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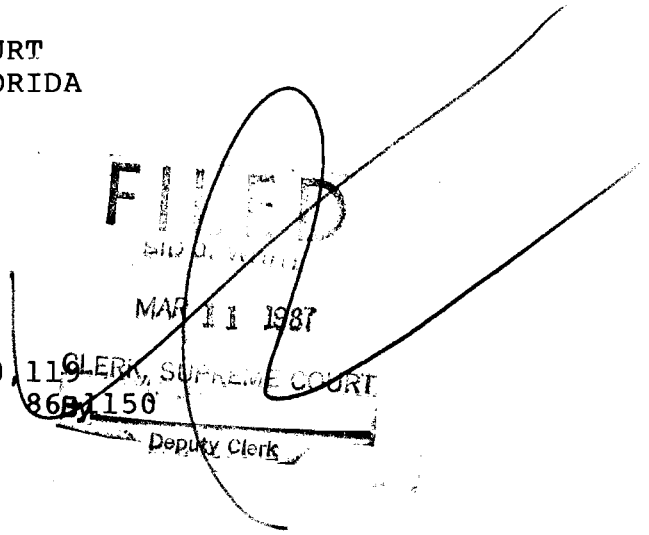
IN THE SUPREME COURT
OF THE STATE OF FLORIDA



PALM HARBOR SPECIAL
FIRE CONTROL DISTRICT,

Appellant,

v.

Case No. 70,119
DCA - 2 No. 86-1150

CELESTINE KELLY,

Appellee.
_____/

ON APPEAL FROM A FINAL ORDER OF THE
SECOND DISTRICT COURT OF APPEAL OF FLORIDA:

INITIAL BRIEF OF APPELLANT
PALM HARBOR SPECIAL FIRE CONTROL DISTRICT

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STATEMENT OF THE CASE AND FACTS

This case comes upon request for review of the Final Order of the Second District Court of Appeal which in part found Florida Statute §447.04(1)(a) unconstitutional. The case originated with the Department of Labor when the Appellant objected to the issuance of a business agent's license to the Appellee. The Appellee is an alien and §447.04(1)(a) provided that an individual had to be a citizen in order to be issued a business agent's license. (A-32-35).

The Department of Labor held a hearing on March 13, 1986 in order to allow the Appellant to voice its objection to issuance of the license. The issue to be decided was solely a matter of law: Whether §447.04(1)(a) of the Florida Statutes prohibited the issuance of a business license to Celestine Kelly because he was not a U.S. citizen. (A-1-40). Both the Appellant and Appellee submitted briefs to the Hearing Officer. After consideration of the briefs the Hearing Officer recommended that the Appellee be issued a business agent's license. (A-104). His opinion was based upon two 1974 Attorney General opinions and the legislative history of Florida Statute §455.10 which he opined amended Florida Statute §447.04(1)(a) by implication. (A-104).

Appellant thereupon filed exceptions to the Recommended Order. Appellee filed no exceptions (A-105-117). At the same time, Appellant asked for a stay of issuance of the license pending appeal.

Subsequent to the entering of the Recommended Order, the City of Tallahassee and the Florida Public Employers Labor Relations Association moved to intervene in this matter in the opposition to the issuance of the license. Their respective motions were granted and they were made parties to the proceeding. They also requested additional time in which to file briefs, however, their requests were denied. The Department of Labor held that to allow additional time for filing exceptions to the Recommended Order or briefs would unduly further delay in the matter. (A-121).

On May 6, 1986, the Director of Labor, Employment and Training issued a final Administrative Order. His order adopted in toto the findings of the Hearing Officer as summarized above. (A-120-128). In response to the motion for stay, the Director granted a fifteen (15) day stay. The Appellant appealed the Department of Labor's decision to the Second District Court of Appeal. In addition, a further stay was requested and denied by the Second District Court of Appeal. (A-127).

On appeal, the Second District Court of Appeal considered two issues:

I. WHETHER IT WAS PROPER FOR THE DEPARTMENT OF LABOR TO CONCLUDE THAT FLORIDA STATUTE §447.04(1)(a) WAS AMENDED BY IMPLICATION BY FLORIDA STATUTES §455.10?

II. WHETHER THE CITIZENSHIP REQUIREMENT OF FLORIDA STATUTE §447.04 (1)(a) OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

As to the first issue the District Court agreed with the

Appellant and concluded that the Department erred in relying upon §455.10. The District Court of Appeal's reasoning was that two facially conflicting statutes are to be harmonized, if reasonably possible, so as to preserve the effectiveness of each, the court reasoned harmony is achieved by construing §447.04(1)(a) as being specifically applicable to the occupation of a labor organization's business agent and §455.10 as being applicable to other occupations and professions not covered by a specific statute such as §447.04(1)(a).

As to the second issue the Court concluded that §447.04(1)(a) violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The District Court of Appeal's basic reasoning was that the citizenship restriction of that section is factually overinclusive under the United States Supreme Court decisions governing the constitutionality of occupation restrictions which work to exclude aliens. (A-233).

As noted above, this appeal questions only the District Court's holding as to the unconstitutionality of Florida Statute §447.04(1)(a).

The facts in this case are undisputed and have been throughout this case. Both the Hearing Officer and the Director of the Department of Labor limited their finding to the issue of law presented (A-100, 120). The facts involved provide:

Celestine Kelly was acting as a business agent for Palm Harbor Fire Fighter's Union, International Association of Fire Fighters, without a license as required by Florida Statute

§447.04. Palm Harbor Special Fire Control District (hereafter Palm Harbor) requested that he be licensed. He subsequently filed an application with the Department of Labor, but continued to bargain without a license. As a result of Mr. Kelly's filing an application, Palm Harbor learned that he was a lawfully admitted alien and therefore not entitled to be licensed under Florida Statute Section §447.04(1)(a).

Representatives of Palm Harbor and the City of Largo objected to the issuance of a business license to Mr. Kelly by the Department of Labor. (A-99).

SUMMARY OF THE ARGUMENT

Florida Statutes §447.04(1)(a) provides that business agents license shall not be issued to non-United States citizens. Although alienage classification are "inherently suspect", there are a line of United States Supreme Court cases which make provisions for employment of alienage classifications where the particular restriction serves political and not economic goals. This exception is called the "Political Functions" Exception. Determining whether the "Political Functions" Exception exists for a particular classification involves application of a two-pronged test.

The particular classification examined under the facts of the case presented is public labor organization business agents.

The District Court examined §447.04(1)(a) and found it to be overinclusive, thereby failing the first prong of the "Political Functions" Exception test. The reasoning of the court was that the §447.04(1)(a) was in the section that covered both private and public labor organization business agents. The Appellant contends that the court failed to test the statute in context of the facts presented in the case at bar and therefore its holding is wrong.

Adjudication of the validity or non-validity of a statute is a decision passing upon the validity of the statute as applied to the facts at bar. If the classification examined is those which apply here, it will pass the "Political Functions" Exception test thereby making §447.04(1)(a) constitutional as applied to public sector business agents. Where an interpretation upholding

constitutionality of the statute is available to the Supreme Court, the Court adopts that construction.

As stated, the classification question herein is that to which the Appellee is a part, public sector business agents. That classification passes the first prong of the two-pronged "Political Functions" test the standard of which asks: Whether the restriction reaches so far and is so broad and haphazard as to belie the State's claim that it is only attempting to ensure that an important function of the government will be in the hands of those having "the fundamental legal bond of citizenship." The inquiry is not whether the classification is overinclusive at all, but rather whether it is a substantial fit. Because the classification as applied to the facts of the case here passes the first prong of the District Court's holding must be reversed.

The second prong of the test examines public sector business agents to see if they are a person holding state elective or important nonelective; legislative judicial positions who participate directly in the formulation, execution a review of broad public policy and hence perform functions that go to the heart of representative government. Public sector business agents satisfy this prong, first on an agency theory and secondly on their own merits. Through an agency relationship with employees who perform functions that fulfill this prong, public sector business agents step into their shoes and pass the second prong.

Furthermore, on their own merits public sector business agents hold a "public" occupation, participate directly in the formulation, execution and review of broad public policy and hence performing functions that go to the heart of representative government.

Because the alienage classification under the facts of the case at bar pass the two-pronged "Poltiical Functions" Exception test provides the court with a construction of §447.04(1)(a) which is constitutional and allows the statute to survive and the legistlative history of §447.04(1)(a) demonstrates that the Legislature intended it to operate despite changes in the case law in the area of alienage classification, the District Court should be reversed and §447.04(1)(a) held to be constitutional as applied to public sector labor organization business agents.

STATEMENT OF THE ISSUE

I. WHETHER FLORIDA STATUTE §447.04(1)(a) WHICH PROHIBITS ISSUANCE OF A BUSINESS AGENT'S LICENSE TO ALIENS OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AS APPLIED TO CELESTINE KELLY, AN ALIEN AND A PUBLIC LABOR ORGANIZATION BUSINESS AGENT?

A. WHETHER THE ALIEN CLASSIFICATION OF §447.04(1)(a) AS APPLIED TO THE FACTS OF THE CASE ARE NEITHER UNDER - OR OVER-INCLUSIVE AND PASS THE FIRST PRONG OF THE "POLITICAL FUNCTIONS" EXCEPTION TEST

B. WHETHER FLORIDA STATUTE §447.04(1)(a) AS APPLIED TO THE CLASSIFICATION OF PUBLIC LABOR ORGANIZATION BUSINESS AGENTS PASSES THE SECOND PRONG OF THE "POLITICAL FUNCTIONS" EXCEPTION TEST

ARGUMENT ON ISSUE

ISSUE I

I. WHETHER FLORIDA STATUTE §447.04(1)(a) WHICH PROHIBITS ISSUANCE OF A BUSINESS AGENT'S LICENSE TO ALIENS OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AS APPLIED TO CELESTINE KELLY, AN ALIEN AND A PUBLIC LABOR ORGANIZATION BUSINESS AGENT?

A. WHETHER THE ALIEN CLASSIFICATION OF §447.04(1)(a) AS APPLIED TO THE FACTS OF THE CASE ARE NEITHER UNDER - OR OVER-INCLUSIVE AND PASS THE FIRST PRONG OF THE "POLITICAL FUNCTIONS" EXCEPTION TEST

Florida Statutes §447.04(1)(a) provides:

> (1) No person shall be granted a license or a permit to act as a business agent in the state;
> (a) who is not a citizen of the United States.

Most alienage classifications are "inherently suspect."

> [However, after Sugarman v. Dougall and the line of cases which followed that decision the Supreme Court determined that although] that state government cannot employ alienage classifications in a burdensome manner in their police powers regulations or their granting of social welfare benefits, they will receive greater latitude in excluding aliens from public employment as well as direct participation in the governance process. While the states will not be allowed to have a blanket exclusion of aliens from public employment, they will be able to exclude aliens from positions that are part of governmental function.
>
> Constitutional Law, J.E. Nowak, 2d Ed. (1983) p.694.

This is called the "Political Functions" Exception to the strict scrutiny approach. When a statute falls within the ambit of this exception it must only be rationally related to the legitimate State interest. The State interest normally involved in these cases involved here is the State's ability to preserve the basic conception of a political community. Determining whether the political function exception exists for a particular classification involves application of a two-pronged test announced in Cabell v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982). Under the first prong the court must examine the specificity of the citizenship job classification: a classification that is substantially over or under inclusive tends to undercut the governmental claims that the classification serves political ends.

If the class is sufficiently tailored, the second prong provides that the exception may only be applied to "persons holding state elected or important nonelective and judicial positions," those officers who "participate directly in the formulation, execution or renewal of broad public policy" and hence "perform functions that go to the heart of representative government." Cabell v. Chavez-Salido, 454 U.S. 432, 439-41 (1982) in part quoting from Sugarman v. Dougall, 413 U.S. 634 (1973).

The Appellant argues that the Second District Court of Appeal's holding that Florida Statute §447.04(1)(a) is unconstitutional because it fails the first prong of this test is

improper. The Court's basic reasoning is that the section is "fatally overinclusive under the United States Supreme Court's decisions governing the constitutionality of occupational restrictions which include aliens." The Court concluded that because §447.04(1)(a) was in the statutory section that covered both private and public labor organization business agents the restriction was overinclusive and therefore failed the first prong of the "political function exception." The court did not consider the second prong of the test.

The Appellant contends that the court failed to test the statute in context of the facts presented in the case at bar. A decision resolving statutory validity cannot normally be rendered in the abstract or upon any consideration other than its application in a certain case.

> The traditional statement is that courts can pass on the constitutionality of a statute only as it applies and is sought to be enforced in the determination of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character. A decision that a statute in a particular circumstance collides with constitutional inhibitions may, as in this case, deprive it of only part instead of all of its effect, depending on the issue if separability and intent and the collision or violation may be plain from the terms of the law in controversy or from such terms only as they operate or apply in the particular case. The adjudication, however, of validity or invalidity in every such case is a decision passing upon the validity of the statute as applied to the facts at bar... Snedeker v. Vernmar, Ltd., 151 So.2d 439, 441, 442 (Fla. 1963).

In the present case the Second District Court of Appeal

decided the issue of constitutionality irrespective of its application to the pertinent facts. Rather the Court held: "thus, even if public employee labor organizations are included with the section's scope and even if the sections are included within the section's scope and even if the sections to that extent has the requisite political function to fulfill the second prong, it is overinclusive because it indiscriminately also imposes a citizenship requirement upon occupation - business agents for private labor organizations - as to which there is no justification under the second prong for doing so." (A-247).

The issue to be decided in this case whether §447.04(1)(a) is constitutional as applied to Celestine Kelly, a public labor organization business agent. The Appellee and the District Court of Appeal would have the section interpreted as not applying to either public or private labor organization business agents. However, statutes attacked as unconstitutional come to court with a presumption of validity. The court must presume that the Legislature considered the pertinent facts of a specific case in reaching its conclusion and in approving the Act. Lund v. Mathas, 145 So.2d 871 (Fla. 1962). Certainly as demonstrated by the District Court of Appeal's decision that §447.04(1)(a) was not amended by §455.10 by implication, the Legislature intended §447.04(1)(a) to apply to the facts here.

The courts have always espoused a duty to construe a statute to save its constitutional infirmities. Smith v. Ayers, 174

So.2d 728 (Fla. 1965). When an interpretation upholding constitutionality of a statute is available to the Supreme Court, the Court adopts that construction. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983). Finally, the Supreme Court has expresses itself as having a responsibility to avoid a holding of unconstitutionality if a fair construction of the statute can be made within constitutional limits. State v. Beasley, 317 So.2d 750 (Fla., 1975).

The Appellee and the District Court of Appeal would have the Court read the statute as totally inapplicable to any business agent, whether public or private, despite the legislative history which shows the Legislature did not intend that it be amended by implication by §455.10 and the District Court of Appeal holding that §447.04(1)(a) is to operate as a special act exception to §455.10. Florida Statute §455.10 is a general statute denying withholding of state licensure solely on the basis of citizenship. Such a construction is improper.

The cardinal rule in construing a statute is that legislative intent must govern in the final analysis. Chiapetta v. Jordan, 16 So.2d 641, 153 Fla. 788 (Fla. 1943). Legislative intent is the polestar of all statutory construction and that by which courts must be guided. Singleton v. Larson, 46 So.2d 186 (Fla. 1950). For these reasons, the Court should construe the §447.04(1)(a) as being only applicable to public labor organization business agents to whom the statute section can be constitu-

tionally applied rather than totally erradicate the section. This conclusion is mandated by reviewing the Supreme Court cases decided in this area of the law. They involve particular facts much different from the case at bar and are distinguishable on that basis.

In Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973), the Supreme Court examined a citizenship classification which included every position in the competitive class of a state civil service system. The competitive class was neither narrowly confined nor precise in its application. Its imposed ineligibility applied to the sanitation man, the typist and to the office worker as well as to the person who directly participated in the formulation, execution and review of important state policy. The citizenship restrictions swept indiscriminately. It, therefore, appeared only to grant an arbitrary economic preference to residents of the state who were U.S. citizens. In Sugarman the Plaintiffs were an administrative assistant, a clerk typist and two human resources technicians. They were not individuals who fell within the "Political Functions" Exception. They did not execute, formulate or review broad public policy as required under that exception.

Furthermore, the Supreme Court specifically noted that its holding in Sugarman was a narrow one: it did not hold that "on the basis of individualized determination an alien may not be refused to be hired or discharged on legitimate state interests.

Nor did the Court hold that a state may not, in an appropriately defined class of positions, require citizenship as a valid qualification for employment." In later cases, Ambach, (infra), Foley v. Connelie, 435 U.S. 291 (1978), 98 S.Ct. 1067, 55 L.Ed. 2d 287 and Cabell, supra, the Court upheld laws which reserved positions in state government agencies for citizens.

The class, in this case, is narrowly defined and precise. The class to which the Appellant objects to licensure is limited to only to public sector labor organization business agents. This is certainly a far cry from the classification found in Sugarman which included all positions in the competitive class of the state civil service system, the class to which the Second District Court of Appeal compared the class of public labor organization business agents. (A-247, 248). In fact, there is no comparison between the class of public labor organization business agents and the class of all positions in the competitive civil service system. On this basis the District Court of Appeal's decision as to this issue must be reversed.

The class of public labor organization business agents in the State is comparable to the classification of all public school teachers in Ambach v. Norwick, 441 U.S. 68, 60 L.Ed. 2d 49. In that case the Plaintiff was an alien who wished to teach in the New York public school system. New York law prohibited certification of an alien who had not made due application to become a citizen. The Plaintiff contended that the statute

violated the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court determined that it was not presented with the question of the permissibility of citizenship requirements pertaining to teachers in private schools. The statute was found constitutional as to public school teachers under the political functions exception.

In Cabell v. Chavez-Salido, 454 U.S. 432, 102 S.Ct. 435, 70 L.Ed.2d 677 (1982) the Court held that a statute which required peace officers be citizens was not unconstitutional and that it could be applied to exclude lawfully resident aliens from holding positions as deputy state probation officers. The general law enforcement character of all peace officers, including probation officers resulted in the court finding that the exclusion was "sufficiently tailored" to the legitimate political purpose of limiting the exercise of important governmental powers to members of the political community.

In Cabell, the lower court applied the two-pronged test to the classification of peace officers which included toll-service employees, cemetery sextons and inspectors and struck down the statute as being overinclusive. Both these positions were eliminated from coverage of the statute. So, when the Supreme Court reviewed the case it did not have to hold the District Court of Appeal was wrong in striking down the statute. However, the Supreme Court described the proper standard for reviewing that statute at the first prong of the test as an inquiry, not to

whether the statute was overinclusive at all, but "whether the restriction reaches so far and is so broad and haphazard as to belie the state's claim that it is only attempting to ensure that an important function of the government be in the hands of those having the 'fundamental legal bonds of citizenship.'" Cabell at 741. Another way of stating the standard is that the citizenship restrictions cannot be an attempt by the state to place restrictions on lawfully resident aliens that primarily affect economic interests.

Certainly, the interest the state has in licensing and qualifications of officers as paid representatives of the labor unions has been recognized by United States Congress and the Florida State Supreme Court, State v. Smith, 123 So.2d 700,703 (Fla. 1960), cert. denied, 371 U.S. 497 (1963). Any attempt by the Appellee to characterize the restriction as a means to ascertain economic advantage for U.S. citizen would be absurd. The concern in the case at bar is that public labor organization business agents formulate, execute and review broad public policy and performs functions that go to the heart of representative government. Therefore, the State has an interest in those public labor organizations business agents being citizens. Furthermore, these business agents are agents of those employees whose positions may constitutionally be restricted to citizens, like peace officers (Cabell), police officers (Foley) and teachers (Ambach). If the employees who they represent may be required to be citizens, then

their business agent should also be required to be a citizen.

The classification in §447.04 (1)(a) is precise enough to pass the standard announced in Cabell, supra. Even more, the classification as limited by the facts as presented in the case at bar further narrows the already concise classification to public labor organization business agents. On this basis there can be no argument that the "restriction reaches so far and is so broad and haphazard as to belie the State's claim that it is only attempting to ensure that an important function of the government be in the hands of those having the 'fundamental legal bonds of citizenship.'" Cabell v. Chavez-Salido, 454 U.S. 432, 442, 102 S.Ct. 735, 741 (1982); quoting Ambach v. Norwick, 441 U.S. at 75, 99 S.Ct. at 1593. On this basis the Second District Court of Appeal's opinion must be reversed.

Now, the second prong of the "Political Functions Exception" must be addressed.

B. WHETHER FLORIDA STATUTE §447.04(1)(a) AS APPLIED TO THE CLASSIFICATION OF PUBLIC LABOR ORGANIZATION BUSINESS AGENTS PASSES THE SECOND PRONG OF THE "POLITICAL FUNCTIONS" EXCEPTION TEST?

The second prong of the test examines the classification to see if it is applied in the particular case to persons holding state elective or important nonelective executive, legislative and judicial positions, who participate directly in formulation, execution or review of broad public policy and hence perform functions that go to the heart of representative government. Cabell v. Chavez-Salido, 454 U.S. 432, 440, 102 S.Ct. 735, 740

(1982).

1. Business Agents Pass the Governmental Functions Test Purely on the Basis of Agency

The "Political Functions" Exception to the strict scrutiny standard, generally applicable to classification based on alienage, rests on important principles inherent in the Constitution. This distinction indicates that the status of citizenship was meant to have significance in the structure of our government. When a statute passes the "Political Functions" test it need bear only a rational relationship to the State's interest furthered by the statue. Ambach v. Norwick, 441 U.S. 68,99 S.Ct. 1589 (1979).

Under the particular facts of the case at bar §447.04 applies only to public labor organization business agents. §447.04(1)(a) passes the "Political Functions" test based purely on the basis of agency relationship which exists between the public sector business agent and certain government employees he represents. Through the agency relationship between business agents and per sons who fulfill vital governmental functions that go to the heart of representative government and who potentially and constitutionally could have citizenship restrictions placed on them, the business agent steps into the shoes of these individuals. It then follows that if the State properly has an interest in these employees being citizens it also follows that the State properly has an interest in business agents representing those employees being required to be citizens of the

Thus for the purpose of the Governmental Functions Exception a bargaining agent's reprsentation is so intertwined with the identity of those State employees that he represents that he too should be required to be a citizen, if the employee in fact could properly be required to be a citizen of the United States.

2. §447.04(1)(a) Passes the Governmental Functions Test

Appellant contends that, notwithstanding the proper application of the agency principle (supra), in place of the two pronged Political Functions Test, business agents also pass that test on their own merit.

a. Business Agents Hold a Public Occupation.

As argued above, business agents by way of the agency theory relationship they have with those they represent who hold a governmental/political position, which goes to the heart of representatiave government as a result of this relationship the business agent steps into the shoes of these individuals who would otherwise pass the Political Functions Test and must also be required to be citizens based on the interest the State has in developing its political community. Furthermore, Adams v. Miami Police Benevolent Association, supra, supports this theory. The role of the business agent is intimately intertwined with the identification of the State such that the role of the business agents cannot be separated from the State. The public sector business agents can be distinguished from the occupations such as engineers, attorneys, dentists, taxi-cab drivers, pharmacists by

United States.

This concept is substantiated by Adams v. Miami Police Benevolent Association, Inc., 454 F.2d 1315 (5th Cir. 1972). In that case the Fifth Circuit held the Police Benevolent Asociation which bargained for wages and other terms of employment for policemen, were so closely intertwined with the City police department that the labor organization was acting under color of state law for purposes of 42 U.S.C.A. §1983. What Adams is saying is that in the public's eyes the identification of unions are so often so bound with that of the State that it for all practical purposes was acting as a part of the State.

Thus, for the purpose of the "Political Functions" Exception a bargaining agent's reprsentation is so intertwined with the identity of those State employees that he represents that he too should be required to be a citizen, if the employee in fact could properly be required to be a citizen of the United States.

2. The position of Public Sector Business Agent is, within its own right, included in the "Political Functions" Exception test.

Appellant contends that, notwithstanding the proper application of the agency principle business agents also pass the "Political Functions" test on their own merit.

a. Business Agents Hold a "Public" Occupation.

The case of Adams v. Miami Police Benevolent Association, supra, supports the proposition that public sector business agents hold a "public" position. The role of the business agent

is intimately intertwined with the identification of the State such that the role of the business agents cannot be separated from the State. The public sector business agents can be distinguished from the occupations such as engineers, dentists, taxi-cab drivers, pharmacists by the nature of their relationship with State employees. None of the occupations listed above deal so closely with the State that the public has come to identify them as part of the State; nor are they occupations whose purpose is to represent State employees; employees who could be required to be citizens.

b. Business Agents "Participate Directly in the Formulation, Execution or Review of Broad Public Policy."

Based on the agency theory, supra, business agents meet the second part of the inquiry of the second prong. Against Appellant's argument that business agents pass this prong on their own merit, the Appellee cited §447.205 and Hillsborough Classroom Teachers Association v. School Board, 423 So.2d 969 (Fla. 1st DCA 1982) to the Second District Court of Appeal to support the proposition that business agents cannot formulate broad public policy decisions. However, §447.209, Fla. Statutes (1985) is merely a management rights clause which is a part of all collective bargaining agreements in one form or another. What §447.209 and Hillsborough Classroom Teachers Association really means is that an employer and union cannot go to impasse over such mandatory subject. It does not mean that unions cannot

bargain about such policy matters. Moreover, certainly bargaining regarding how much public employees are to be paid, and under what terms and conditions they will work is the formation of broad public policy. For instance, these wages, terms and conditions become a model against which private employers compare and gauge their own wages, terms and conditions of employment.

As to execution of broad public policy Appellant looks to Hillsborough Classroom Teachers Association, supra. In that case, the Florida Supreme Court held that impact of implementation of decisions regarding class size and minimum staffing levels (policy decisions) on "wages, hours and terms and conditions of employment is mandatorily bargainable..." In other words, how policy decisions are to be executed are determined by the bargaining agent in bargaining sessions.

The bargaining agent's right to raise grievances and require arbitration also plays a role in the execution of public policy. This conclusion is supported by the remaining portion of §447.209 not quoted by the Appellee which provides:

> It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the

> exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation. (emphasis added).

Finally, the ability of the business agent to set a grievance for arbitration also puts him in the position of reviewing public policy arising out of a collective bargaining contract of the public employer. For example, when an employee is discharged for insubordination and the business agent requests arbitration, the business agent in effect reviews the execution of public policy and to an extent the formulation of the policy regarding discharge for insubordination. Thus, the business agent reviews the execution of public policy each time he makes the decision of whether or not he will bring each particular grievance to arbitration or whether he will agree to settle it at a lower level by comparing the execution against the standards he bargained for. Therefore, the business agent does participate in all three areas of public policy, formulation, execution and review. Indeed, bargaining sessions between the business agent and a public employee are required to be "open" and public under Florida's Sunshine Law. (F.S. §286.011).

c. Business Agents Perform Functions That Go to "The Heart of Representative Government."

Again and finally, based on an agency theory alone, business agents meet this final part of the inquiry of the second prong of

the test. Public sector business agents step into the shoes of policemen, teachers, peace officers who may constitutionally be required to be citizens based upon the "Political Functions" Exception. However, they also meet the last prong on their own merit. The inquiry at this final prong is what is the role of public sector business agents and what responsiblity and discretion do they have in fulfilling that role (Ambach at 75, 1594).

d. Public Sector Businss Agents Role, Responsibilities and Broad Discretionary Powers

The role of the Public Sector Business Agent is to act as the agent of the employees he represents in securing wages, hours, terms and conditions of work the employees will work under. As their representative, the business agent becomes not only the mouthpiece for the employees but also the talisman who formulates the collective bargaining relationship, the collective bargaining contract and who has everything to do with the type of ongoing relationship between the employees and the State. The ramification that the collective bargaining relationship has on the way in which these employees effectuate their duties and functions is apparent. The collective bargaining contract is the foundation upon which the employees will gauge their responsibilities and the performance thereof. Business agents have a strong influence on the type of grievances which are brought not against the State. It is the agent's responsibility to determine whether or not a non-member's grievance will be arbitrated.

Indeed, the outcome of these grievances have an acute impact on the spirit and morale of the employees within the collective bargaining unit. Furthermore, through the presentation to employees of the perceived rights the bargaining agent is bargaining for with the State, he can influence the attitudes of the employees in regard to what they view as their responsibilities in performing their government function and how they do in fact view the State.

In short, the attitudes and belief systems of the business agent which arise in part out of whether or not he is a citizen has an apparent impact on all aspects of the collective bargaining relationship as the talisman of the bargaining unit. That bargaining relationship is a guide to the employees of the State who perform "a governmental function" and has an overriding effect on how the employee fulfills their duties and functions which goes to the heart of representative government. It is the present of these functions which allow the State to place citizenship requirements on certain classifications of positions. Therefore it only seems logical to require those who have so much influence on the relationship out of which these duties and governmental functions eminate also be required to be a citizen.

Public sector business agents have broad discretionary powers in determining what wages, terms and conditions they will settle for as reasonable offers from the employer. Business agents also have broad discretionary powers in determining which grievances

he will demand be arbitrated. Contrary to the Appellee, the Appellant does argue that the discretionary powers of the police officer and probationary officer's power to arrest a person whom either officer decides has violated the law is comparable to the discretionary powers of the business agent. By way of analogy when a business agent sets a grievance for arbitration he is bringing the State to trial. The business agent brings an "information and indictment" against the State communicating the State has acted improperly in a manner which violates the law of the contract made between the parties.

This discretionary role of the business agent is key to his function being one which goes "to the heart of representative government." Foley, 435 U.S. at 297, 98 S.Ct. at 1071, 33 L.Ed. 293. The business agent plays a key role in ensuring that the State exercises its powers fairly over its employees. The business agent's discretionary policiy duties over the contract between the parties ensures a balance prevails between employees rights and the State's right in effectuating its policy. Certainly, this role of the business agent does have a day to day impact on the general community and its view of how democratically the State indeed operates with its people. This impact is seen specifically be private sector employers using conduct between the State and its employees as a guide for its own employment activities. This representative function of the business agent like the public education function, Ambach v. Norwick,

supra, and the police function, Foley v. Connelie, fulfills a most fundamental obligation of government to its constituency for these reasons.

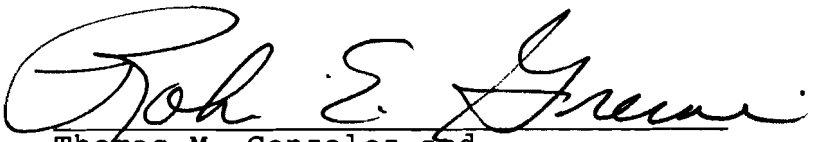
Therefore, for the foregoing reasons §447.04(1)(a) passes the Governmental Functions Test and does not violate the equal protection clause of the Fourteenth Amendment.

CONCLUSION

The first prong of the "Political Functions" Exception test is met here in that the classification upon which the facts of this case lie is public labor organization business agents. This classification is precise and concise enough to demonstrate that the state is only attempting to ensure that an important function of government be in the hands of those having the "fundamental legal bond of citizenship." The second prong of the test is met first solely on an agency theory and secondly because public labor organization business agents have the requisite political function to fulfill the second prong.

Because the Political Functions Exception test is met, the Second District Court of Appeal's opinion should be reversed. Florida Statute, §447.04(1)(a) should be held constitutional as applied to public labor organization business agents and licenses applied for in such case should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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