

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

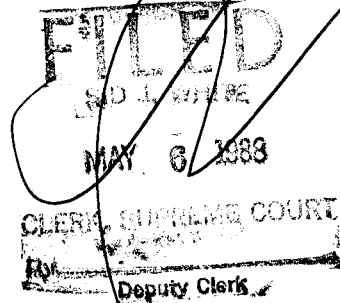
RICA GRETZ,

Petitioner,

vs.

UNEMPLOYMENT APPEALS COMMISSION,

Respondent.



CASE NO. 72,137

Certified Question of Great Public Importance  
From the First District Court of Appeal

ANSWER BRIEF OF RESPONDENT  
UNEMPLOYMENT APPEALS COMMISSION

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TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Citations. . . . .	ii - iii
Summary of Argument . . . . .	1
Argument	
THE UNEMPLOYMENT APPEALS COMMISSION IS NOT PROHIBITED FROM CHARGING CLAIMANTS FOR PROVISION OF TRANSCRIPTS OF THEIR HEARINGS . . . . .	2 - 10
Conclusion. . . . .	11
Certificate of Service	

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<u>Banfield v. United States Sugar Corp.</u> , 506 So.2d 461 (Fla. 4th DCA 1987) . . . . .	6
<u>Barnes v. Employment Security Board of Review</u> , 504 P.2d 591 (Kan. 1972) . . . . .	9
<u>Butler v. City of Newaygo</u> , 320 N.W.2d 401 (Mich. Ct. App. 1982) . . . . .	7
<u>Crawford v. Bradford</u> , 23 Fla. 404, 2 So. 782 (Fla. 1887) . . . . .	8
<u>Dade County v. Strauss</u> , 246 So.2d 137 (Fla. 2d DCA), <u>cert. denied</u> 253 So.2d 864 (Fla.), <u>cert. denied</u> 406 U.S. 924 (1971) . . . . .	8
<u>Gray v. Blanche</u> , 493 So.2d 840 (La. Ct. App. 1986) . . . . .	8
<u>Hernandez v. Catherwood</u> , 307 N.Y.S.2d 24, 33 A.D.2d 972, <u>affirmed</u> 315 N.Y.S.2d 866, 27 N.Y.2d 811, 264 N.E.2d 257 <u>app. disp.</u> , <u>cert. denied</u> , 401 U.S. 986 (1970) . . . . .	10
<u>Martinez v. Unemployment Appeals Commission</u> , ____ So.2d _____, 12 F.L.W. 2679 (Fla. 3d DCA 1987) . . . . .	7
<u>Poirier v. Division of Health, State</u> , 351 So.2d 50 (Fla. 1st DCA 1977) . . . . .	5
<u>Roberts v. Unemployment Appeals Commission</u> , 512 So.2d 212 (Fla. 3d DCA 1987) . . . . .	6
<u>Smith v. Adams</u> , 370 A.2d 288 (N.H. 1977) . . . . .	7
<u>Smith v. Department of Health and Rehabilitative Services</u> , 504 So.2d 801 (Fla. 2d DCA 1987) . . . . .	5, 6
<u>Sweeney v. Board of Review, Division of Employment Security</u> , 206 A.2d 345 (N.J. 1965) . . . . .	7, 8

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<u>Thurston v. Illinois Department of Employment Security,</u> 147 Ill.App.3d 734, 498 N.E.2d 864, (Ill. Ct. App. 1986) . . . . .	9
<u>Unemployment Appeals Commission v. Gretz,</u> 519 So.2d 1025 (Fla. 1st DCA 1988) . . . . .	4
 <u>Statutes</u>	
Section 120.57(1)(b), Florida Statutes . . . . .	5
Section 120.57(1)(b)6., Florida Statutes . . . . .	6
Section 120.57(1)(b)7., Florida Statutes . . . . .	4
Section 443.041(2)(a), Florida Statutes. . . . .	4, 5, 6, 7, 9, 10
 <u>Other Authority</u>	
Florida Administrative Code Rule 38E-3.09. . . . .	2
Florida Administrative Code Rule 38E-3.009 . . . . .	2
Florida Administrative Code Rule 38E-3.009(3). . . . .	6
Florida Administrative Code Rule 38E-5.024(6) . . . . .	4
Florida Rule of Appellate Procedure 9.200(b)(1). . . . .	2
Florida Rule of Appellate Procedure 9.400 . . . . .	2, 3
Florida Rule of Appellate Procedure 9.400(a) . . . . .	2
Florida Rule of Appellate Procedure 9.400(a)(2). . . . .	9
12 Fla.Jur.2d, <u>Costs</u> Section 1 (1979). . . . .	9
20 C.J.S., <u>Costs</u> Section 1 (1940). . . . .	9

SUMMARY OF ARGUMENT

Rica Gretz demands a free transcript of her administrative hearing. She contends that the Unemployment Appeals Commission is not only required to prepare the transcript, but also is prohibited from charging her for it. The First District Court of Appeal denied Gretz's request, but has certified the following as a question of great public importance:

WHETHER A CLAIMANT IN AN UNEMPLOYMENT  
COMPENSATION CASE MAY BE CHARGED A FEE  
BY THE UNEMPLOYMENT APPEALS COMMISSION  
FOR THE PROVISION OF A TRANSCRIPT OF  
THE AGENCY HEARING.

Florida's Administrative Procedure Act requires the Unemployment Appeals Commission to preserve all testimony taken at its administrative hearings. The Commission is also required to make transcripts available to the parties at no more than actual cost. The Unemployment Appeals Commission is not required to prepare transcripts and is not prohibited from charging a fee if it does prepare a transcript at a party's request. Three district courts of appeal have considered the question certified and all have answered it in the affirmative. The following discussion will demonstrate that those decisions were correctly decided and should be approved. The question certified must be answered in the affirmative.

ARGUMENT

THE UNEMPLOYMENT APPEALS COMMISSION IS  
NOT PROHIBITED FROM CHARGING CLAIMANTS  
FOR PROVISION OF TRANSCRIPTS OF THEIR  
HEARINGS.

Florida Rule of Appellate Procedure 9.200(b)(1), which is applicable to judicial review of orders of the Unemployment Appeals Commission, provides:

Within 10 days of filing the notice, the appellant shall designate those portions of the transcript of proceedings not on file deemed necessary for inclusion in the record. Within 20 days of filing the notice, an appellee may designate additional portions of the proceedings. Copies of designations shall be served on the court reporter. Costs of the original and all copies of the transcript of proceedings shall be borne initially by the designating party, subject to appropriate taxation of costs as prescribed by Rule 9.400.

The rule places the burden squarely on the parties, particularly on the appellant, to have the proceedings transcribed for the purpose of review. Costs attendant to the transcription of the proceedings are initially borne by the requesting party subject to taxation of costs in favor of the prevailing party at the conclusion of the appellate proceedings. Fla. R. App. P. 9.400(a).

When the Commission substantially amended former Florida Administrative Code Rule 38E-3.09, the newly fashioned and renumbered Rule 38E-3.009 closely resembled Florida Rule of Appellate Procedure 9.200(b)(1):

(3) Within 10 days of filing of the notice, the appellant shall designate

those portions of the proceedings for transcription and inclusion in the record. Within 20 days of filing of the notice, the appellee may designate additional portions of the proceedings. Copies of designations shall be served on the Clerk of the Commission along with a request that the Clerk provide a duplicate of the tape recorded record of the proceedings for transcription by a court reporter. Within 30 days of a designation, the designating party shall transcribe and deliver to the Clerk of the Commission the designated proceedings. In the alternative, the designating party may request that the Clerk of the Commission arrange transcription of the designated proceedings by the clerk's staff or other qualified person. The Clerk shall charge no more than actual costs for duplication of the tape recording of the proceedings or transcription of the proceedings. Costs shall be borne initially by the designating party, subject to taxation of costs as prescribed by Florida Rule of Appellate Procedure 9.400.

Fla. Admin. Code Rule 38E-3.009(3), (as amended eff. Oct. 15, 1986) An examination of the two rule provisions demonstrates that the Commission's rule complies with the appellate rule while providing a more flexible and potentially less expensive method of preserving and transcribing the administrative hearing for use by the parties and the courts when judicial review is invoked.

Rica Gretz, petitioner here, is an unemployment compensation claimant. She asserts that the Commission's rule is invalid and demands that the Commission prepare the transcript of her hearing and provide it free of charge. Gretz contends that Section 120.57(1)(b)7., Florida

Statutes (1987), requires the Commission to prepare the transcript for her and Section 443.041(2)(a), Florida Statutes, prohibits the Commission from charging her for this service because she is a claimant. Gretz's argument was rejected by the court below in Unemployment Appeals Commission v. Gretz, 519 So.2d 1025 (Fla. 1st DCA 1988), and has been rejected by every Florida appellate court that has considered it.

Section 120.57(1)(b)7., Florida Statutes (1987), requires the Unemployment Appeals Commission, like all other administrative agencies, to "preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost." (Emphasis added). Testimony at unemployment compensation hearings is preserved by electronic recording. Fla. Admin. Code R. 38E-5.024(6). The Commission makes these recordings available at no more than actual cost. When it does so, the Commission has discharged its statutory responsibility. The Commission is not obligated to prepare and provide a transcript to anyone at any price. Its statutory obligation is limited to making the transcript available. The Commission's rule, however, goes beyond the Commission's legal obligation and gratuitously provides that a party may arrange for transcription of the hearing tapes by Commission personnel at no more than cost. This provision reflects a past practice of the Commission to have its employees prepare



transcripts of hearing tapes when appeals were taken from Commission orders and provide them to the appellate court and the parties without charge. The fact that the Commission engaged in such practice, however, did not give rise to a legal obligation that the Commission continue it indefinitely.

In Smith v. Department of Health and Rehabilitative Services, 504 So.2d 802 (Fla. 2d DCA 1987), the court rejected the argument that an administrative agency is required by Section 120.57(1)(b), Florida Statutes, to prepare a transcript of the proceedings. The court was not persuaded that the past practices of the agency made preparation of transcripts a regular function of the agency's personnel. In Poirier v. Division of Health, State, 351 So.2d 50 (Fla. 1st DCA 1977), the court held that an administrative agency is not required to provide a court reporter; it may preserve testimony by other means. See also Kelly v. Department of Health and Rehabilitative Services, 502 So.2d 42 (Fla. 1st DCA 1987) (rev. pending, No. 69,793, Fla. 1988); Curran v. Florida Probation and Parole Commission, 498 So.2d 629 (Fla. 1st DCA 1986); Harris v. Department of Corrections, 486 So.2d 27 (Fla. 1st DCA 1986).

Since the Commission is not required to prepare transcripts, it does not run afoul of Section 443.041(2)(a), Florida Statutes, when it charges claimants who request that they be prepared. The statute prohibits

the Commission from charging a fee for its services. It is silent with respect to recovery of costs for performing other functions.

The question certified was first heard and decided by the Fourth District Court of Appeal. In Banfield v. United States Sugar Corp., 506 So.2d 461 (Fla. 4th DCA 1987), the court denied a motion to compel the Commission to provide a free transcript. The Court certified to this Court the identical question certified by the court below. The issue was next visited in Roberts v. Unemployment Appeals Commission, 512 So.2d 212 (Fla. 3d DCA 1987), by the Third District Court of Appeal. The court stated:

We believe there is no statute or rule provision which obliges the Commission to prepare the transcripts in question, see Section 120.57(1)(b)6., Fla. Stat. (1983); Smith v. Department of Health & Rehabilitative Services, 504 So.2d 801 (Fla. 3d DCA 1987), and thus no requirement that they be furnished without cost under Section 443.041(2)(a), Florida Statutes (1983).

512 So.2d at 212. The Third District Court of Appeal, like the Fourth before it, certified the question under review, but in neither instance did the non-prevailing party invoke the Supreme Court's jurisdiction.

That jurisdiction was not invoked until the First District Court of Appeal entered its decision below. Under review by the First District Court of Appeal was an order of a Hearing Officer of the Division of Administrative

Hearings which declared invalid Florida Administrative Code Rule 38E-3.009(3). The court held:

We reverse on the basis of the Third District's holding in Roberts v. Unemployment Appeals Commission, 512 So.2d 212 (Fla. 3d DCA 1987), that there is no statute or rule requiring the Commission to prepare transcripts for indigent claimants appealing the denial of unemployment compensation benefits and, thus, no requirement that they be furnished without cost under Section 443.041(2)(a), Florida Statutes (1983). See also Martinez v. Unemployment Appeals Commission, \_\_\_\_\_ So.2d \_\_\_\_\_ (Fla. 3d DCA 1987), opinion filed November 24, 1987 {12 F.L.W. 2679}, following Roberts.

519 So.2d at 1026. The First District Court of Appeal certified for the third time the question whether the Unemployment Appeals Commission may charge claimants for transcripts of their hearings. For the first time, the jurisdiction of this Court was invoked to review it.

Every Florida appellate court which has considered the question has rejected the argument urged by the petitioner. Not surprisingly, the petitioner resorts to decisions of foreign jurisdictions in an attempt to bolster her position. Of those authorities, Butler v. City of Newaygo, 320 N.W.2d 401 (Mich. Ct. App. 1982), best typifies why those cases lend no support for Gretz's position. Michigan court reporters, unlike most Florida court reporters, are officers of the court. Thus, in Butler it was held that a Michigan statute requiring the court's personnel to provide their services to indigent

persons free of charge encompassed preparation of transcripts by court reporters. Smith v. Adams, 370 A.2d 288 (N.H. 1977) (court reporters appointed by the court), and Sweeney v. Board of Review, Division of Employment Security, 302 A.2d 345 (N.J. 1965) (transcription by New Jersey agency is "part of their regular work"), fail to support Gretz's position for the same reason. As previously discussed, although never required by law, the Commission at one time transcribed the tapes of appeals referee hearings in those few cases that were appealed to the district courts of appeal. Hearing tapes were never routinely transcribed by the Commission's personnel for their use. They were transcribed only when an appeal to a district court of appeal was filed and, since October 1986, are transcribed only when the appellant or other requesting party makes arrangements with the Clerk of the Commission for payment of transcription costs.

Gray v. Blanche, 493 So.2d 840 (La. Ct. App. 1986), also cited by the petitioner offers no support for her position. Louisiana's unemployment compensation law prohibits charging of fees or costs. The charges imposed by the Commission when it prepares a transcript are costs, not fees. In Dade County v. Strauss, 246 So.2d 137 (Fla. 2d DCA 1971), cert. denied 253 So.2d 864 (Fla.), cert. denied 406 U.S. 924, the court observed:

"Costs and fees" are altogether different in their nature generally. The one is an allowance to a party of

expenses incurred in the successful transaction or defense of a suit. The other is compensation to an officer for services rendered in the progress of the cause. See Crawford v. Bradford, 23 Fla. 404, 2 So. 782 (Fla. 1887).

See 12 Fla.Jur.2d, Costs Section 1 (1979); 20 C.J.S., Costs Section 1 (1940). Amounts paid for duplication of tapes or preparation of transcripts are not fees for official services. The charges are to defray some of the expenses for providing a transcript. These expenses will occur regardless of whether the Commission's personnel transcribe the testimony or a court reporter transcribes it at the request of the Commission or a party. The Commission does not routinely transcribe hearing testimony. It reviews the recorded testimony without a transcript. Only when a court appeal is taken from a final order of the Commission and a party makes arrangements with the Clerk of the Commission is a transcript prepared by Commission personnel or a court reporter. These charges for preparation of the record are specified as taxable costs pursuant to Florida Rule of Appellate Procedure 9.400(a)(2).

In Barnes v. Employment Security Board of Review, 504 P.2d 591, 604-05 (Kan. 1972), the Kansas Supreme Court held that its statute which also provides that unemployment compensation claimants cannot be "charged fees of any kind" in litigation of their claims did not preclude assessment of costs against claimants who are unsuccessful

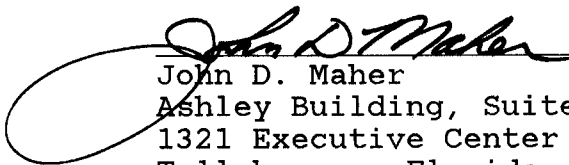
appellants. A similar decision was reached in Thurston v. Illinois Department of Employment Security, 147 Ill.App.3d 734, 498 N.E.2d 864, 866-67 (Ill. Ct. App. 1986). The trial court in Thurston held that its "no fee" provision prohibited the Illinois unemployment compensation agency from charging for a copy of the transcript. The appellate court reversed holding that the provision would prohibit the agency from charging a claimant a filing fee, but would not prohibit it from charging for making the copy. The court based its decision on the distinction between "costs" and "fees." See also Hernandez v. Catherwood, 307 N.Y.S.2d 24, 33 A.D.2d 972, affirmed 315 N.Y.S.2d 866, 27 N.Y.2d 811, 264 N.E.2d 357 app. disp., cert. denied, 401 U.S. 986 (1970).

The charges which a party incurs in having the transcript prepared are costs of the proceedings. They may be recovered if the party prevails, but they are not barred by Section 443.041(2)(a), Florida Statutes, when the appellant is a claimant.

CONCLUSION

The decision of the First District Court of Appeal must be approved. The question certified must be answered in the affirmative.

Respectfully submitted,



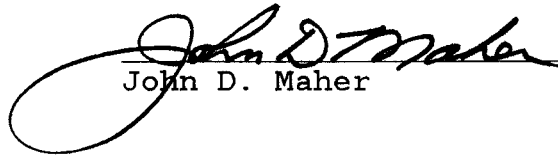
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to Suzanne Harris, Florida Rural Legal Services, Inc., 305 North Jackson Avenue, Post Office Drawer 1499, Bartow, Florida 33830, on this 4th day of May, 1988.

  
John D. Maher



APPENDIX

Florida Unemployment Appeals Commission v. Gretz, 519  
So.2d 1025 (Fla. 1st DCA 1988).