IN THE SUPREME COURT OF
THE STATE OF FLORIDA

RICA GRETZ

vs.

FLORIDA UNEMPLOYMENT
APPEALS COMMISSION
_______________________________/

CASE NO. 72,137

PROCEEDING ON QUESTION OF GREAT PUBLIC IMPORTANCE
CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

		Page
I.	RESPONDENT'S RELIANCE ON THE APPELLATE RULES FOR SUPPORT OF HIS POSITION IS MISPLACED	1
II.	THE RESPONDENT INCORRECTLY ARGUES THAT IT'S ONLY RESPONSIBILITY IS TO MAKE A RECORDING OF THE HEARING AVAILABLE	2
III.	RESPONDENT'S ATTEMPT TO DISTINGUISH THE SWEENEY CASE MUST FAIL	3
IV.	THE CASES WHICH RESPONDENT CITES FROM OTHER STATES TO SUPPORT ITS POSITION ACTUALLY PROVIDE SUPPORT FOR NOT ALLOWING IT TO CHARGE FOR PROVISION OF THE TRANSCRIPT	4
CONCLUSION		5
CERTIFICATE OF SERVICE		6

TABLE OF CITATIONS

CASE	Page
Barnes v. Employment Security Board of Review, 504 P.2d 591, 604-05 (Kan. 1972)	4, 5
Hernandez v. Catherwood, 307 N.Y.S. 2d 24, 33 A.D. 2d 1972	4, 5
In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972)	1
Sweeney v. Board of Review, Division of Employment Security, Department of Labor and Industry, 206 A.2d 345 (N.J. 1965)	3
Thurston v. Illinois Department of Employment Security, 147 Ill. App. 3d 734, 498 N.E. 2d 864, 498 N.E. 2d 864, 866-67 (Ill. App. Ct. 1986)	4, 5

REGULATIONS

Fla. Adm. Code Rule 38E-3.009(3)	2, 3

STATUTES

Florida Statute §120.57(1)(b)7	2

MISCELLANEOUS

Florida Constitution, Article V, Section 3	1
Florida Rule of Appellate Procedure 9.200(b)(1)	1, 2
Committee Notes accompanying Rule 9.430, Florida Rules of Appellate Procedure	1

I. RESPONDENT'S RELIANCE ON THE APPELLATE RULES FOR SUPPORT OF HIS POSITION IS MISPLACED

Respondent's first argument in favor of allowing it to charge for preparation of the transcript is based on Florida Rule of Appellate Procedure 9.200(b)(1) which indicates that the costs attendant to the transcription of the proceedings are initially borne by the party requesting transcription.

However, this rule is not controlling on the issue of whether the Commission can charge a fee for transcription. The Supreme Court is only authorized to promulgate rules governing "practice and procedure" in the courts. Fla. Const. Art. V §3. The Court, itself, has determined that payment of fees or costs in a case is a matter of substantive law. The Court has stated: "The existence of [rights of indigents to proceed with an appeal without payment of fees or costs] is a matter governed by substantive law."[1] Committee Notes accompanying Rule 9.430, Fla. R. App. Pro.

Even if that were not the case, this Court has discussed the difference between practice and procedure and substantive law in <u>In Re Florida Rules of Criminal Procedure</u>, 272 So.2d 65 (Fla. 1972). There the Court said:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights. . . Substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. <u>Id</u>., at 66

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[1] While the Court talked about the rights of "indigents" to proceed without payment of costs or fees, surely the same is true of the rights of unemployment claimants to proceed without payment of costs or fees.

Thus, the right found at Chapter 443.041(2)(a) to pursue an unemployment claim without payment of "fees of any kind" is clearly a substantive right. The language found in Rule 9.200(b)(1) governs only the form or manner of proceeding, and would apply only in the absence of a substantive right to proceed without payment of fees of any kind.

Respondent's attempt to adopt the procedures found at 9.200(b)(1) in Rule 38E-3.009 must fail as the substantive right to proceed without payment of fees of any kind supercedes the procedural rules. Rule 9.200(b)(1) simply cannot be used to bolster Respondent's arguments that it can charge a fee for the transcript.

II. THE RESPONDENT INCORRECTLY ARGUES THAT IT'S ONLY RESPONSIBILITY IS TO MAKE A RECORDING OF THE HEARING AVAILABLE

Respondent argues that it fulfills its obligation of making a "transcript available" found at Chapter 120.57(1)(b)7 Fla. Stat. (1987) by making a tape recording of the hearing available. Respondent emphasizes the word available in his brief (Respondent's brief, page 4), but glosses over the fact that it is the transcript which must be available. Respondent seems to equate making a recording of the testimony available with making a transcript available. The two are quite different. The statute requires that the "testimony" be preserved, but that the "transcript" be made available. Chapter 120.57(1)(b)7, Fla. Stat. (1987). The legislature specifically used the word "transcript" in the statute and it must be assumed that it did so for a purpose (see Appellant's main brief, pp. 3 and 4). If the legislature thought that a tape recording was sufficient, it could have said so. It did not. Instead, it used the word "transcript". The

Commission's argument that making a tape recording available fulfills its responsibility ignores the plain meaning of the words used in the statute.

III. RESPONDENT'S ATTEMPT TO DISTINGUISH THE SWEENEY CASE MUST FAIL

Respondent argues that the case of Sweeney v. Board of Review, Division of Employment Security, 206 A.2d 345 (N.J. 1965) is distinguishable because the transcript was prepared by employees of the agency "as part of their regular work". Rather than being something which distinguishes Sweeney from the present case, that fact equates Sweeney to the present case. Prior to the promulgation of Rule 38E-3.009, employees of the Commission transcribed the tapes as part of their regular work, that is, the tapes were not sent out to be transcribed by another agency or transcription service, but rather prepared by the employees during their regular working hours along with their other typing duties. Respondent argues that the phrase "as part of their regular work" means that transcripts were prepared in each case for the agency's own use (Respondent's Brief, p. 8). However, that is clearly not what the phrase says or means. Respondent cannot read into the case facts which are not there and then use those facts to distinguish a case which is otherwise clearly on point to the present case.

IV. THE CASES WHICH RESPONDENT CITES FROM OTHER STATES TO SUPPORT ITS POSITION ACTUALLY PROVIDE SUPPORT FOR NOT ALLOWING IT TO CHARGE FOR PROVISION OF THE TRANSCRIPT

The cases cited by Respondent from other states actually support Plaintiff's position.

In Barnes v. Employment Security Board of Review, 504 P.2d 591, 604-05 (Kan. 1972) the issue was whether an unsuccessful litigant could be assessed "costs" after the outcome of the litigation. The court determined that under Kansas law they could be assessed costs. This is an altogether different inquiry than whether a fee can be charged for provision of the transcript during the pendancy of the litigation. In fact, the definitions of "costs" and "fees" adopted by the court supports a finding that the charges for a transcript here are fees. The court stated:

> Generally speaking, fees are compensation for the performance of services, while costs are expenses allowed to a party which are incurred in the maintenance of a lawsuit.

Barnes at 605. Here the Commission seeks to charge a fee for performance of the service of transcribing the hearing tape. If it wished to recover those charges at the end of the litigation it would be a cost. Thus, the Barnes case actually supports Appellee's position.

The other two cases cited by Appellant, Thurston v. Illinois Department of Employment Security, 147 Ill. App. 3d 734, 498 N.E. 2d 864, 498 N.E. 2d 864, 866-67 (Ill. App. Ct. 1986) and Hernandez v. Catherwood, 307 N.Y.S. 2d 24, 33 A.D. 2d 1972, affirmed 315 N.Y.S. 2d 866, 27 N.Y. 2d 811, 264 N.E. 2d 357 app. dism., cert. denied, 401 U.S. 986 (1970) involve whether the claimants should be allowed a copy of the hearing transcript when their cases reached the agency review

board, not the appellate court. In Thurston, the agency routinely prepared transcripts of the agency hearings for the agency review board. Unlike the present case, there was no statutory requirement that the claimant be given a copy of the record. Rather, the statute required that the claimant be given either an opportunity to see the record or be given a copy of the record. The only question was could the agency charge a fee for copying the record. The court held that these copying charges were "costs", not "fees". However, the court determined that "making any charge for preparation of the record for review within the administrative agency or an administrative review in the courts" would be a fee and thus prohibited. Thurston, at 866. Thus, once again, the case cited by Appellant actually supports Appellee's position that the Commission may not charge for preparation of the transcript.

Finally, the Hernandez case is very short and it is impossible to tell from the decision whether New York has a statute similar to Florida's which prohibits fees of any kind. Thus, there are no out of state cases which support Respondent's position. The lower court decisions in Florida stand alone in requiring the claimant to pay money for a transcript in order to pursue an unemployment appeal which the legislature has guaranteed would be free of "fees of any kind".

CONCLUSION

The Legislature has spoken clearly that no fees of any kind can be charged in an unemployment appeal. Clearly, it did not want

claimants to forego pursuing an unemployment claim due to an economic barrier. That is just what the Commission has done by the promulgation of Rule 38E-3.009.

Respectfully submitted,

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BY: [signature]
SUZANNE HARRIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER has been sent by regular U.S. mail, postage prepaid, to JOHN D. MAHER, Ashley Building, Suite 221, 1321 Executive Center Drive, East, Tallahassee, Florida 32399-0681 on this 20 day of May, 1988.

[signature]
SUZANNE HARRIS

/cjc