

THE LEGISLATURE HAS AUTHORITY TO EXEMPT EN MASSE A CLASSIFICATION OF CAREER SERVICE EMPLOYEES WITH PERMANENT STATUS TO MEET A RATIONAL STATE OBJECTIVE.

There does not appear to be any disagreement between Appellants and Appellee that the Legislature has the authority to control, modify or abolish positions from the Career Service System. See Higginbotham v. Baton Rouge, 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968 (1939); Dupont v. Kember, 501 F.Supp. 1081 (M.D. La. 1980); Hall v. Strickland, 170 So.2d 827 (Fla. 1965); City of Jacksonville v. Smoot, 92 So. 617 (Fla. 1922); Grobsmith v. Kempiners, 430 N.E.2d. 973 (Ill. 1981). Indeed, there is no disagreement between the parties that the Legislature has the authority to specifically create positions in and to exempt positions from the Career Service System. Article III, Section 14, Florida Constitution. Appellee's Brief p. 4, 10.

Appellee argues and Appellants agree that once state employees obtain permanent status in the Career Service, the employees have a property right in their employment. Headley v. Baron, 228 So.2d 281 (Fla. 1969). Their property right in employment entitles them to protections against arbitrary adverse employment actions. Blanton v. Griel Memorial Psychiatric Hospital, 758 F.2d 1540 (5th Cir. 1958); Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978).

Appellee does not argue that the enactment of Chapter 85-318, Laws of Florida, was violative of any procedural due process. Appellee's Brief p. 5. The Legislature is constitutionally authorized to exempt doctors and lawyers from the Career Service and the legislative process which considered the exemptions provided them all of the process that was due. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

Appellee argues that the Legislature has no authority to exempt doctors and lawyers en masse from Career Service when those professionals have attained permanent status and there is no valid reason for the exemption. In support of this position, Appellee asserts that Chapter 85-318 is unconstitutional because the exemption of doctors and lawyers is not rationally related to a legitimate state purpose. Appellee's reliance upon San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, reh den. 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973), is correct regarding the standard of review given to Chapter 85-318 for a rational basis because neither a suspect class nor a fundamental right was involved. San Antonio Independent School District, supra, concerned state financing of school districts and not public employee classifications.

Appellee admits that Legislature has the authority to exempt positions from the Career Service pursuant to Article III, Section 14 of the Florida Constitution. Appellee's Brief p. 4,

10. This exemption authority is not limited to only certain positions of a particular classification. The limitation on whether positions of a classification may be exempted from Career Service depends upon whether Chapter 85-318 "is rationally and reasonably related to some legitimate purpose and is not arbitrarily or capriciously imposed." United Yacht Brokers Inc. v. Gillespie, 377 So.2d 668, 670 (Fla. 1979). See also, Golden v. McCarty, 337 So.2d 388 (Fla. 1976); Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974); Wiggins v. City of Jacksonville, 311 So.2d 406 (Fla. 1st DCA 1975).

Chapter 85-318, Laws of Florida, declared that the policy for the Selected Professional Service[1] is to:

> create a system of personnel management which ensures to the state the delivery of high quality performance in select exempt classifications by facilitating the state's ability to attract and retain qualified personnel in these positions, while also providing sufficient management flexibility to ensure that the work force is responsive to agency needs. The Legislature recognizes that the public interest is best served by developing and refining the technical and managerial skills of its selected professional service employees.

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[1] Chapter 86-149, Laws of Florida, changes the name of the Selected Professional Service to the Selected Exempt Service and transfers several hundred employees from the Senior Management Service to the Selected Exempt Service effective February 1, 1987.

Application of the rationally and reasonably related test in reviewing Chapter 85-318 clearly establishes that the Legislature properly exempted all doctors and lawyers from the Career Service. The Legislature perceived a lack of ability on the part of the state to attract and retain qualified doctors and lawyers capable of delivering high quality performance. The Legislature also perceived an inability upon the part of state management to tailor a professional work force to be responsive to each state agency's need to develop the required high quality performance.

Chapter 85-318 addresses the problems perceived by the Legislature. To attract and retain qualified doctors and lawyers, the Legislature required that the doctors and lawyers receive "greater pay and benefits overall than are provided for the Career Service and less pay and benefits overall than are provided for the Senior Management Service." (R-313, A-8). To eliminate the inability of state management to tailor a responsive professional work force, the Legislature provided management with the flexibility to maintain such a professional work force by requiring doctors and lawyers to serve at the pleasure of the agency heads. (R-313, A-30).

As the Legislature enacted a statute that was rationally and reasonably related to the legitimate purposes of attracting and retaining qualified doctors and lawyers, and maintaining a responsive professional work force, the statute must be upheld.

San Antonio Independent School District, supra; United Yacht Brokers, Inc., supra; McCarty, supra; Lasky, supra; Wiggins supra.

Appellants agree that the United States Supreme Court has held that public employees who have obtained permanent status or tenure acquire a property right in their employment. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). As long as the employees remain members of the Career Service they are entitled to all of the protections due process affords against the loss of their property right in employment. Rosenfelder v. Huttoe, 24 So.2d 108 (Fla. 1945) (en banc); Headley v. Baron, 228 So.2d 281, (Fla. 1969), reversed in part, Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973).

However, the Legislature exercising its authority pursuant to Article III, Section 14, of the Florida Constitution, exempted doctors and lawyers from Career Service because of the perceived need to improve the attraction and retention of doctors and lawyers while affording management greater flexibility over them. The Legislature specifically did not intend for the doctors and lawyers to carry any of their former permanent status into the exempt service with them because the plain language of Chapter 85-318 requires them to serve at the pleasure of their agency heads. St. Peterburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982).

II.

DOCTORS AND LAWYERS MAY BE EXEMPTED FROM PROPERTY RIGHTS IN EMPLOYMENT IN THE MANNER PROVIDED BY CHAPTER 85-318, LAWS OF FLORIDA.

Again, Appellants agree as Appellee repeats its argument that once Career Service employees obtain permanent status, they acquire a property interest in their employment, and are entitled to due process protections against the imposition of discipline i.e., termination from employment. Rosenfelder v. Huttoe, supra; Headley v. Baron, supra;, Vining v. Florida Real Estate Commission, supra. Property rights in employment were created for state employees by the Legislature with the enactment of Chapters 110, 120 and 447, Florida Statutes. Those statutes provide permanent Career Service employees with the bases for having a legitimate expectation of continued employment. Cleveland Board of Education v. Loudermill, ____ U.S. ____, 105 S.Ct. 1487 (1985); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The Legislature created no property rights in employment for employees in the Selected Professional Service. Chapter 85-318, Laws of Florida, makes no allowances for permanent status for doctors and lawyers in the Selected Professional Service as it requires each of those professionals to serve at the pleasure of his or her agency head. Employees who serve at the pleasure

of the agency head serve at will and do not have a continued expectation of employment and are not entitled to protections against adverse employment actions. Thompson v. Bass,. 616 F.2d 1259 (5th Cir. 1980), cert. denied, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980) ("A state employee that may be discharged at will under state law has no property interest in his or her state job."). Any claims the doctors or lawyers had to the protections afforded them as permanent employees of the Career Service System were relinquished when the Legislature transferred them into the Selected Professional Service. "This is a case where the Legislature gave and the Legislature took away." State v. Swank, 12 So.2d 605, 609 (Fla. 1943).

In enacting Chapter 85-318, Laws of Florida, the Legislature primarily amended Section 110.205(2), Florida Statutes, to exempt doctors and lawyers from Career Service. However, 85-318 did not impair the doctors' and lawyers' constitutional right to bargain collectively. Chapter 85-318 amended the state's collective bargaining law at Section 447.203(2), Florida Statutes, to allow employees in the Selected Professional Service to continue to exercise their right to collectively bargain in accordance with Article 1, Section 6 of the Florida Constitution. Attorneys have never exercised their right to collectively bargain. Those doctors represented by the FNA union have exercised their right to do so. They are able to bargain over wages and other benefits encompassed by the

designated pay and benefit plans as they were able to do previously. Although they may be able to negotiate some type of grievance procedure, it may not interfere with their requirement that employees serve at their pleasure of the agency heads.[2]

III.

CHAPTER 85-318, LAWS OF FLORIDA, HAS A RATIONALLY STATED PURPOSE.

The lower court in its final judgment stated that "[p]resumably it was the self-same legislatively stated employment policy of the state under which state employed doctors and lawyers were assigned to the Career Service in the first instance." (R-305, A-30). Appellee, in erroneously describing the lower court's presumption as a specific finding, appears to argue that the employment policy for the Career Service presents the only legitimate employment policy for doctors and lawyers and that the policy for the Selected Professional Service is wholly irrelevant to the achievement of any state objective other than to be able to easily discharge incompetent professionals.

Although the state's overall basic employment policy has provided for a Career Service, the Legislature has determined the need for specific objectives which go beyond the basic employment

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[2] The State and Appellee signed a collective bargaining agreement on behalf of the doctors and others which expires on June 30, 1987. They agreed, and the lower court ordered, that it shall continue in full force and effect until it expires on June 30, 1987. The State has never indicated that it would not honor the agreement.

policy. In 1980, the Legislature determined that there was a need to attract, retain and develop highly competent senior level managers to operate the highly complex programs and agencies of state government. Chapter 80-404, Laws of Florida. In response to that determination, the Senior Management Service was created requiring the exemption of hundreds of employees with permanent status from the Career Service System. In a similar fashion, the Legislature determined that the state's needs regarding medical and legal professionals went beyond the state's basic employment policy and also required exemption of their positions from the Career Service. Chapter 85-318, Laws of Florida. Because the Legislature did not perceive the same need for other professionals does not render the purpose for the exemption irrelevant. The Legislature may select one or two classifications to apply a remedy -- while neglecting others. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

When the Legislature determined the need to exempt all doctors and lawyers from the Career Service, that determination was made upon different legislative considerations than the need for confidentiality and policy-making which apply to most of the earlier exemptions under Section 110.205(2), Florida Statutes. Doctors and lawyers were exempted because of the legislatively perceived need to attract and retain qualified doctors and lawyers and to afford management the flexibility to

maintain a responsive work force of those professionals. (R-313, A-30). The policy for exempting doctors and lawyers from the Career-Service is not the same as the lower court presumed for initially placing them in the Career Service. At one time almost all state employees were members of the Career Service. Exemptions were made as deemed necessary by the Legislature.

Appellee asserts that the burden of establishing whether Chapter 85-318 is rationally related to a legitimate state purpose is upon the state. However, the two cases it relies upon do not place that burden on the state. Ex Parte Lewinsky, 63 So. 577 (Fla. 1913), concerned the sale of intoxicating liquor to a female by a petitioner who filed a writ of habeas corpus. This Court dismissed the writ for failure of the petitioner to prove any invasion of his constitutional rights. Melton v. Gunter, 773 F.2d 1548 (11th Cir. 1985), involved two classes of fire fighters -- one which was required to join the Florida Retirement System and the other which was given the option of joining the Florida Retirement System or a special fire fighters' retirement system. Although the trial court required the state official to establish a rational basis for the statutory retirement system option, the appellate court held it to be in error because the burden had been incorrectly assigned based upon a standard of review for a suspect class designation. Neither Ex Parte Lewsky, supra, nor Melton v. Guther, supra, requires the state to establish a rational basis when a statute is reviewed under the rational basis test.

Chapter 85-318 does not involve a suspect class or a fundamental right and a constitutional challenge of it must be reviewed under the rational basis test. United Yacht Brokers, Inc. v. Gillespie, 377 So.2d (Fla. 1979); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). When a challenged statute does not impact upon a fundamental right or suspect class, the burden is on the challenger to show that it does not have a rational basis. Woods v. Holy Cross Hospital, supra, 1174. See also, Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982).

The burden in this action is upon the Appellee and it is one which it can not carry. The Legislature is presumed to have acted within its constitutional power when it enacted Chapter 85-318 and the statute should not be set aside if there are any rational and reasonable reasons for its existence. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); State v. State Board of Education of Florida, 467 So.2d 294 (Fla. 1985); Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978). Chapter 85-318's exemption of doctors and lawyers is not "wholly irrelevant" to achieving the legitimate state objectives of attracting and retaining qualified doctors and lawyers, and allowing management the flexibility to maintain a work force responsive to state agency needs. Maryland v. McGowan, supra, 81 S.Ct. 1105. This Court should defer to the legislative determination that the objectives will be acomplished by

exemption from Career Service. Woods v. Holy Cross Hospital, supra, 1173. Indeed, this Court has a duty to resolve all doubts concerning the validity of Chapter 85-318 in favor of its constitutionality. Powell v. State, 345 So.2d 724, 725 (Fla. 1977).

IV.

THE LOWER COURT MAY NOT GRANT AN EQUITABLE REMEDY WHICH INTERFERES WITH LEGISLATIVE ENACTMENTS FOR DOCTORS AND LAWYERS.

In enacting Chapter 85-318, Laws of Florida, the Legislature required that doctors and lawyers be treated as selected professionals who serve at the pleasure of their agency heads. Essentially, this was a prohibition against their being treated in another manner. See, Alsop v. Pierce, 19 So.2d. 799 (Fla. 1944). The lower court's decision requires that some employees in the Selected Professional Service be treated in a way other than the Legislature intended (R-305, A-31).

By failing to hold Chapter 85-318 constitutional as applied to all selected professionals, including those doctors and lawyers who had permanent status and those who did not have permanent status prior to the enactment of Chapter 85-318, the lower court attempted to fashion an equitable remedy for all affected by the final judgment. The equitable power of the lower court to grant an injunction is subject to the paramount power of the Legislature to set public policy through the enactment of

laws. Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board, 183 So. 759 (Fla. 1938).

The Legislature's announced statement of policy for the Selected Professional Service clearly established that Chapter 85-318 was rationally and reasonably related to the legitimate purposes of attracting and retaining qualified doctors and lawyers and providing state management with the flexiblity to tailor a professional work force responsive to state agency needs. (R-313, A-17). To the extent that the final judgment interferes with the legislatively required management flexibility, it impermissively altered the Legislature's determination of public policy. Miami Laundry Co., supra.

V.

CHAPTER 85-318, LAWS OF FLORIDA IS CONSTITUTIONAL AS APPLIED TO ALL DOCTORS AND LAWYERS AFFECTED BY IT.

Appellee incorrectly asserts that the state has the burden to establish that a rational basis exists for the enactment of Chapter 85-318, Laws of Florida. However, Appellee challenges the constitutionality of the statute and, as the challenger, it has the burden of showing that the statute does not have a rational basis. Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). Appellee's reliance upon Clements in

support of its argument is misplaced as the decision is clearly inapposite to Appellee's position. When challenging a statute on equal protection grounds, it is the claimant's burden in the first instance -- not the state's. Clements v. Fashing, supra, 102 S.Ct. 2845.

Appellee incorrectly attempts to cast the doctors as being in a "suspect" classification requiring state justification for Chapter 85-318. A suspect classification includes status such as race, alienage and ancestry but it does not include the status of an employee as a medical doctor. Woods v. Holy Cross Hospital, supra.

The fact that the Legislature exempted all doctors and no other health care providers does not create any constitutional defect. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The Legislature may determine to address what it perceives as a problem for one classification while not addressing others. Williamson v. Lee Optical, supra.

The Legislature determined a need to address what it perceived as the State's inability to attract and retain qualified doctors and lawyers. To remedy this, it exempted them from the Career Service and required the adoption of:

> a pay plan and benefit package for the Selected Professional Service which provides for greater pay and benefits overall than are provided for the

> Career Service and less pay and benefits overall than are provided for the Senior Management Service.

Chapter 85-313, Laws of Florida.

Additionally, the Legislature determined a need to address what it perceived as the inability of state management to exercise flexibility in tailoring a professional work force to be responsive to each state agency's needs. To remedy this, the Legislature exempted doctors and lawyers from the Career Service and required them to serve "at the pleasure of the agency head." Chapter 85-318, Laws of Florida (R-313, A-8). Appellants contend that the Appellee has failed to show that the exemption of doctors and lawyers is "wholly irrelevant" to achieving legitimate state objectives. As Chapter 85-318, Laws of Florida, is rationally related to legitimate state objectives, it must be substained as to all doctors and lawyers affected by it. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

CONCLUSION

This case does not involve a suspect class or any fundamental right affected by th enactment of Chapter 85-318, Laws of Florida. The statute is rationally and reasonably related to legitimate state objectives and Appellee has failed in its burden to show that said statute does not have a rational basis for its existence.

This Honorable Court is urged to defer to the Legislature's determination of the need for Chapter 85-318, Laws of Florida, and to resolve all doubts concerning the validity of it in favor of it being constitutional. Accordingly, Appellants urge that the judgment of the lower court as to employees with permanent status in Career Service prior to October 1, 1985, be held erroneous as a matter of law and reversed and that the remainder of the decision below be affirmed. Appellants further urge this Court to enter judgment for Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing as been furnished by U.S. Mail to RHEA P. GROSSMAN, P.A., 2710 Douglas Road, Miami, Florida 33133 and DONALD D. SLESNICK, II, ESQUIRE, 2285 S.W. 17 Avenue, Miami, Florida 33146 on this 11th day of August, 1986.

GEORGE DRUMMING, JR.