

047

IN THE SUPREME COURT OF FLORIDA

JOHN PAUL JONES, JR.,)
 Judge of Compensation Claims,)
 Petitioner,)
)
 v.)
)
 LAWTON CHILES, Governor,)
 State of Florida,)
)
 Respondent.)

Case No. 82,895

FILED

SID J. WHITE

JAN 7 1994

CLERK, SUPREME COURT

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Chief Deputy Clerk

RESPONSE OF GOVERNOR LAWTON CHILES

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RESPONSE OF RESPONDENT CHILES TO
PETITION FOR WRIT OF MANDAMUS

The Respondent, Lawton Chiles, Governor, pursuant to the request of this Honorable Court, files his Response to the Petition for Writ of Mandamus filed herein by the Petitioner, John Paul Jones, Jr., Judge of Compensation Claims.

PRELIMINARY STATEMENT

References to section 440.45, Florida Statutes, unless indicated otherwise, are to the statute as amended by chapter 93-415, Laws of Florida (1993), which became effective January 1, 1994.

STATEMENT OF FACTS AND THE CASE

The respondent is in substantial agreement with the petitioner's Statement of the Facts. Paragraph (2)(c) of amended section 440.45, Florida Statutes, includes within its provisions the following:

Each judge of compensation claims shall be appointed for a term of 4 years, but during the term of office may be removed by the Governor for cause. Prior to the

expiration of judge's (sic) term of office, the statewide nominating commission shall review the judge's conduct. The commission shall report its finding to the Governor no later than 6 months prior to the expiration of the judge's term of office. **The report of the commission shall include a list of 3 candidates for appointment. The candidates shall include the judge whose term is expiring, if that judge desires reappointment and the judge's performance is satisfactory upon review by the commission. (e.s.)**

While the petitioner contends that his reappointment should have occurred on September 3, 1992, this Petition for Writ of Mandamus was not filed until December 16, 1993, sixteen days before the effective date of Chapter 93-415, Laws of Florida (1993).

ARGUMENT

I. Orr v. Trask is not controlling in the instant case.

Petitioner's reliance upon Orr v. Trask, 464 So. 2d 131 (Fla. 1985) in support of his argument that the governor's reappointment of a judge of compensation claims is merely a nondiscretionary or ministerial act, is misplaced. Orr did not directly construe the constitutional issue presented here, rather it was a case in which the Court addressed the removal power of the governor found in section 440.45, Florida Statutes. As the Court observed:

The parties present us with a wide ranging variety of constitutional and statutory questions, most of which are not squarely posed or are not necessary to a disposition of the case.

Orr at 133.

The statements quoted on page 6 of the petition as "holdings" are prime examples of issues that are not necessary to a disposition of that case. The first paragraph of the cited matter is, in fact,

far from a holding of the Court; it is merely the Court's restatement of the arguments presented by the appellee. Id. at 133. The second paragraph of the cited material relied upon by petitioner is the quotation of a statute, and the third paragraph relied upon is simply a restatement of the statute. Id. at 133-4. The Court did not need to reach the more amorphous constitutional questions in construing the language of section 440.45, as it decided the case on wholly unrelated grounds.

What the Court did address was whether the Legislature could reduce the number of deputy commissioners of workers' compensation (now judges of compensation claims), through proviso language in the general appropriations act. Trask served as an incumbent deputy commissioner with over two years remaining in his term at the time his position was threatened. He challenged the ability of the governor and secretary to remove him from office. Acting pursuant to the proviso language of the appropriations bill, the department secretary eliminated Trask's position, even though over two years of his term remained unexpired. The "true" issue in the case, according to the Court, was whether proviso language contained in an appropriations act lawfully enabled the governor to truncate the term of an incumbent commissioner.

Orr held that the subject proviso violated article II, section 3 of the Florida Constitution in that it left unbridled discretion in the executive branch, and that the proviso also violated article III, section 12, which prohibits the Legislature from amending or nullifying substantive legislation through an appropriations act.

Id. at 134-5. Orr does not control the outcome of the issue presented here, for the opinion is both factually and legally distinguishable.

In contrast, the question presented here is whether the Legislature violated article IV of the state constitution by vesting the nominating commission with authority to appoint a judge of compensation claims to a new term of office.

The Court's discussion in Orr of the power to appoint or to reappoint officers was unnecessary to resolve Trask's claim, and must be regarded as mere dicta. It is axiomatic that the power to remove and the power to appoint are different, and the exercise of each power advances independent policy aims. For these reasons, Orr does not foreclose review of the question presented.

- II. **The Legislature, in enacting section 440.45(1), Florida Statutes (1991), impermissibly usurped the constitutional power of the governor to directly supervise an executive department placed under his supervision, by vesting the nominating commission with exclusive authority to reappoint incumbent judges of compensation claims.**

Prior to the 1993 amendment of section 440.45, Florida Statutes, the workers' compensation law unconstitutionally deprived the governor of the gubernatorial appointment prerogative when the nominating commission recommended reappointment of an incumbent.

The Constitution vests the governor with plenary power over the executive branch of state government. Art. IV, § 1(a), Fla. Const. ("The supreme executive power shall be vested in a governor"). The constitution further provides that all executive branch functions shall be allotted among departments, and:

The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the **direct supervision** of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office. (e.s.)

. . . .

Art. IV, § 6, Fla. Const.

The Legislature placed the Department of Labor and Employment Security under the direct supervision of the governor, with the agency head being appointed by the governor, subject to confirmation by the Florida Senate. § 20.171(1), Fla. Stat.

Section 440.45, Florida Statutes, establishes a procedure for the appointment of judges of compensation claims, who are officers of the executive branch, placed within the Department of Labor and Employment Security. § 440.45(3), Fla. Stat. In contrast with the conclusions of the Court in Chiles v. Public Service Comm'n Nominating Council, 573 So. 2d 829, 832-3 (Fla. 1991), that the Public Service Commission is a "legislative entity" and "[a]s such, the Legislature may constitutionally establish the appointment method for its officers...", compensation claims judges are, indisputably, executive officers. The nominating procedure for judges of compensation claims provides for a 15-member nominating commission, comprised of 5 appointees of the Board of Governors of The Florida Bar, 5 appointees of the governor, and 5 appointees of the appointees of the Bar and the governor. § 440.45(1), Fla. Stat.

As to a vacancy where an incumbent is not recommended by the nominating commission, the governor must make his appointment from a slate of at least three nominees furnished by the commission. Id. In the case where the commission determines that an incumbent judge should be retained, the former statute appears to provide that the commission, rather than the governor, makes the appointment of the judge.¹

As recently recognized by this Court in Wright v. Florida Medical Examiners Comm'n, 18 Fla. L. Weekly S509 (Fla. Sept. 30, 1993), there is, in Florida, a "deep-rooted philosophy favoring the governor's appointment prerogative." Id. at S510, citing In re Advisory Opinion to Governor, 551 So. 2d 1205 (Fla. 1989); Westlake v. Merritt, 85 Fla. 28, 95 So. 662 (1923). In Westlake the Legislature established an appointment procedure for members of the Florida State Board of Chiropractic Examiners which required the governor to appoint from nominations made by the Florida Chiropractors' Association. Id.

The Court held that the limitation of the governor's appointment power by limiting his choice to persons selected by

¹The statute states that "[i]f the statewide nominating commission votes to retain the judge of compensation claims in office, then the Governor shall **reappoint** the judge of compensation claims for a term of 4 years." § 440.45(2), Fla. Stat. (1991). (e.s.). Under this scheme, the vote to retain the judge of compensation claims, in fact, is the appointment. Accordingly, the Legislature apparently meant to direct that the governor **commission** the officer, commissioning being a ministerial act, as opposed to appointing, which carries with it the presumption that discretion is involved. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803).

another body is unconstitutional, stating:

[The statute] pretends to lodge the appointment power with the Governor, but seeks to limit his constitutional prerogative by vesting in the Florida Chiropractors' Association the right to confine the Governor in his appointments.... To a certain degree, this empowers the Florida Chiropractors' Association to share with the Governor the appointing power, which is lodged solely in him by the Constitution.

Id. at 662.

Since the Westlake case, the state constitution has been amended so that boards authorized to grant and revoke licenses are excepted from those departments of state which must be placed under the direct supervision of one of the listed executive entities; however, the philosophy underlying the case remains.

Further, while the governor no longer possesses the exclusive power to appoint all non-elective state and county officers, (see Art. III, § 27, Fla. Const. (1885)), he does possess direct supervisory authority over departments and the departmental officers that are placed within his control. And, the sole limitation that may be placed on his appointing power, at least with regard to a statutory officer of an agency under his direct supervision, is that confirmation may be required by the Senate or by three members of the cabinet. Art. IV §1(a), Fla. Const.

The decision of the chief executive respecting the retention or non-retention of personnel is critical to the operation of the executive branch, for the decision includes the opportunity to reappoint incumbents who demonstrate professional competence, and to reject those incumbents whose professional conduct or performance detrimentally affects the operations of a department's

statutory mission. Section 440.45, Florida Statutes (1991), impermissibly diverts responsibility for this function from the governor to the nominating commission. The statute relegates the governor's exercise of the appointment prerogative to that of a ministerial function--one of rubber-stamping a decision of the commission to retain a particular administrative judge, and divests the governor completely of the power to decide whether the officer should be retained.

The constitution would allow for judges of compensation claims to be appointed and directly supervised by a board or commission appointed by and serving at the pleasure of the governor, (Art. IV, § 6, Fla. Const.), but it does not allow for such direct oversight by a board partially appointed by other entities, such as the Board of Governors of the Florida Bar, nor would it allow for sharing of direct supervision of a department by a board and the governor. Id.

III. The reappointment scheme set forth in section 440.45, Florida Statutes (1991), which provides for appointment by the nominating commission, with no meaningful review by the governor, is contrary to public policy.

Section 440.45, Florida Statutes, makes incumbent judges of compensation claims politically accountable to the nominating commission. Yet, the commission has little allegiance to the governor, who has constitutional responsibility and political liability for the direct supervision of the department, or to the department secretary, who the Legislature designated to head the

department, or to the electorate, for whose benefit the department exists.

In the case of the petitioner, serious questions were raised as to his fitness to continue serving as a judge of compensation claims. For example, during petitioner's reappointment hearing before the nomination commission, several statements were made and evidence was introduced by various presenters that cast doubt upon his judicial demeanor, ethics and overall fitness for office. Allegations of judicial bias and cronyism were made.² See e.g. Commission Transcript, (Appendix 1) February 28, 1992 at pp. 100-111, 158-184, 240-256, 276-293, 361-395, 401, and 406-448. Accordingly, the governor questions whether the petitioner's reappointment would be in the best interests of the citizens of this state. However, the reappointment scheme set forth in section 440.45, Florida Statutes (1991), purports to leave the governor no choice but to validate the nominating commission's recommendation, notwithstanding the serious questions raised about the petitioner's fitness to serve as a judge of compensation claims.

The absence of commission accountability to a statewide

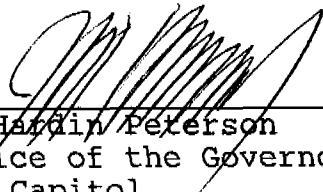
²After taking over 13 hours of testimony, the nominating commission was evenly divided as to whether to recommend that petitioner be reappointed. See Commission Transcript, February 28, 1992, p. 443-8. (Appendix 1) Following considerable discussion as to the import and perceived consequences of a tie vote, the commission's chair, Stephen L. Rosen, changed his vote, with apparent misgivings, which resulted in an 8-6 majority recommendation for Petitioner's reappointment. (One member of the nominating commission was absent).

officer or directly to the people risks undermining public confidence in the institution. But more fundamentally, the vesting of the appointment authority in the nominating commission violates the Constitution by negating the constitutional grant of the executive power of the governor.

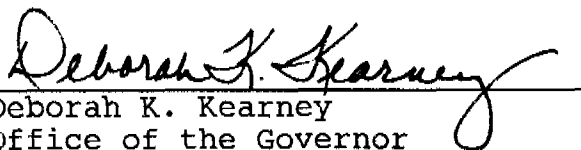
CONCLUSION

Based upon the foregoing, Respondent Governor Lawton Chiles respectfully requests that this Court determine that section 440.45, Florida Statutes (1991), be stricken as in violation of article IV, section 6 of the Florida Constitution, and that this Court dismiss the Petition for Writ of Mandamus filed herein.

Respectfully submitted,



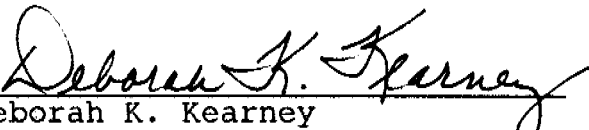
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by U.S. Mail to Richard A. Sicking, P.A., Attorney for Petitioner, 2700 S.W. Third Avenue, Suite 1E, Miami, Florida 33129 this 7th day of January, 1993.


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