IN THE SUPREME COURT OF FLORIDA

CASE NO. 78-792

LAWTON CHILES, ETC., ET AL,

Petitioners,

vs.

CHILDREN A, B, C, D, E, AND F, ETC.,

Respondents.

CERTIFIED JUDGMENT FROM THE
CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA

AMICUS CURIAE BRIEF

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INTRODUCTION

This amicus brief is filed by Jon Mills as an interested citizen on behalf of himself.

STATEMENT OF THE CASE AND FACTS

The Constitution of the State of Florida requires a balanced budget. Art. VII, §1(d), Fla. Const. A budget deficit has been predicted by the Revenue Estimating Conference. A provision for deficit reduction is made in §216.221, Fla. Stat., whereby the Governor or Comptroller may certify the revenue shortfall to the Administration Commission. The Commission, made up of seven cabinet members, including the Governor, may then reduce the budgets of state agencies in order to balance the budget. Section 216.011(1)(ll), Fla. Stat., includes the judiciary in the definition of state agencies.

Governor Chiles has followed this procedure and certified the shortfall to the Commission, which has proposed budget cuts of approximately $600 million. The judicial branch budget will be cut by $8.4 million, or 5.4% of its budget. (Trial Record, p. 4). The budget cut will result in the termination of the Guardian ad Litem program. The Petitioners have sued for declaratory relief seeking, 1) to have §216.221 ruled an unconstitutional delegation of legislative powers, and 2) to have the inclusion of the judiciary as a state agency ruled a violation of the separation of powers doctrine.

The circuit court held for the petitioner, finding the statute unconstitutional. (See Appendix p. 1). This court certified the judgment on October 21, 1991.

SUMMARY OF ARGUMENT

The delegation of the power in §216.211 Fla. Stat. to the Administration Commission is an unconstitutional delegation under the doctorine of Askew v. Cross Keys, since inadequate legislative guidelines are provided to the executive branch in making budget cuts. Further, §216.211 violates the separation of powers requirement of the Florida constitution by delegating authority of the legislative and executive branches to the Administration Commission.

ARGUMENT

I. Florida Statute §216.221 is an unconstitutional delegation of legislative authority in violation of Art. II, §3, Fla. Const., under the principles stated by this court in Askew v. Cross Keys Waterways, 372 So. 2d 913 (1978).

The language of §216.221 creates an unconstitutional delegation of authority to the executive branch, in violation of the separation of powers clause of the Florida Constitution. Art. II, §3 Fla. Const. The language of §216.221 delegates authority to the Administration Commission (composed of the Governor and Cabinet) to "reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund." §216.221(2). State agencies are defined, for purposes of fiscal affairs, to include all budget entities other than the legislature. §216.011(11). The act of reducing the budget requires a majority vote of the cabinet under §14.202 Fla. Stat. The statute requires that majority to include the Governor.

Based on this court's previous holdings, §216.221's language is an overbroad unconstitutional delegation. Askew v. Cross Keys Waterways, 372 So. 2d 913 (Fla. 1978), Orr v. Trask, 464 So. 2d 131 (Fla. 1985), Lewis v. Pasco, 346 So. 2d 53 (Fla. 1976). Section 216.221 requires no legislative authorization of cutbacks. Nor does it restrict the amount or percentages of the cuts, other than requiring that they be sufficient to "prevent a deficit."

While §216 relinquishes broad discretion and authority to the Administration Commission,. this court has held consistently that the legislature must limit its delegation of authority with specificity. Following the standards of Askew and related cases, this court should hold the legislature to a the rigorous standard required by the Florida Constitution in delegating the fundamental power of budget decisions.

A. Cutbacks under §216.221 as part of Florida's Appropriations and Budget Process

Appropriations and budget decisions are so important that such decisions require, under the Constitution, affirmative approval by the legislature and acquiescence of the Governor. Art. III, §§ 7 and 8, Fla. Const. In other words, before a budget item goes into effect, the legislature must appropriate and the Governor must decide not to veto a provision of the bill.

Florida law prohibits impoundments of appropriations by the executive branch, as does the federal government.[1] §216.195, Fla. Stat.; 2 U.S.C. §621; see Levison and Mills, Budget Reform and Impoundment Control, 27 Vand. L. Rev. 615 (1974). Under §216.195, impoundment is restricted to prevent either an agency or the Governor from the appropriations except to avoid deficit under §216.221. The reasonable goal of this section is to avoid withholding of appropriations for unspecified reasons. This provision, which was passed in 1989, demonstrates legislative

[1] Impoundment is defined in §216.011(2) as "the omission of any appropriation ... in the approved operating plan."

concern about budget cuts.

Section 216.292 limits the executive branch, through a detailed process, to transfers of less than 5% within budget entities. It requires the executive to make such revisions "consistent with the intent of the approved operating budget." §216.292(2)(c). These restrictions further evidence a statutory process designed to make budget cuts follow the intent specified jointly by the legislature and the governor in approved appropriations.

Section 216.221(2) grants, in contrast to the other restrictive and specific provisions in §216, broad powers to the Administration Commission. An explanation for the continued existence of §216.221 is that, prior to the 1991 proposed cuts, few budget cuts were perceived to have substantial policy impacts. However, §216.221 appears to accord policy-making or "law giving" authority to a majority of the Administration Commission.[2] Under the provisions of §216.221(4), it appears that, if the governor does not certify, or if the commission does not act within 10 days of the certification, a majority of the commission, excluding the governor, may make cuts "sufficient to ensure that no deficit will occur."

Under §216.221(2), four cabinet members (a majority) may in

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[2] "Law giving ... is a responsibility assigned to the legislature, and that body is prohibited from relegating its responsibility wholesale to persons, whether elected or appointed, whose duties are simply to see that these laws are observed. The people of Florida placed that restraint on the legislature, as they had every right to do." Askew v. Cross Keys Waterways, 372 So. 2d 913, 925 (1978), England C.J., concurring.

effect veto an appropriation without limit of amount or percentage and without the chance for legislative override as exists with a veto. Hypothetically, under §216.221(4), such a cut could be made without the agreement of either the governor or the legislature.

Under §216.221, no statutory limits exist up to the amount of a projected deficit. Accordingly, then, budget cuts up to two or three times the current amounts would not be restricted.

If the current shortfall had happened, or been accurately predicted, during the legislative session, the appropriations bill would reflect the projection, and the reduced appropriation would be an act of the entire legislature approved by the Governor. Under §216.221, if the shortfall occurs one month later, the legislature has no responsibility to act and the Administration Commission makes, with little statutory guidance, the legislative decision of where and how much to cut.

B. Section 216.221 Violates Florida's Delegation Doctrine.

Askew v. Cross Keys, 372 So. 2d 913 (Fla. 1978), is the pivotal case in the action before the court. In Askew, this court held the provisions of §380.05(2)(a) and (b), Fla. Stat., were an unconstitutional delegation of authority to the Administration Commission to make determinations of areas of critical state concern. Id. at 925.

The Askew opinion analyzed thoroughly Florida's strict approach to the delegation doctrine. Id. at 923-24. The court said, "Flexibility in administration of a legislative program is

essentially different from reposing in an administrative body the power to establish fundamental policy." Id. at 924. It quoted the lower court's finding with approval:

> The [great] deficiency of §380.05(2)(a) is that it does not establish [priorities] or provide for establishing priorities or other means for identifying and choosing among the resources the Act was intended to preserve."

Id. at 919, quoting from 351 So. 2d 1069.

The court in Askew concluded,

> When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of law.

372 So. 2d at 918-919.

The court specifically rejected more liberal interpretations by other states and by the federal courts, reasoning that Florida's constitution, "by its second sentence contains an express limitation upon the exercise by a member of one branch of any powers appertaining to another branch."[3] Id. at 924. Additionally, the court noted that Florida has rejected the argument by Professor Kenneth Culp Davis that allows a much broader discretion and more general delegation to agencies. Id. Professor Davis argues that safeguards in the administrative process justify less explicit legislative guidelines and permit needed legislative flexibility. Other states (including Washington and Rhode Island) have adopted Professor Davis's view. In fact, other states might

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[3] "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla. Const. art II, §3.

arguably uphold the validity of §216.221 under a different delegation doctrine than Florida's. See In re State Employee's Unions, 587 A. 2d 919 (R.I. 1991)

An example of unconstitutional delegation under §216 is found in Orr v. Trask, 464 So. 2d 131 (Fla. 1985). This court found that the statute delegated too broadly to the executive branch the task of eliminating a statutory office that could normally only be eliminated through legislative action. In Orr, the legislature reduced the funding for deputy commissioners within the Department of Labor and Employment Security, compelling the executive branch to eliminate several positions. Id. at 132-33. The court ruled that the legislature did not provide the executive branch sufficient legal authority to truncate the term of a deputy commissioner, because it provided the executive branch no guidance as to the criteria to be used in selecting the positions to be eliminated. Id. at 134. Reiterating its position in Askew, the court held that Art II, §3, Fla. Const., does not require the legislature to make the actual cuts; however, the legislature must provide the executive branch with "ascertainable minimal criteria and guidelines on how the selection was to be made." Id. at 134-35.

In Lewis v. Pasco, 346 So. 2d 53 (1976), this court invalidated a statute which gave the Department of Banking authority to release otherwise-confidential records. Because the statute placed no limits on the department's power to release confidential documents to the press, the court found it

unconstitutional. Id. at 55. It held that statutes which grant power to administrative agencies must clearly define the power granted. Id. This is important to prevent the agency from "acting through whim, showing favoritism, or exercising unbridled discretion." Id. at 56.

The Attorney General considered the implications of §216.221 as it affected the potential shortfall from the repeal of the services tax. 1987 Op. Att'y Gen. Fla. 87-57 (Sept. 28, 1987). The Attorney General advised Governor Martinez that "While the Governor participates in the legislative process through exercise of his veto power, he may not usurp the right of the Legislature to make decisions regarding the purposes for which public funds may be spent. Op. Att'y Gen. Fla. 87-57, 153.

An argument has been advanced, offering a distinction between two applications of §216.221: first, when the legislature, through repeal of a funding source, causes a shortfall, and second, when a shortfall occurs because of a downturn in the economy or unpredicted shortfall. However, if the procedures in §216.221 are constitutionally invalid, then the cause or circumstance surrounding the shortfall calling for its exercise are irrelevant. In other words, the statute is void as a source of authority for cutbacks no matter what the reason for the shortfall.

May §216.221 constitutionally delegate authority to make cutbacks in the face of potential deficits? Yes, if the delegation is limited and specifically described by the legislature. Other states have methods limiting cutbacks by

percentages or requiring the cuts be passed by the legislature. A National Conference of State Legislatures report in 1988 detailed restrictions on Executive branch authority to reduce appropriations. Examples cited range from a binding requirement of approval by House and Senate Appropriations Committee in Michigan to Illinois, where cuts over 2% of total appropriations requires approval of the full legislature. However, some states were cited as granting much broader authority to the executive (for example, Indiana and Georgia).[4] A procedure providing limits on the authority to cut avoids delegating the right to make policy and might survive the requirements of Florida's separation of powers and delegation requirements.

C. Constitutional Authority of the Governor

Article VII, §1(c), Fla. Const., requires that sufficient revenue be raised to defray the costs of the state for each fiscal year. This requirement for a balanced budget is fundamental to Florida's budget process.

The Governor is charged, under Art. IV §9(a), Fla. Const., with the duty to provide that the laws be "faithfully executed." Budget shortfalls require the Governor to assure budgetary resources to fund an appropriation. Once a budget has been enacted, the question arises as to what duties and responsibilities rest with the Governor?

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[4] Legislative Budget Procedures in the 50 States: A Guide to Appropriations and Budget Processes, National Conference of State Legislatures, Fiscal Affairs Program, 1988.

The Attorney General suggests that the Governor call the legislature into session to either raise revenue or cut appropriations in order to balance the budget. 1987 Op. Att'y Gen. Fla. 87-57 (Sept. 28, 1987), 157.

However, if the legislature were called back into session and failed to enact taxes or to enact adequate cuts what options remain for the governor? The combination of duties and powers in Articles IV and VII, Fla. Const., may accord the governor authority to make cuts, since acting alone, he cannot raise revenue. Yet the Governor is simultaneously bound to enforce the balanced budget. Consequently, the Governor could constitutionally make cuts at that point. Thus, the Governor arguably has the constitutional authority to make cuts without §216.221 and without calling the legislature into special session.

If the provisions of §216.221 delegated authority only to the Governor, its constitutional standing would be improved. As §216.221 currently reads, it can be interpreted to usurp the authority of both the Governor and the legislature and give unconstitutional authority to the Administration Commission.

CONCLUSION

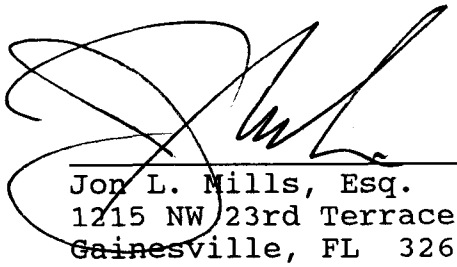
Finding §216.221 unconstitutional does not mean that delegation of authority to make cutbacks to avoid deficits is impossible. However, §216.221 delegates the power to make policy to the Administration Commission and fails to provide guidelines this court has required to meet the requirements of Florida's

strict delegation doctrine.

If §216.221 were ruled unconstitutional the Governor could call a legislative session to make cuts or raise revenue, the legislature could enact amendments to §216.221 to provide a lawful delegation, or the governor could identify another source of authority, such as Articles IV and VII, Fla. Const., to avoid a deficit. Under any circumstance, §216.221 should be invalidated.

This court is not asked to pass on the wisdom of the budget cuts enacted on October 22, 1991, by the Administration Commission. Indeed, the cuts may be the wisest and most prudent choices available in difficult times. The constitution, however, requires the court to review §216.221 for its long-term implications. From this perspective, the potential results of constitutionally impermissible delegations require voiding authority, which might be abused or arbitrarily exercised. Protection from such potential abuse is precisely what the constitution requires.

Respectfully submitted,



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