IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE EX REL. LAWTON CHILES, AS GOVERNOR OF FLORIDA, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AND MELANIE N. HINES, STATEWIDE PROSECUTOR, Petitioners, v. PUBLIC EMPLOYEES RELATIONS COMMISSION, Respondent.	Case No. 81-835 Relating to PERC Case No. RC-93-019

RESPONSE OF PUBLIC EMPLOYEES RELATIONS COMMISSION TO ORDER TO SHOW CAUSE

Comes now the Florida Public Employees Relations Commission (Commission), by and through its undersigned counsel, and responds to this Court's June 30, 1993, show cause order, stating the following:

Procedural History

1. On March 23, 1993, a representation-certification petition was filed with the Commission pursuant to Section 447.307(2), Florida Statutes (1991), and Florida Administrative Code Rule 38D-17.007, by the State Employees Attorney Guild, FPD, NUHHCE, AFSCME, AFL-CIO, (SEAG), seeking certification as the collective bargaining representative of a bargaining unit composed of attorneys employed by the State of Florida. On April 5, 1993, the Commission determined that the bargaining unit sought was consistent with Florida Administrative Code Rule 38D-17.023(2)(b). See In re PERC Rule 38D-17.023, 13 FPER ¶ 18264 (1987).

2. In its response to the petition filed on April 12, the State contended that the "proposed [bargaining] unit is inappropriate because it is an unconstitutional attempt to comprehensively regulate and alter the practice of law by members of the Florida Bar who are employed by the State of Florida, in derogation of the Supreme Court's exclusive jurisdiction to regulate the practice of law under Article V, Section 15, of the Florida Constitution." The State further alleged that the "proposed unit is also inappropriate because it appears to include attorneys who share the constitutional authority of the Attorney General and Statewide Prosecutor and are therefore not 'employees' covered by the Act (Chapter 447, Part II, Florida Statutes)."

3. In its response to the SEAG's representation-certification petition, the State requested that the Commission issue a stay of the administrative proceeding pending the State's decision to file a petition for writ of prohibition with this Court. On April 29, the Commission issued an order denying the State's request for stay, indicating inter alia that:

> [T]he Commission has previously determined that jurisdictional issues are appropriate for resolution by the Commission after an evidentiary hearing. E.g., Federation of Public Employees v. Clerk of Court of Broward County, 10 FPER ¶ 15287 (1984), aff'd, 478 So.2d 117 (Fla. 4th DCA 1985) (representation petition dismissed because proposed unit did not include "public employees" entitled to the collective bargaining). Even where there has been an appellate review of an interlocutory Commission decision determining jurisdiction, it has been after a jurisdictional determination by the Commission based upon a factual record. See Osceola County PBA v. Sheriff of Osceola County, 2 FPER 35 (1976), aff'd sub

nom., Murphy v. Mack, 341 So.2d 1008 (Fla. 1st DCA 1977), rev'd in part, 358 So.2d 822 (Fla. 1978).

Attached hereto, as a separate appendix, is a complete copy of the Commission's administrative file, a portion of which has previously been submitted by the State.

4. On May 27, 1993, the State filed a petition with this Court, alleging that the unit sought by the SEAG is improper and that a writ of prohibition should be granted based upon this Court's exclusive authority to regulate members of the Florida Bar. The Commission and this Court stayed the SEAG's representation-certification petition.

Preliminary Statement

5. In the instant action the State seeks a writ of prohibition requiring the review of a non-final administrative order issued by the Commission finding reasonable cause to believe that the Commission has jurisdiction of the representation-certification petition.

6. This Court held in PERC v. City of Orlando, 452 So.2d 517 at 519 (Fla. 1984), that the Commission "is a proper party to review proceedings from its own orders" and "should be made a party appellee in any future proceedings upon request or upon the designation of the party seeking review." Nevertheless, this Court has also indicated, that as a quasi-judicial administrative agency, the Commission should be reluctant to "participate merely to add another voice in support of its own orders." Id. at 519. Thus, the Commission's participation in this action is limited to

the Commission's assertions that: 1) The Legislature has vested the Commission with the jurisdiction to entertain the representation-certification petition which initiated this petition and this statute is facially constitutional; and 2) any subsequent decision affecting the rights of the State's attorneys to engage in collective bargaining over their wages, hours and terms and conditions of employment should be made only after a Section 120.57(1) evidentiary proceeding has been concluded and a factual record has been developed.

The Commission Has Jurisdiction Over The Pending Representation-Certification Petition and There Has Been No Showing That Chapter 447 is Facially Unconstitutional

7. The seminal purpose of Chapter 447, Part II, Florida Statutes, is to implement the collective bargaining rights guaranteed public employees by Article II, Section 6, of the Florida Constitution. § 447.201, Fla. Stat. (1991); Dade County CTA, Inc. v. The Florida Legislature, 269 So.2d 684 (Fla. 1972). The Commission is a quasi-judicial administrative agency created by the Legislature as the statutory vehicle for insuring that all questions, controversies, and disputes arising under Chapter 447, Part II, Florida Statutes are resolved. § 447.207(6), Fla. Stat. (1991). In resolving these matters, the Commission's directives require it to act in the public's interest, rather than in the interest of any private person, organization, or entity.

8. The Commission order determining that the petition is facially sufficient to proceed to an evidentiary hearing is

predicated upon the conclusion that the State's attorneys fall within the Commission's jurisdiction. This conclusion is supported by analysis of the pertinent statutory provisions.

9. Through Section 447.203(2), Florida Statute, the Legislature has deemed the Governor to be the public employer of the State's attorneys for purposes of collective bargaining. Specifically, Section 447.203(2), Florida Statutes, provides "with respect to all public employees determined by the Commission as properly belonging to a statewide bargaining unit composed of State Career Service System employees or Selected Professional Service employees,[1] the Governor shall be deemed to be the public employer; ..." Thus, the Commission has jurisdiction over the Governor as the public employer for employees within the statutory classification covering the petitioned-for employees.

10. The Legislature has also vested the Commission with jurisdiction over the attorneys employed by the State. Section 447.203(3), Florida Statutes, defines "public employee" as meaning "any person employed by a public employer ..." except for certain limited exceptions. Any limitations on the scope of Section 447.203(3), Florida Statutes, can be seen in the

---

[1]This title was subsequently changed to "Selected Exempt Service System" as set forth in Section 110.601-607, Florida Statutes. This statute covers the state attorneys, who are not otherwise included in the Senior Management Service System set forth in Section 110.401-407. See Florida Department of Corrections v. Florida Nurses Association, 508 So.2d 317 (Fla. 1987).

statute's specifically enumerated exceptions. None of these exceptions name attorneys or employees included in the Selected Exempt Service System. See State Department of Administration v. PERC, 443 So.2d 258 at 259 (Fla. 1st DCA 1983) (district court observes that there is no exception from the definition of public employees as contained in Chapter 447 for hearing officers). Nor do the provisions of Section 110.601-607, Florida Statutes, reflect a legislative intent to preclude collective bargaining for these employees. In fact, Section 110.105(5), Florida Statutes, specifically provides, "Nothing in this chapter shall be construed either to infringe upon or to supersede the rights guaranteed public employees under Chapter 447." Thus, these statutes evidence the Legislative intent behind it; to provide comprehensive coverage of the individuals to be covered by Chapter 447.

11. The status of the State's attorneys as public employees is particularly significant when viewed in light of Article I, Section 6, of the Florida Constitution which prohibits abridging the right of all employees, including public employees, to bargain collectively. See City of Tallahassee v. PERC, 410 So.2d 487 at 491 (Fla. 1982), citing, Dade County CTA, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969); UFF, Local 1877 v. Board of Regents, 417 So.2d 1055 (Fla. 1st DCA 1982). In interpreting the Constitution, this Court has decided that governmental restrictions upon a public employee's right to bargain collectively may only be premised upon a compelling state interest; i.e., a

"strict-scrutiny standard ... that is difficult to meet under any circumstances." See Hillsborough County GEA, Inc. v. Hillsborough County Aviation Authority, 522 So.2d 358 at 362 (Fla. 1988).

The State's Arguments Are Only Properly Pursued To The Court System After Exhaustion of Administrative Remedies

12. Based upon the conclusion that the State's attorneys are public employees and that there has been no showing that the statute is facially unconstitutional, the Commission is statutorily obligated to process the representation-certification petition. § 447.307(3)(a), Fla. Stat. (1991); Key Haven Associated Enterprises, Inc. v. Baret of Trustees of Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982).

13. The lack of a specific constitutional challenge to Section 447.307, Florida Statues, reveals that the State's petition is actually challenging the Commission's rule defining the attorney unit, Florida Administrative Code Rule 38-17.023(2)(b), and the potentialities of the Commission's processing of the representation-certification petition. Specifically, the State asserts that this Court's jurisdiction to regulate the practice of law will be usurped by the Commission's processing of the petition. This assertion presupposes that the Commission's processing of the representation-certification petition will result in a determination that the State's attorneys unit is appropriate for purposes of collective bargaining, and assumes that the SEAG will prevail in the election. These assumptions

may never transpire. Moreover, without a factual record based upon a hearing, it cannot be assumed that bar membership by the State's attorneys creates an incompatibility with their constitutional right to collectively bargain. See Fla. Rule of App. Proc. 9.100(e)(2)(requiring extraordinary writ petitions to state the "facts upon which the petition relies").

14. Moreover, the State's advanced concerns about attorney unionization being precluded by lawyer-client confidentiality have not been endorsed by proclamations of the Florida Bar or of this Court. In fact, as admitted by the State in its petition for writ of prohibition, the American Bar Association has recognized that collective bargaining for lawyers is not per se inconsistent with their ethical requirements and that they may ethically belong to unions. The State's assertion also overlooks the fact that all its arguments about confidentiality and conflicts inherent to the negotiation process could be advanced in any situation when attorneys are employed by private entities, such as corporations. This Court has not traditionally precluded such relationships. See The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 18 Fla. L. Weekly S393 at S394 (July 1, 1993) (the Florida Supreme Court's constitutional authority over courts and attorneys' admission to the Bar and their discipline does not extend to the employment practices of lawyers); The Court also has not prevented the Legislature's determination of governmental procedures, even when the lawyer-client relationship is potentially affected. Neu v. Miami Herald Publishing

Co., 462 So.2d 821 at 825 (Fla. 1985) (the attorney-client privilege belongs to the client and the legislature may require political subdivisions to have open public meetings); City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 at 219 (Fla. 1985) (the Legislature has the constitutional power to regulate records and it may waive the right to confidential communications).

15. The remaining question is whether any or all of the State's attorneys should be excluded from collective bargaining based upon the contention that they are "deputies" as addressed by the Court in Murphy v. Mack, 358 So.2d 822 (Fla. 1978). The Commission submits that this, just like the questions of whether certain of these employees are "managerial" or "confidential" employees pursuant to Section 447.203(4) and (5), Florida Statutes, is an evidentiary question which should be resolved upon facts developed in Section 120.57(1), Florida Statutes, after a hearing.

16. In summation, the State's contentions challenge the potential consequences of the Commission's processing of SEAG's representation-certification petition via application of a duly promulgated rule. The processing of the petition will provide the State with the opportunity to challenge the Commission's rule, question the competing ethical obligations of attorneys, and advance the argument that attorneys are excluded from the definition of public employees as "deputies," or should be excluded because they are "managerial" or "confidential"

employees pursuant to Section 447.203(4) and (5), Florida Statutes. In the interim, the Court should adhere to its policy articulated in Key Haven because: 1) the Administrative process will provide due process for the effected parties and individuals; 2) the instant petition may become moot should the Commission reconsider its rule or should the SEAG not prevail in the election; and 3) should the SEAG become certified to represent the State's attorneys, a factual record will be developed to properly analyze the State's contentions.

17. As demonstrated herein, the interest of the state's attorneys to engage in collective bargaining is substantial and constitutionally based. Therefore, the Commission, as the Chapter 120 administrative body who is charged with determining the interests of parties with respect to collective bargaining in the public sector in Florida, respectfully requests that this Court deny the State's petition for a writ of prohibition and vacate the stay of the representation-certification petition so that further Commission proceedings may continue. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 157-58 (Fla. 1982) (administrative proceedings must be exhausted when there is a challenge to the facial unconstitutionality of an agency's rule).

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 15th day of July, 1993, to the following:

Kimberly J. Tucker, Esquire
Department of Legal Affairs
The Capitol - PL01
Tallahassee, Florida 32399-1050

and

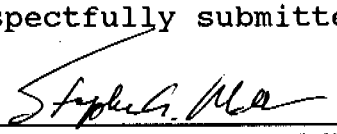
Peter J. Hurtgen, Esquire
MORGAN, LEWIS & BOCKIUS
200 South Biscayne Boulevard, Suite 5300
Miami, Florida 33161

Attorneys of record for Petitioner

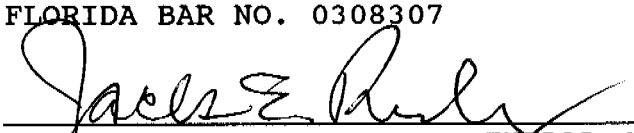
Thomas W. Brooks, Esquire
MEYER and BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302

Attorney of record of SEAG

Respectfully submitted,



STEPHEN A. MECK, GENERAL COUNSEL
PUBLIC EMPLOYEES RELATIONS COMMISSION
2586 SEAGATE DRIVE, SUITE 100
TALLAHASSEE, FLORIDA 32301-5032
(904) 488-8641
FLORIDA BAR NO. 0308307



JACK E. RUBY, ASSISTANT GENERAL COUNSEL
PUBLIC EMPLOYEES RELATIONS COMMISSION
2586 SEAGATE DRIVE, SUITE 100
TALLAHASSEE, FLORIDA 32301-5032
(904) 488-8641
FLORIDA BAR NO. 0224774

SAM/JER/gr