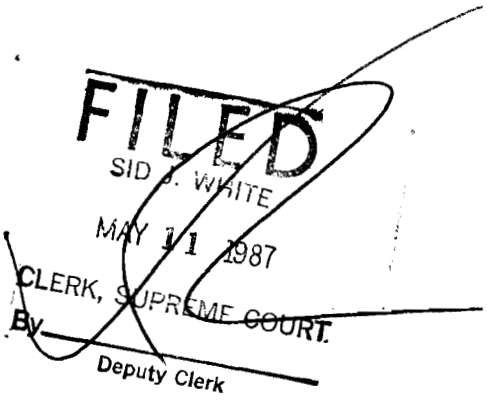
5-29

IN THE SUPREME COURT
OF THE STATE OF FLORIDA



PALM HARBOR SPECIAL
FIRE CONTROL DISTRICT,

Appellant,

vs.

CASE NO.: 70,119

DCA-2 NO.: 86-1150

CELESTINE KELLY,

Appellee.

_____/

REPLY BRIEF OF APPELLANT
PALM HARBOR SPECIAL FIRE CONTROL DISTRICT

On Appeal From A Final Order of the
Second District Court of Appeal of Florida

Submitted by:

Robin E. Greiwe
Thomas M. Gonzalez
THOMPSON, SIZEMORE & GONZALEZ, P.A.
Post Office Box 639
Tampa, Florida 33601
(813) 273-0050
Counsel for Palm Harbor Special
Fire Control District

AMENDED TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

I. WHETHER THE COURT OF APPEALS PROPERLY CONCLUDED THAT FLORIDA STATUTES §447.04(1)(a) WAS NOT AMENDED BY IMPLICATION BUT IS A SPECIAL ACT EXCEPTION TO FLORIDA STATUTE §455.10.[1]

INTRODUCTION

Section 447.04, Fla. Stat. (1985) provides:

(1) No person shall be granted a license or permit to act as a business agent in the state:

(a) Who is not a citizen of the United States.

Section 455.10, Fla. Stat. (1985) provides:

> No person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.

Faced with this conflict, the Department of Labor decided as a matter of law that §455.10 amended by implication §447.04(1)(a) because §455.10 was the last substantive expression of legislative intent. The District appealed the Department's construction to the District Court of Appeals upon the principles that amendment by the implication is not favored and should not be found in doubtful cases. State v. J.R.M., 388 So.2d 1227 (Fla. 1980).

The District Court agreed and held that two facially conflicting statutes are to be harmonized, if reasonably possible, so as to preserve the effectiveness of each, harmony is achieved here by construing §447.04(1)(a) as being specifically applicable to

---

1 The Appellant did not argue this issue in its Initial Brief because the Appellee did not cross appeal on this issue. The Appellant answers here in its Reply Brief as to this issue.

the occupation of labor organization business agents and §455.10 as being applicable to other occupations and professions not covered by a specific statute like §447.04(1)(a).

A. The last substantive expression of the legislative intent on the subject of restricting persons from practicing occupations based on citizenship does not control.

The Appellee argues that §455.10 is the last substantive expression of legislative intent and, therefore, should control over §447.04(1)(a). Appellant disagrees for two reasons:

1) The last substantively enacted statute does not control in the face of two conflicting statutes that can be harmonized.

2) If the last substantive expression of legislative intent does control, that last expression would be §447.04(1)(a).

First, the last substantively enacted statute does not control in the face of two conflicting statutes which can be harmonized. Parker v. Baker, No. 85-2900 (Fla. 2d DCA Oct. 17, 1986) [11 FLW 2223]. A more specific statute will be given precedence over a more general one, regardless of their temporal sequence. Busic v. United States, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753, 64 L. Ed.2d 381, 389 (1980).

Section 447.04(1)(a) is a specific provision which requires business agents be citizens. Section 455.10 is a general statute which addresses licensing non-citizens.

The 1977 legislative history of §447.04(1)(a) demonstrates that the Legislature intended that it operate in the face of the operative words of §455.10. During the 1977 legislative session, that section was amended twice within one week. On May 27, 1977,

the legislature amended §447.04(1)(a) eliminating the citizenship requirement for the issuance of a license to a business agent while maintaining a residency reguirement. (House Bill No. 962 Ch. 77-116, Laws of Fla.) On June 2, 1977, however, §447.04(1)(a) was once again amended reinstating a citizenship requirement for a business agent's license. (Senate Bill No. 393, Chapter 77-84, Laws of Fla.). Based upon this history, it appears that the 1977 Legislature intended to require business agents licensed under Chapter 447, Part 1, Fla. Stat. to be citizens of the United States, notwithstanding the statutory provisions found in Chapter 455, Fla. Stat. (R-123, 235). Subsequent amendment to §455.10 in 1979 does not require that it replace §447.04(1)(a). Rather, case law provides the two should be harmonized, with §447.04(1)(a) operating in instances when licensing of non-citizens business agents arise. Such construction agrees with Parker v. Baker, No. 85-2900 (Fla. 2d DCA Oct. 17, 1986) [11 FLW 2223].

In Parker an employee ran for county appraiser and lost. When he returned to work the appraiser, his superior, told him that he had resigned by operation of law. A Florida Statute, §99.012(7), provided that an individual resigns when he seeks the position of his supervisor. However, a local statute provided that an unpaid leave must be taken once the employee has qualified as a candidate.

The employee argued that the local law was controlling on the basis that the local law prevailed over the general statute and was the last legislative enactment.

The Parker court concluded that the specific provisions of the general statute which addressed the issue presented would prevail, i.e. the employee ran against his supervisor, he did not merely qualify. The court based its decision on the legal principle that more specific provisions in a law control over more general provisions of another law, regardless of whether the laws under scrutiny are local or general statutes. The provisions that more specifically address the particular situation will survive and control.

In the case at hand, §447.04(1)(a) specifically addresses the issuance of licensing non-citizen business agents while §455.10 in a more general sense addresses licensing of non-citizens. As provided by the District Court, §477.04(1)(a) "'will operate as an exception to or qualification of the terms of the more comprehensive statute to the extent only of the repungancy, if any.'" Parker, 11 FLW at 2224, quoting Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959), quoting from Stewart v. Deland-Lake Helen Special Road and Bridge Dist., 71 So. 42, 47 (1916).

The attempt made by the Appellee to distinguish the case presented from Parker is unavailing. The contention that both §447.04 and §455.10 are specific statutes addressing citizenship is unsound. Both statutes address the issuance of licensing non-citizens. However, §455.10 speaks generally about licensing while §447.04(1)(a) speaks specifically to licensing non-citizen business agents. In fact, part of Appellee's argument is that §455.10 is a comprehensive revision of the subject matter of

licensing of non-citizens. He cannot say that §455.10 is a comprehensive revision on one hand and a specific statute on the other.

The court's decision that §447.04(1)(a) controls over §455.10 also rested on Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986). In Floyd the appellant demanded a jury trial for criminal contempt proceedings. He claimed that he had a right to a jury trial under §918.0155, Fla. Stat. (1986), but §38.22, Fla. Stat. (1985), provided that the court would hear all questions of law and fact when exercising its inherent contempt power. The court concluded that §38.22 would apply to the situation presented because it addressed the particular issue in question and has been a traditional court power.

Here, the legislature provided generally in §455.10 that licensing would not be proscribed on the basis of citizenship. However, there are certain specific instances where such proscriptions are and have traditionally been ignored. Section 447.04(1)(a) provides such a traditional instance.

As a specific statute which addresses the issue of licenses to non-citizen business agents, §447.04(1)(a) must prevail over §455.10, Fla. Stat., which only generally addresses the licensing of non-citizens. Two conflicting statutes should be harmonized whenever possible to give both effect. Therefore, §447.04(1)(a), the more specific statute shall be given precedence over the general one regardless of their temporal sequence in instances of licensing non-citizen public sector business agents.

Appellee cites State v. Dunman, 427 So.2d 166 (Fla. 1983); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); DeBolt v. Dept. of Health & Rehab. Services, 427 So.2d 221 (Fla. 1st DCA 1983) as cases where the last substantive expression of legislative intent or amendment by implication was found. These cases are distinquishable from the case presented.

In State v. Dunman, the issue was whether the legislature dispensed of the element of intent to permanently deprive an owner of his property to find someone guilty of theft. Section 812.041 required specific intent. The repealing section, §812.014(1) provided no intent was necessary. The finding of amendment by implication rested on strong evidence of legislative intent to repeal. Specifically, the sections in conflict were in the same chapter. Additionally, the court noted in footnote* at 168-69 that the 1982 legislature had amended §812.014(1) to provide for intent to deprive either permanently or temporarily and repealed §812.041. Furthermore, the Fifth District Court of Appeals had recognized the changes made by Ch. 82-164, Laws of Fla. in Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982), cert. denied 422 So.2d 842 (Fla. 1982). Therefore there were several signs indicating that the legislative intent was to repeal §812.041. Finally, §812.041 or the "joy riding statute" covered theft of motor vehicles, aircraft, boats or boat motors while §812.012 - §812.037 are civil theft statutes. There was no basis for distinguishing between the intent required for theft of motor vehicles, aircrafts, boats and boat motors and other property.

In Oldham, 361 So.2d at 140, the issue was whether a 1891 statute which provided it was unlawful for any public officer to be in anyway interested in a public construction contract in which such officer was a party to the letting was repealed by 1973 Florida Statute, §112.314(1). Section 112.314(1) (1973) provided that no officer shall transact business in his official capacity where he owns a controlling interest. The court held that §112.314(1) repealed §839.07 by implication. Section 112.314(1) had originated in 1967 and had been substantially amended in 1974 to cover local as well as state officers. Furthermore, in the Declaration of Policy of Part III, Chapter 112, the Florida legislature made it apparent that it intended the chapter to deal pervasively with the subject matter of conflict between the official duties and private interests of public officials and employees. Thus as in Dunman, 427 So.2d at 166, there was direct evidence of legislative intent that §112.314(1) control. Additionally, there was no room to have §839.07 operate as a special act exception. The law was contravened either if an officer participated in the letting of a public contract if he had any interest or if he had a controlling interest in the contract. There was no reason for having the stricter standard for the letting of a public construction contract versus the letting of any other type of public contract.

In DeBolt v. Dept. of Health & Rehab. Services, 427 So.2d 221 (Fla. 1st DCA 1983), the issue presented was whether §768.28, Fla. Stat., specifically enacted to remove sovereign immunity in tort claims "in cases where a private person would be

liable," repealed §402.34 (1969), quoting Jetton v. Jacksonville Electric Authority, 399 So.2d 396, 397 (Fla. 1st DCA 1981), cert. denied 411 So.2d 383 (Fla. 1981). Legislative history demonstrated that in this instance §768.28 was to control over §402.34. Section 402.34 (1969) was enacted to grant HRS "corporate" powers, not to immunize it from tort actions. Additionally, confusion had arisen regarding whether or not counties and municipalities could be sued under §768.28, and the legislature had amended the statute to specifically include them. This amendment demonstrated that agencies were to be included within the scope of §768.28. So once again, there was a specific showing of legislative intent that the repealing statute was to prevail in that case. Here, however, there is no evidence that the legislature intended §455.10 to prevail over §447.04(1)(a).

Sections 455.10 and §447.04(1)(a) are in totally different chapters, unlike the Dunman case. The legislature has not amended §455.10 in recent years to demonstrate its intent to override all other statutes contrary to it as it did in Dunman. Section 447.04(1)(a), Fla. Stat., is not a statutory artifact such as the Oldham court was dealing with.

Moreover, a legislative intent to repeal is not clear in this case as it was in these three cases. Section 447.04 was amended in 1983 and yet provision (1)(a) was left intact. The operative words of §455.10 have been present since the initial enactment of the statute in 1972. Yet the 1977 legislative history of §447.04(1)(a) indicates the legislative intent was that it operates in the face

of §455.10, despite the existence of cases like Sugarman v. Dugall, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed.2d 853 (1973) of which we must assume that the legislature had knowledge. Furthermore, the statement of legislative purpose of §455.10 does not make it clear that it is to repeal all other statutes in conflict, nor does §455.10 expressly provide for the same.

In conclusion, here, a construction of special act exception is totally warranted. In the cases cited by the Appellee it was not warranted because the legislative intent made it apparent appeal was required.

Amendment by implication is not favored and not to be used in doubtful situations. State ex rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985); State v. J.R.M., 388 So.2d at 1227. The presumption is that the legislature did not intend to keep really contradictory enactments on the statute books or to effect so important a measure as repeal of a law without expressing the intention to do so, and an interpretation leading to such a result should not be adopted unless it is inevitable.

Therefore, under the facts and cases presented, §447.04(1)(a) must be found to operate regardless of the last substantive amendment to §455.10. Section 447.04(1)(a) must be harmonized with §455.10 and operated in this case to control over the general provisions of §455.10 proscribing restriction on alienage basis.

Secondly, if the Court were to agree with the Appellee that the last substantive expression of legislative intent was to

operate, Appellant contends §447.04(1)(a) would still control as the last substantive expression.

In 1983 the legislature amended §447.04 and left subsection (1)(a) unchanged. Leaving subsection (1)(a) intact despite the revision to §455.10 in 1979 evidences that the legislature did not intend repeal by implication. In fact, it demonstrates that the legislature intended to leave §447.04(1)(a) in full force and effect.

A case which supports this contention is Littman v. Commercial Bank & Trust Co., 425 So.2d 636 (Fla. 3d DCA 1983). The defendant in that case claimed that the trial court erred in granting the plaintiff summary judgment predicated on a violation §818.01 and §818.03, Fla. Stat. Those sections declared the disposal of property subject to a lien without consent of the vendor to be a misdemeanor. The defendant appealed on the basis that §818.01 was impliedly repealed by §679.311, Fla. Stat. (1979).

The court affirmed summary judgment on the basis that appeal by implication was not favored. The court found particularly persuasive the fact that §818.01 and §818.03 had been amended following the adoption of §679.311 and yet no striking of the supposedly conflicting provision had been effected.

This decision makes good common sense as well. One must presume that when any amendment to a statute is made, the rest of the statute must be reviewed. Such a review checks to see if the same amendment must be made to other sections of the statute or

adversely affects the meaning of other sections of the statute. Here, §447.04 was reviewed in the same way when part of it was amended in 1983. The fact that §447.04 was amended in 1983 without striking (1)(a) is indeed persuasive that the legislature intended it to survive a repeal by §455.10 which has been unchanged since 1979 and was the last substantive expression of the legislative intent in this area. Therefore if the last substantive expression of the legislature was found to control here, §447.04(1)(a) would be that last expression and prevail over §455.10.

B. Section 455.10 was not intended to be a comprehensive revision of the subject matter of restricting employment based on citizenship requirements.

Appellee argues that §455.10 is a comprehensive revision of the subject matter of restricting employment based on citizenship requirements and therefore should amend §447.04(1)(a) by implication. This is an extention of the argument raised in A, supra. For the reasons cited there alone, the argument that §455.10 is a comprehensive revision should not be considered a basis for overturning the District Court.

However, Appellant would add that Appellee has provided the Court with no evidence that §455.10 is indeed a comprehensive revision. To the contrary, Appellant contends §455.10 is not such a revision for the following reasons: One, the operative words of §455.10 have been part of the statute since 1972. Yet in the face of those words, the 1977 legislative history of

§447.04(1)(a) made it apparent that the legislature intended business agents to be an exception to the provisions of §455.10. Moreover, the elimination of §455.10's previous restrictions based on non-citizenship in 1979 did not change the scope of the law's application to the different occupations it covers. The striking of the provisions just eliminated the ambiguities in the statute. The amendment was not a comprehensive revision of the subject matter.

Two, Appellee contends that the division of Chapter 455 into Parts I and II demonstrates that the 1979 amendment to §455.10 was to have an all "inclusive" occupational scope. According to the Appellee the statutes in Part I (and which §455.10 is a part) apply to "all occupations". However, the purpose section of the statute announcing the division stated only that Parts I and II relate to the "department", that is the Department of Professional Regulations (DPR). Ch. 79-197, Laws of Fla.

If the legislature had intended that Part I of the chapter apply to all occupations, the purpose section would have said so. It appears more likely that the intent was to have §455.10 apply to the DPR and other agencies and boards listed in §455.01, not to Department and all other occupations.

If the legislature had intended §455.10 (1979) to be a comprehensive revision as Appellee submits, then it simply could have used words such as "notwithstanding any other laws to the contrary..." or similar language. But it did not, because the legislature did not intend that the statute be a comprehensive revision.

In an attempt to prove that §455.10 (1979) was intended to be all-encompassing, the Appellee states that an amendment was made in 1980 to §943.13(2) which added the words "notwithstanding any laws of the state to the contrary." The truth of the situation is that since 1976, that language has been a part of §943.13(2).

> Section 943.13 Police officers; qualifications for employment - After August 1, 1974, any person employed as a police officer shall..."
> (2) Be a citizen of the United States, notwithstanding Chapter 74-37, Laws of Fla., or any act of the Legislature passed during the 1976 Regular Session. Fla. Stat. 943.13 (1977).

In 1976, §455.012 (later amended §455.10) was not amended, so that portion of the 1976 amendment to §943.13(2), Fla. Stat. could not have occurred as a result of §455.012. In fact, it is not really possible to know that the amendment to §943.13(2), which occurred in 1980 and is referred to by the Appellee occurred as a result of the amendment to §455.10 in 1979. Moreover, the "notwithstanding" language of §943.13(2) was added prior to the time of the 1979 amendment of §455.10 and the 1977 legislative history of §447.04(1)(a) which indicated the intent tht it control. Thus, the 1980 amendment does not have the significance that the Appellee would lead the Court to believe.

Therefore, all indications are that §455.10 was not a comprehensive revision of the subject matter of restricting employment based on citizenship requirements. The legislative purpose of the §455.10 (1979) amendment specified Parts I and II were related to the DPR. There was no language indicating that §455.10 was to be all encompassing. Finally, language changes in other statutes did not arise as a result of the 1979 amendment to §455.10.

C. The Department's construction of the statute is not entitled to great weight.

In a case of statutory interpretation the Court is free to interpret the statute without regard to the agency's view. §120.68(9), Fla. Stat. (1985). This freedom to interpret the law -- a function for which courts are better suited for than agencies -- is recognized in several Florida decisions involving the Public Employment Relations Act.

For instance, in Murphy v. Mack, 358 So.2d 822 (Fla. 1978), the Supreme Court overturned Public Employee Relation Commission's (PERC's) determination that deputy sheriffs are "public employees within the meaning of the Act." In that case there was no choice between two plausibly correct positions consistent with the Public Employees Relations Act. A deputy sheriff was either a "public employee" or he was not. The Court read the legislative intent differently from PERC and reversed PERC's holding.

In the case at hand, Murphy v. Mack, is applicable. The Department of Labor has determined that Chapter 447.04(1)(a) has been repealed by implication by §455.10. There is no choice between two plausibly correct consistent positions regarding which statute controls under the given fact situation. Public sector business agents either must or must not be United States citizens.

A second and the simplest type of review is where the Appellant seeks to overturn the factual finding by the agency. In those cases it is clear that the Court may not overturn findings of fact where the versions found by the agency is supported

by substantial competent evidence. Section 120.68(10), Fla. Stat. (1985) City of Bartow v. Public Emp. Relations Com'n, 382 So.2d 311 (Fla. 2d DCA 1979). In this case no facts were found by the agency and no such findings are under attack.

The third type of review is where any agency acts pursuant to statute by which it was created and chooses between one of several alternatives as to "policy." In those cases the court is not free to substitute its choice of "policy" unless there is shown an abuse or discretion by the agency. Section 120.68(12), Fla. Stat. (1985), City of Clearwater (Fire Dept.) v. Lewis, 404 So.2d 156 (Fla. 2d DCA 1981). In City of Clearwater, the agency chose to implement the Public Employee Relations Act's description of employee's rights by holding that the right to union representation included a right of an employee to have a union steward at the disciplinary meeting. PERC's choice in the matter was respected by the court.

Historically, repeal by implication has been frowned upon. Chapter 447.04(1)(a) either has or has not been repealed. The Court has the power to read as a matter of statutory interpretation the legislative intent differently from the Department and reverse the Department's holding.

All the cases mentioned by the Appellee refer to review of rulemaking which fit under the third level of review, i.e. where an agency acts pursuant to the statute by which it was created and chooses between one of several alternatives as to "policy." In those cases the Court is not free to substitute its

choice of "policy" unless there is shown an abuse of discretion. Therefore, they are not applicable here.

The Appellee cited Depart. of Ins. v. Southeast Volusia Hosp. District, 438 So.2d 815 (Fla. 1983), cert. denied, 466 U.S. 901 (1984) for its contention that the Department of Labor's interpretation should be afforded great weight. However, as the District Court pointed out, that case does not permit an agency's interpretation of a statute which disregards an established judicial rule of statutory construction to stand.

Therefore the Department of Labor's interpretation of repeal by implication is not to be given great weight. This is a case of statutory interpretation in which the Court is free to interpret that statute without regard to the Agency's view. This is not a case where the Agency is free to interpret between several alternatives as to policy. When the Agency ignored an established rule of statutory construction, namely harmonizing statutes whenever possible, the Court is free to overrule that interpretation.

D. As an alternative approach to applying the statutory construction rule of the specific statute controlling over the general statute, the Court should find §455.10 applies only to the Department of Professional Regulations and the administrative boards listed in §455.01.

Instead of applying the rule of construction favoring specific provisions over general ones, alternatively, the Court should find that §455.10 applies only to Chapter 455. In §455.01 there

is a list of occupational and professional boards as well as the Department of Professional Regulation (DPR) which is governed by Chapter 455. None of these agencies or boards have ever regulated business agents licensing.

The 1973 enactment of §455.012 (now §455.10) read as follows:

> (1) No person shall be disqualified from applying for examinations to practice an occupation or profession regulated by any administrative board defined by §455.01 solely because he is not a United States citizen. However, any administrative board may require that an applicant submit proof of his intention to become an citizen as a condition of eligibility to sit for any board examination. The notarized declaration of intention to become a citizen, in lieu of formal declaration of intention to become a citizen, shall be sufficient proof of the applicant's intention to become a citizen.
>
> (2) No such board shall require citizenship as a condition of licensure if an applicant has otherwise successfully met the requirements for licensure. However, any board listed in §455.01 which requires a declaration of intention to become a citizen as a condition of applying for examination may, by board action, revoke a license issued to a non-citizen if it becomes apparent to the board that the non-citizen does not intend to become a citizen.
>
> (3) Any complaints concerning the violation of this section shall be processed in accordance with the provision of the Administrative Procedure Act, Chapter 120. (emphasis added). Fla. Stat. §455.012 (1973).

Thus §455.10 expressly applied to occupations and professions regulated by the administrative boards listed in §455.01.

Finally, it is worth noting again, that the division of Chapter 455 into two parts was accompanied by a purpose statement

which proclaimed both parts were to apply to the "department" i.e. DPR. There is no evidence that the legislature intended that §455.10 apply to more occupations than those controlled by the agencies and boards listed in §455.01.

Therefore, as demonstrated by the legislative intent, §455.10 should only apply to the occupations controlled by the boards and agencies listed in §455.01.

II. WHETHER FLORIDA STATUTES, §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?

The political functions exception permits the state to exclude aliens from "state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution or review of broad public policy perform functions that go to the heart of representative government." Sugarman v. Dugall, 413 U.S. 634, 647, 93 S. Ct. 2842, 2850, 37 L. Ed.2d 853, 863 (1973). More explicitly the rational for the political function exception is grounded in the notion that some state functions are so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of all persons who have not become a part of the process of self-government. Ambach v. Norwick, 441 U.S. 68, 73-74, 99 S. Ct. 1589, 1593, 60 L. Ed.2d 49, 54-55, (1979).

To determine whether an occupational classification fits within the political functions exception, a two prong test is applied. The first prong determines whether the classification is over- or underinclusive. The second prong determines whether the classification is a state elective or important nonelective executive, legislative, and judicial positions, officers who participate directly in the formulation, execution or review of

broad public policy, hence perform functions that go to the heart of representative government. The following demonstrates that the classification of public sector business agents pass this two prong test and therefore fall within the political functions exception.

A. Whether the alienage 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?

1. The classification of all business agents is not over-inclusive.

The first prong of the political exception test provides that the classification which bears citizenship restriction must be sufficiently tailored. The proper standard of review asks "whether the restriction reach 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 bond of citizenship.'" Cabell v. Chavez-Salido, 454 U.S. 432, 442, 102 S. Ct. 735, 741, 70 L. Ed.2d 677, 686 (1982) quoting Ambach v. Norwick, 441 U.S. at 75, 99 S. Ct. at 1593.

The District Court concluded that §447.04(1)(a) violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The court's basic reasoning was that the classification was fatally overinclusive because it contained private as well as public sector business agents "to which there is no justifications under the second prong for doing so." (R - 247).

In other words, the District Court applied the second prong to arrive at its answer to the first prong thereby deciding that the classification was overinclusive. Moreover, the court concluded that because the classification was overinclusive at all it failed the first prong. Such a process of analysis is wrong as demonstrated in Cabell v. Chavez-Salido. In Cabell, the district court relied wholly on its behalf that because of the more than 70 positions included within the classification of peace officers, some undefined number of them could not be considered members of the political community no matter how liberally the category was viewed. Upon review, the Supreme Court held that any overinclusiveness does not void the statute. "The classification need not be precise; there need only be a substantial fit." 454 U.S. at 442, 102 S. Ct. at 741, 70 L. Ed.2d at 677.

The classification of peace officers in Cabell included dental board inspectors, parks and recreation department employees and voluntary fire wardens and yet it was not found to be overinclusive. The court held that basic quality common to all of the "peace officers" was their power to make arrest.

Here §447.04(1) covers both public and private sector business agents. The basic quality that all the individual business agents have in common is the power to represent public employees. There is nothing that keeps the individual private sector business agent from going public or a public business agent from going private. What constitutes an overinclusive classification was demonstrated in Sugarman v. Dugall, 413 U.S. 634, 93 S. Ct.

2842, 37 L. Ed.2d 853 (1973). The classification consisted of all permanent positions in the competitive civil service system in the state of New York. The alien restriction applied to a broad range of occupations which included high-ranking state officers who actively participated in the formulation and execution of broad public policy, but also employees such as sanitation workers and typists.

In this case the classification consists only of business agents. Where the classification consists of one occupational classification, it does not fail the first prong. For instance, in In re Griffiths, the scrutinized classification was all attorneys applying for the Connecticut Bar. The court did not find the classification of all attorneys, which included both public and private attorneys to be overinclusive. The statute was declared unconstitutional at the second prong of the test. Attorneys were not found to be "officials of government by virtue of being lawyers." 413 U.S. 717, 729, 93 S. Ct. 2851, 2858, 37 L. Ed. 910, 919 (1973).

Likewise in Bernal v. Fainter, 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed.2d 175 (1984) the scrutinized calssification was all state notaries public. Again, the classification did not fail the first prong, but the second of the test.

In summary, cases involving classification of one occupation like In Re Griffiths (attornies) and Fainter (notaries public) were not found to be overinclusive. Likewise, §447.04(1)(a) is not overinclusive. It does not fail the first prong of the political exception test because the classification consists of one

occupation - business agents, all of whom as individuals can represent public sector employees.

2. The two prong test must be applied in context of the case presented.

Appellant contends that the constitutionality of §447.04(1)(a) must be tested as applied to the facts presented in the case at bar. Specifically, the issue becomes, is §447.04(1)(a) constitutional as applied to Celestine Kelly, a public sector business agent.

In its initial brief the Appellant argued that the correctness of the Appellant's contention resides, first, in court approved statutory construction and secondly on the distinctions other cases decided in this area. Shedeker v. Vernmar, Ltd., 151 So.2d 439, 441, 442 (Fla. 1963) (See Initial Brief p. 11-18.) Although the Appellant still affirms its position, it made the important observation that this same analysis was conducted by the Supreme Court in Cabell v. Chavez-Salido, 454 U.S. at 432. (1982). In that case the court examined the classification of peace officers which encluded over 70 positions and found the classification neither under- or overinclusive. Then the court examined the classification of deputy probation officers which was the position for which the plaintiffs had applied and were denied on the basis of alienage. Again, the court found the classification neither under-or overinclusive.

The appellee argues that the Appellants contention of examination of the statute in context of the facts is wrong for three reasons.

First, Appellee says such a construction "flies in the face of this Court's prior decisions." (Answer brief at p. 20). However, the Appellee cites only one decision, State v. Smith, 123 So.2d 700, 703 (Fla. 1960), cert. denied 371 U.S. 947 (1963). In Smith, this court held that §447.04 applied to both public and private sector business agents and was not preempted by the National Labor Relations Act. Obviously, the issue raised here on appeal concerns only §447.04(1)(a) and its constitutionality under current law as applied to public sector business agents. In other words Smith did not consider the issue raised here. In fact, the Appellant supports Smith in that it contends that all other provisions of §447.04 should continue to apply to both public and private sector business agents. Kelly contends that §447.04(1)(a) should apply to neither public or private sector business agents. Such a contention hardly agrees with Smith. Moreover, it cannot be said that the Appellant's contention "flies in the face of the Court's prior decisions" if the Appellee's contention does not. (Answer Brief p. 20).

Secondly, the Appellee argues that deciding the constitutionality of §447.04(1)(a) in context of the facts at bar "stand the first prong of the political functions exception on its head." (Answer Brief p. 20). The Supreme Court in Cabell, did not think so. 454 U.S. at 432. It agreed with the Appellant's contention and went through the same analysis in that case. In Kelly's argument, he reasons that "the state intended to apply, has applied, and is applying §447.04(1)(a) to business agents of

private employee labor organization and this fact "undercuts any claim that the restriction serves legitimate political ends." (Answer Brief at p. 21). Not only is this argument senseless under Cabell, id., but it directly conflicts with Appellee's argument on p. 15 which says the Labor Department has not applied §447.04(1)(a) to private sector business agents since 1981. Thirdly, the Appellee states that restricting §447.04(1)(a) to public sector business agents still provides the court with an overinclusive classification. Kelly argues that because public sector business agents represent a host of other public employees who cannot be restricted on the basis of alienage that the classification of public sector business agents is overinclusive.

As pointed out above, the fact that a class is overinclusive at all is not the standard to examine the classification. Moreover, Appellant contends that there is absolutely no overinclusiveness here. Public sector business agents may at any time represent public employees who may constitutionally be restricted on the basis of citizenship. Because, the public sector business agent may choose at any point in time to benefit from representing these employees, he must take the restrictions which go along with said representation.

The standard of inquiry that the Appellee endorses here are too narrow. Kelly is looking for a precise fit, not the "substantial fit" mandated in Cabell, 454 U.S. at 441. The correct standard is one which looks at the classification, which here consists of public sector business agents. By

the Sugarman and Cabell standards that classification is neither under- or over-inclusive. The class contains one occupation not a wide variety, which run the gamut from clerical to political functions occupations.

B. Whether the citizenship restriction of §447.04(1)(a) passes the second prong of the political functions exemption test?

1. Public sector business agents hold a political functions occupation.

Appellee contends that because public sector business agents are not employed by the state that the position is not a political function. To the contrary, the United States Supreme Court held in Bernal v. Fainter, 467 U.S. 216, 104 S. Ct. 2312, 2314, 81 L. Ed.2d 175, 178 (1984), that "the dispositive factor [of whether a position falls within the policital functions exception] is the actual function of a position, not its source." (Emphasis added).

Public sector business agents represent public employees, some of whose occupations can be restricted to citizens under Sugarman v. Dugall, 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2883 (1973).

It only follows that if the employees must have the fundamental legal bonds of citizenship to act with the state, then the public sector business agent, because of their agency relationship, must also when securing wages, hours and conditions of work for them.

The function of public sector business agents is to represent public employees in bringing to and securing from their state

employers demands which bear upon wages, hours, terms and conditions of work. Through a process of negotiation the public sector business agent formulates the collective bargaining contract that exist between the parties which represent a whole myriad of policy decisions impacting on wages, hours and conditions of work. He also determines how policy decisions will be handled as they impact on the employees that he represents, in other words, how policy decisions are to be executed. Public sector business agents also review policy. For instance, they review public policy which relates to discharge and other topics of employment through the grievance and arbitration process. They decide if a grievance will be raised and whether it will go to arbitration.

Moreover, the role of the public sector business agent is so intertwined with the identification of the state, that the role and functioning of the business agent cannot be separated from the state. Adams v. Miami Police Benevolent Association, 454 F.2d 1315 (5th Cir. 1972).

The actual functioning of public sector business agents is to stand in the shoes of employees who constitutionally can be restricted to citizens. This agency relationship alone makes his positon a political functions position. Furthermore, his representation of employees, discretionary powers, and formulation of broad public policy forms the basis with the identification the public has of him with the state. The public sector business agent's functioning effects the overall efficiency of the working of the state. Who employs Kelly is irrele-

vant, he functions as a nonelective officer who formulates, executes and reviews broad public policy that goes to the heart of representative government. Although arguably Kelly is paid by the International Association of Firefighters, it is the public employees who really pay for his services through their dues and the state pays them.

2. Public sector business agents participate directly in the formulation, execution or review of broad public policy.

Appellee argues that public sector business agents do not participate directly in the formulation, execution or review of broad public policy because he does not have any more power than an attorney. However, the Appellee's comparison is erroneous.

The public sector business agent's counterpart is the "managerial employee" defined under §447.203(4), Fla. Stat. (1985) as employees who

> (a) Perform jobs that are not of routine, clerical, or ministerial nature and require the exercise of independent judgment in the performance of such jobs and to whom one or more of the following applies:
>
> 1. They formulate or assist in formulating policies which are applicable to bargaining unit employees.
>
> 2. They may be required on behalf if the employer to assist in the preparation of the conduct of collective bargaining negotiations.
>
> 3. They have a role in the administration of agreements resulting from collective bargaining negotiations.
>
> 4. They have a role in personnel administration.
>
> 5. They have a role in employee relations.

By inference the business agent as the head of the local

representative has all these same powers in order to reach the requisite equality of bargaining power each side is supposed to have. The definition recognizes that public sector business agents does more than routine, clerical or ministerial. The definition recognizes that public sector business agents work entails independent judgment and requires that they both alone and with others formulate policies which are applicable to the bargaining unit they service.

As stated above, the Appellee's comparison to an attorney is misplaced. In In re Griffiths, 413 U.S. at 717, the court examined the role of attorneys as officers of the court: their right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables. The Court stressed that their duties as court officers did not involve matter of such policy or responsibilities. The court was not looking at a position held by an attorney within the political framework. The closer analogy is made to the public school teachers in Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed.2d 49 (1979). As teachers engage in the formulation of students' attitudes and have a wide discretion in their day-to-day contact with students, so do public sector business agents formulate the employees attitudes and have a wide discretion in their day-to-day contact with employees.

Appellee attempts to rebut the Appellant's argument that public sector business agents' powers impact on broad public policy by pointing to Sections of Chapter 447 which supposedly limit their power.

However, §447.209 is a management rights clause which is present in all collective bargaining contracts, both public and private. It provides that an employer can take individual action in regards to the rights listed there. This does not mean that such terms may not be bargained about or if the employer refuses to bargain on the basis of §447.209 that it will not be charged with an unfair labor practice charge by the business agent and later made to bargain. Furthermore, the power §447.209 gives public employers is circumscribed by the power business agents have to file the grievances.

That provisions of §447.209 not provided by the Appellee states:

> 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. §447.209, Fla. Stat. (1985)

Finally, under §447.301(4) public employees have the right to represent their own grievance only so long as the business agent had a "reasonable opportunity to be present at any meeting called for the resolution of such grievances."

Despite the presence of restrictions on the business agents' powers, that does not in fact keep business agents from exercising such powers. Section 447.505 prohibits public employees from striking. However, strikes have occurred despite such prohibitions and under the direction and support of the business agents' labor organization. See, City of Hollywood and IAFF, Local 1375, et al, 7 F.P.E.P. ¶12271 (1981).

Although it is true that §447.309(1) provides an agreement must be submitted to the employee of the bargaining unit for ratification, the business agent may get around this requirement by failing to provide reasonable notice of ratification vote and by failing to provide the bargaining members with a reasonable opportunity to examine the proposed amendments to the collective bargaining agreement as required under §447.501(2)(a) and Fla. Admin. Code 38D -20.02. The public employee does not have the standing to assert the interest of the employees in ensuring that the union has followed the proper ratification provisions Intern. Brotherhood of Painters v. Anderson, 401 So.2d 824, 830 (Fla. 5th DCA 1981); Hillsborough Transit Auth. v. Amalgamated Transit Union, 7 F.P.E.R. ¶12400 (1981). Therefore, it is apparent that the business agent can get provisions ratified without the employees understanding their full implication or prevent public employee from ratifying an otherwise sound proposal because the employees lack the time to become familiar with it.

Therefore, public sector business agents particiapte directly in the formulation, execution or review of broad public policy as provided in the Initial Brief at p. 22 - 21, and by the definition of their counterpart under §447.203(4) (1985). Though there are certain limitations on public sector business agents' powers, these limitations do not thwart their overall participation in formulation, execution or review of broad public policy. Additionally, they have the means to circumvent the limitation which could possibly interfere with their powers.

3. Public sector business agents perform functions that go to the heart of representative government.

This sub-issue elicits a two part question: 1) whether the position involves the exercise of broad discretionary power, and, 2) the importance of the function as a factor in the concept of democratic self-government. The Appellee argues that public sector business agents have no discretion.

Section 447.203(4), Fla. Stat. (1985) defines managerial employees or the counterpart of the business agent as an employee who:

> (a) "Perform jobs that are not of a routine, clerical or ministerial and require the exercise of independant judgment in the performance of such jobs and to whom one or more of the following applies:

If the business agent's counterpart is assumed to be using independant judgment, certainly the business agent is given the same power. The whole idea behind the collective bargaining acts is to give employees bargaining power equal to the employer they work for.

The Appellee argues that because business agents allegedly do not execute public policy than they do not perform functions that go to the heart of representative government. First such a contention is untrue as Appellant demonstrated in its Initial Brief at p. 26-28.

Secondly, just because there has not been a case which addresses an occupation that formulates or reviews public policy does not keep the Court from doing so here. The test provides that the considered position "participate directly in the for-

mulation, execution or review of broad public policy." Sugarman, 413 U.S. at 647. The main discretionary powers of the public sector business agent lie in his formulation and review of broad public policy. He is the talisman behind the collective bargaining agreement and the review of actions taken under that collective bargaining agreement through grievances and arbitration. Like teachers who engage in the formulation of students' attitudes and by necessity have a wide discretion in their day-to-day contact with students, public sector business agents engage in the formulation of public employees' attitudes regarding wages, hours and conditions of work. Public sector business agents have broad discretionary powers in determining when he will intercept the implementation of policy decisions which impact on wages, hours, terms and conditions of work which are mandatory subject of bargaining. Appellee argues that the business agent does come direct into contact with members of the general community on a day-to-day basis. This is not true. Through the media and the various other means of communication, their presence is ever felt. More importantly, communitywide impact is not the standard. In Cabell, 454 U.S. at 444, the Supreme Court said that the community-wide responsibilities of teachers and police was not a prerequisite for finding a valid classification. It may affect only a narrow subclass.

It is baffling that the public sector business agent discounts his service and the impact which his services have on the state and yet at the same time sells these services and con-

vinces employees that they are valuable enough to be paid for each month. In short, the Appellee inaccurately argues that his services have little to no impact on the state.

Finally, the Appellee argues that public sector business agents' functions are like civil engineers, or attorneys or notaries public because business agents do not formulate public policy, are not involved in matters of state policy and are not vested with the discretion of school teachers. First this is not true as argued above and in the Initial Brief at p. 25-28. Secondly, the striking difference between these occupations and public sector business agents is the obvious intertwining between the business agent, the state and its employees. The state is not directly impacted by any of the occupations cited by the Appellee. However, the state does feel the strong impact of business agents demands and his philosophical and political views that he imputes into those demands. Moreover, contrary to the Appellee's contentions, the public secotor business agent does hold an important nonelective position and participates directly in the formulation, execution or review of broad public policy and hence performs functions that are an important factor of the concept of self-government. He functions as a representative of state employees whose wages, hours and conditions of employment ultimately affect the functioning of the state. That overall functioning is a basic foundational element in the performance of functions which go to the heart of reprsentative government.

Therefore, public sector business agents pass the two prong political exception test, making §447.04(1)(a) constitutional.

CONCLUSION

Based on the foregoing the Appellant prays that the Court conclude that §447.04(1)(a) controls over §445.10 and does not violate the Equal Protection Clause of the Fourteenth Amendment.

Respectfully Submitted,

Robin E. Greiwe
Thomas M. Gonzalez
THOMPSON, SIZEMORE & GONZALEZ, P.A.
201 East Kennedy Boulevard
Post Office Box 639
Tampa, Florida 33601
(813) 273-0050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to JOSEPH H. KAPLAN, ESQUIRE, Kaplan, Sicking & Bloom, P.A., Post Office Drawer 520337, Miami, Florida 33152; STEVE ROSENTHAL, FPELRA, City of Largo, Post Office Box 296, Largo, Florida 34294; PETER HURTGEN, General Counsel for FPELRA, 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131; DAN F. TURNBULL, JR., Hearing Officer, Department of Labor and Employment Security, 2562 Executive Center Circle, E., Suite 131, Montgomery Building, Tallahassee, Florida 32301 this 9th day of May, 1987.

Robin E. Greiwe