IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,213

AGENCY FOR HEALTH CARE ADMINISTRATION, ET AL.
Appellants, Cross-Appellees
vs.
ASSOCIATED INDUSTRIES OF FLORIDA, INC., ET AL.
Appellees, Cross-Appellants

ON A CERTIFIED QUESTION FROM THE FIRST DISTRICT COURT OF APPEAL

CASE NO. 94-2578

FROM THE CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 94-3128

AMICUS BRIEF OF THE HILLSBOROUGH COUNTY HOSPITAL AUTHORITY IN FAVOR OF APPELLANTS, CROSS-APPELLEES

JAMES S. EGGERT, ESQUIRE
FBN: 949711
MICHAEL N. BROWN, ESQUIRE
FBN: 136180
Allen, Dell, Frank & Trinkle
Barnett Plaza, Suite 1240
101 East Kennedy Blvd.
P.O. Box 2111
Tampa, FL 33601
(813) 223-5351
And
FREDERICK B. KARL, ESQUIRE
FBN: 041450
P.O. Box 1289
Tampa, FL 33601
Attorneys for Amicus Curiae,
The Hillsborough County
Hospital Authority.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii-iv

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. SCOPE OF BRIEF AND STANDARD OF REVIEW 3

II. AHCA IS NOT UNCONSTITUTIONALLY STRUCTURED IN VIOLATION OF ARTICLE IV, §6 OF THE FLORIDA CONSTITUTION. 4

A. The court should construe Florida Statute §20.42 in a light most favorable to its constitutionality. 5

B. Article IV, §6 of the Florida Constitution grants the Legislature authority to create AHCA. 6

III. THE SUBJECT ORDER IS SUBJECT TO REVERSAL BECAUSE THE TRIAL COURT HAD NO BASIS TO SUPPORT ITS HOLDING THAT FLORIDA STATUTE §20.42 VIOLATES THE 25 DEPARTMENT REQUIREMENT. 15

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

CASES:

Ammerman v. Markham, 222 So.2d 423 (Fla. 1969) 10

Bonvento v. Board of Public Inspection, 194 So.2d 605 (Fla. 1967) 3

Chatlos v. Overstreet, 124 So.2d 1 (Fla.1960) 5

City of Jacksonville v. Bowden, 64 So. 769 (Fla. 1914) 7

Gallant v. Stevens, 358 So.2d 536 (Fla. 1978) 10

Greater Loretta Inp. Ass'n. v. State ex rel. Boone, 234 So.2d 665 (Fla. 1970). 9

Halavin v. Tamiami Trail Tours, Inc., 124 So.2d 746 (Fla. 1960) 3,16

Holl v. Talcott, 191 So.2d 40 (Fla. 1966) 15

Huber Distrib. Co. Inc. v. National Distrib. Co. Inc., 307 So.2d 1976 (Fla. 1974) 14

In re Advisory Opinion to the Governor, 225 So.2d 512 (Fla. 1969) 7

In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969) 8

In re Estate of Caldwell , 247 So.2d 1 (Fla.1971) 5

Interlachen Lakes Estates, Inc. v. Brooks, 341 So.2d 993 (Fla. 1976) 16

Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968) 10

Mayo v. Market Fruit Co. of Sanford, 40 So.2d 555 (Fla. 1949) 16

McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392 (Fla. 1931) 9

Moore v. Morris, 475 So.2d 666 (Fla. 1985) 15

Pinellas County v. Lawmer, 94 So.2d 837 (Fla. 1957) 7

State ex. rel. Collier Land Inv. Corp. v. Dickenson, 188 So.2d 781 (Fla. 1966) 6

State ex. rel. Green v. Pearson, 145 So.2d 565 (Fla. 1943) 6

State v. Housing Finance Auth. of Polk Cty., 376 So.2d 1158 (Fla. 1979) 10

State of Fla. Dept. of Environmental Regulation v. C.P. Developers, Inc., 512 So.2d 258 (Fla. 1st DCA 1987) 15

Taylor v. Dorsey, 19 So.2d 876 (Fla. 1945) 6

University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993), cert.denied, 126 L.Ed.2d 252, 114 S.Ct. 304 (1993) 8

Vinales v. State, 394 So.2d 993 (Fla. 1981) 10

Wills v. Sears, Roebuck & Co., 351 So.2d 29 (Fla. 1977) 3

Wright v. Board of Public Instruction, 48 So.2d 912 (Fla. 1950) 9

215-22nd Street, Inc. v. Board of Bus. Reg., Div. of Dev., 330 So.2d 821 (Fla. 1st DCA 1976) 8

FLORIDA STATUTES:

Fla. Stat. §20.42 (1993) 4,5,12,13,16,17

Fla. Stat. §20.03(2) (1993) 11

Fla. Stat. §27.251 (Supp. 1978) 10

Fla. Stat. §20.165(4)(d)(1)-(14)(1993) 13

FLORIDA CONSTITUTION:

Article II, §5(a), Florida Constitution (1968) 10

Article III, §23 Florida Constitution (1885) 10

Article IV, §6, Florida Constitution (1968) 2,3,4,6,11,16,18

LAWS OF FLORIDA:

Ch. 93-220, §3, Laws of Florida 12

Ch. 93-220, §1, Laws of Florida 12

FLORIDA ATTORNEY GENERAL OPINIONS:

Op. Att'y.Gen. Fla. 72-153 (1972) 16

OTHER:

Black's Law Dictionary, (5th Ed.) 11

Webster's New Collegiate Dictionary, (1980) 11,13

STATEMENT OF THE CASE AND FACTS

Amicus hereby accepts as true, adopts and incorporates herein the Statement of the Case and Facts as set forth by the Appellants, Cross-Appellees in its intial brief.

SUMMARY OF ARGUMENT

The organizational structure of the Agency for Health Care Administration (AHCA) does not violate the 25 department limit on executive departments set out in Article IV, §6 of the Florida Constitution. Rather than being a limitation upon legislative power, the constitutional provision in question is a grant of legislative power to reorganize the Executive Branch of government. The Legislature has interpreted the 25 department limitation of Article IV, §6 to require the establishment of "departments" oriented around functional and programmatic lines rather than mandating any specific organizational structure. AHCA was created "within" the Department of Business and Professional Regulation (DBPR) but is not subject to the control and supervision of the head of DBPR. Nevertheless, Article IV, §6 does not require the head of AHCA to be under the control or supervision of DBPR as long as the program function of AHCA logically fits within the program and function of DBPR. AHCA logically fits within DBPR because AHCA was designed to regulate the health care industry which is composed of numerous professional and business elements. The Legislature's construction of Article IV, §6 is controlling on the court and supports the constitutional validity of AHCA's organizational structure.

Furthermore, the trial court had no sufficient basis to declare a violation of Article IV, §6 of the Florida Constitution since it did not find that an excess of 25 departments in fact presently exist. Therefore, a material fact exists concerning whether a constitutional violation has actually taken place rendering improper the trial court's granting summary judgment on the ground that AHCA is unconstitutional.

ARGUMENT

I. SCOPE OF BRIEF AND STANDARD OF REVIEW.

This brief will be limited to discussing the court's ruling that AHCA is unconstitutional. Specifically, paragraph 5 of the Final Order and Declaratory Judgment entered by the court below on June 26, 1995, states:

> 5. Count VIII - Constitutionality of the Agency for Health Care Administration, Article IV, Section 6 of the Florida Constitution requires all functions of the executive branch to be allotted the twenty-five departments. The Agency for Health Care Administration ("AHCA") was created "within" the Department of Business and Professional Regulation ("DBPR") but AHCA is not subject to the "control, supervision, or direction" of DBPR. §2042, Fla.Stat. (1993). A "function" cannot be "allotted" to a department if the department has no control over that function. Since DBPR has no control or supervision over AHCA, AHCA is unconstitutionally structured in violation of the twenty-five department limit of Article IV, §6 of the Florida Constitution.

In paragraph 6 of the above order, the court granted the Plaintiff's/Appellee's Motion for Summary Judgment on Count VIII. The only question before the court on appeal from a Summary Judgment is whether there was sufficient competent substantial evidence before the trial court at the hearing on the Motion for Summary Judgment from which a jury could have lawfully drawn an inference against the prevailing party under the issues framed by the pleadings in the case. Halavin v. Tamiami Trail Tours, Inc., 124 So.2d 746 (Fla. 1960). Furthermore, an appellate court will indulge all proper inferences in favor of the party against whom a summary judgment is entered. Wills v. Sears, Roebuck & Co., 351 So.2d 29 (Fla. 1977). Lastly, with respect to the constitutionality of a statute, the subject statute must be shown unconstitutional beyond a reasonable doubt. Bonvento v. Board of Public Inspection, 194 So.2d 605 (Fla. 1967).

II. AHCA IS NOT UNCONSTITUTIONALLY STRUCTURED IN VIOLATION OF ARTICLE IV, §6 OF THE FLORIDA CONSTITUTION.

The trial court ruled that AHCA is "unconstitutionally structured" in violation of the 25 department limit of Article IV, §6 of the Florida Constitution. The structural provisions of AHCA are set out in Fla. Stat. §20.42 which provides as follows:

> There is created the Agency for Health Care Administration within the Department of Professional Regulation. [1] The agency shall be a separate budget entity, and the director of the agency shall be the agency head for all purposes. The agency shall not be subject to control, supervision, or direction by the Department of Professional Regulation in any manner, including but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.
>
> (1) DIRECTOR OF HEALTH CARE ADMINISTRATION. - The head of the agency is the Director of Health Care Administration, who shall be appointed by the governor. The director shall serve at the pleasure of and report to the governor.
>
> • • •

The stated mission of AHCA is to ensure access to basic and affordable health care for all residents of the state. Fla. Admin. Code 59-1.002. AHCA is divided into (1) the Division of Health Quality Assurance, headed by a Deputy Director, which is responsible for facility licensure, certification, inspection, and plans and construction review, (2) the Division of Health Policy and Cost Control, headed by a Deputy Director, which is responsible for health policy, the State Center for Health Statistics, and development of the Florida Health Plan, research and analysis, budget review, certificate of need, provider data, special studies, joint venture policy,

---

[1] The Department of Professional Regulation was abolished and its duties transferred to the Department of Business and Professional Regulation by S.3. Ch. 93-220.

and the health care board, and (3) the Division of Administrative Services, headed by a Deputy Director, which is responsible for personnel services, finance and accounting, budget, general services, and management information services. Section 20.42(2) Fla.Stat., (1993). Also see, Fla. Admin. Code 59-1.004.

A. The court should construe Florida Statute §20.42 in a light most favorable to its constitutionality.

There is a general presumption in favor of the validity of legislation. In re Estate of Caldwell, 247 So.2d 1 (Fla.1971). This is particularly the case when, as here, a trial court has declared a statute unconstitutional:

> When an appellate court has occasion to pass upon the validity of a statute after a trial court has found it to be unconstitutional, the statute is favored with the presumption of constitutionality. This is an exception to the rule that a trial court's judgment is presumptively valid. Moreover, all reasonable doubts as to the validity of statutes under the Constitution are to be resolved in favor of constitutionality.

Id. at 3. It is well established that it is the duty of courts to so construe legislation as to save it from unconstitutional infirmities, and to effect a constitutional result if it is possible to do so. Chatlos v. Overstreet, 124 So.2d 1,2 (Fla.1960). An act of the Legislature should never be stricken down if there is any reasonable theory on which it can be upheld. Habin v. Conner, 174 So.2d 721, 725 (Fla. 1965). Therefore, Fla. Stat. §20.42 creating AHCA is presumed constitutional. The following analysis will demontrate that there exists both a reasonable doubt regarding the validity of AHCA and a reasonable theory under which AHCA may be upheld as constitutional.

B. Article IV, §6 of the Florida Constitution grants the Legislature authority to create AHCA.

In pronouncing AHCA an unconstitutionally structured agency, the trial court has directly challenged the power of the Legislature to create an agency with the powers set out above. As a general matter, it must be assumed that the Legislature has constitutional authority to create AHCA absent any express limitation on that power. The state constitution is a limit upon rather than a grant of power. State ex. rel. Collier Land Inv. Corp. v. Dickenson, 188 So.2d 781 (Fla. 1966). The power of the Legislature is inherent although it may be limited by the constitution. State ex. rel. Green v. Pearson, 145 So.2d 565 (Fla. 1943). Consequently, unless legislation is clearly contrary to some expressed or implied prohibition contained in the constitution, the courts have no authority to pronounce it invalid. Taylor v. Dorsey, 19 So.2d 876 (Fla. 1945).

The asserted ground for the alleged unconstitutionality of AHCA is Article IV, §6 of the Florida Constitution which provides as follows:

> All functions of the Executive Branch of the state government shall be allotted among not more than 25 departments, exclusive of those specifically provided for or authorized in this constitution. 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 of board appointed by and serving at the pleasure of the governor. . .[2]

The above provision would appear to set out an express limitation on legislative power since it

---

[2] It should be noted that the trial court merely held that AHCA is unconstitutionally structured in violation of the 25 department limit set out in the first sentence of the constitutional provision at issue. Therefore the supervision requirement set out in the second sentence of the provision is not at issue in this appeal. In any event, the supervision requirement is not violated by AHCA since §20.42(1) specifically provides that the head of AHCA "shall be appointed by the governor" and "shall serve at the pleasure of and report to the governor."

specifically provides that functions "shall be allotted" and administration "shall be placed" as specifically set forth. However, this court has already well noted that the above constitutional provision has been cited by many as a mandate to the Legislature to reorganize the Executive Branch of state government into an organized and comprehensive plan. In re Advisory Opinion to the Governor, 225 So.2d 512, 513 (Fla. 1969). In that advisory opinion, the court stated that Article IV, §6 "is not self-executing despite the fact that it is a clear mandate to the Legislature to take action." (emphasis added). Id. at 515. Accordingly, Article IV, §6 should be construed primarily as a grant rather than a limitation of legislative power.

The power of the Legislature, even absent the mandate for executive department restructuring set out in Article IV, §6, is extremely broad:

> The lawmaking power of the Legislature of the state is subject only to the limitations provided in the State and Federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.

City of Jacksonville v. Bowden, 64 So. 769, 771-772 (Fla. 1914). The Legislature looks to the Constitution for limitations on its power, and if such limitations are not found to exist, its discretion reasonably exercised is the sole break on the enactment of legislation. Pinellas County v. Lawmer, 94 So.2d 837 (Fla. 1957). For example, this court has held that the 1885 constitutional provision which "invested" the Legislature with power to pass laws governing excessive charges by common carriers was not a grant of power to the Legislature, nor was it a limitation on the power of the Legislature, but was "simply an expressed recognition of a power existing in the Legislative Department of the state government." In re Advisory Opinion

to the Governor, 223 So.2d 35, 37 (Fla. 1969). Likewise, Article IV, §6 implicitly recognizes the Legislature's broad power to devise the most effective measures to consolidate executive power and to reduce the number of state agencies exercising delegated executive functions. See 215-22nd Street, Inc. v. Board of Bus. Reg., Div. of Dev., 330 So.2d 821, 823 (Fla. 1st DCA 1976). ("This Constitutional provision reflects an obvious attempt to consolidate executive power and to reduce the number of state agencies exercising delegated executive functions.").

The court will give great weight to any legislative Declaration of Policy which may indicate that the Legislature was aware of any constitutional issue and concluded that the statute was not an arbitrary, unwarranted or abusive exercise of its power. University of Miami v. Echarte, 618 So.2d 189, 196 (Fla. 1993), cert. denied, 126 L.Ed.2d 252, 114 S.Ct. 304 (1993). The Declaration of Policy in Chapter 20 of the Florida Statutes demonstrates that the Legislature understood and was attentive to the requirements of Article IV, §6 when it created AHCA. Fla. Stat. §20.02 provides:

> (1) The State Constitution contemplates the separation of powers within state government among the legislative, executive and judicial branches of the government. The Legislative Branch has the broad purpose of determining policies and programs and reviewing program performance. The Executive Branch has the purpose of executing the programs and policies adopted by the Legislature the of making policy recommendations to the Legislature. The Judicial Branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation of application of the laws.
>
> (2) Within constitutional limitations, the agencies which comprise the Executive Branch should be consolidated into a reasonable number of departments consistent with executive capacity to administer effectively at all levels. The agencies in the Executive Branch should be integrated into one of the departments of the Executive Branch to achieve maximum efficiency and effectiveness

> as intended by S.6, Art. IV of the State Constitution.
>
> (3) Structural reorganization should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to public needs.

• • •

This declaration demonstrates that the Legislature is resolved to consolidate the agencies comprising the Executive Branch "within constitutional limitations." The Legislature has therefore intended all of the provisions of Chapter 20 to comport with the "reasonable number of departments" intended by Article IV, §6. It is presumed that the Legislature has considered and discussed the constitutionality of all enactments passed by it. McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392, 395 (Fla. 1931). It is also presumed that the Legislature would not knowingly enact an unconstitutional measure. Wright v. Board of Public Instruction, 48 So.2d 912, 194 (Fla. 1950).

Furthermore it is a fundamental principle of state constitutional construction that the court will accord great deference to a legislative interpretation of a constitutional provision. This is particularly true where a word used in a constitutional provision is susceptible to different interpretations:

> In such a situation where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling.

Greater Loretta Inp. Ass'n. v. State ex rel. Boone, 234 So.2d 665, 669 (Fla. 1970). In that case, this court agreed with the legislative interpretation of the word "lottery" as used in Sec.

23, Art. 3, Fla.Const. (1885) to permit legislation authorizing bingo. Id. at 672. The court relied on previous federal precedent stating:

> If the constitutional provisions in question are susceptible of two constructions - one being that contended for by complainants, the other that taken by the Legislature - the action of the Legislature in adopting one of those constructions and enacting a statute carrying it into effect, as thus construed, must be deemed conclusive. That rule is: "That the acts of a State Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly and consistent with the language or subject matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution and never where serious doubt exists as to the conflict."

Id. at 669. Similarly in Vinales v. State, 394 So.2d 993 (Fla. 1981), this court upheld Fla. Stat. §27.251(Supp. 1978), authorizing the appointment of municipal police officers for some purposes as investigators for the state attorney, as not violative of Article 2, Section 5(a) of the Florida Constitution, stating, "where a constitutional provision is susceptible to more than one meaning, the meaning adopted by the Legislature is conclusive." Id. at 994. See also, Gallant v. Stevens, 358 So.2d 536 (Fla. 1978)(stating "In matters of constitutional interpretation, the Legislature's view of its authority is highly persuasive."); Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968)(court sustained a statute defining the word "charitable" as used in the Florida Constitution even though such definition conflicted with earlier decisions); Ammerman v. Markham, 222 So.2d 423 (Fla. 1969)(court upheld a legislative definition of the terms "real property" and "dwelling house" as used in the Constitution even though definitions contradicted earlier decisions); State v. Housing Finance Auth. of Polk Cty., 376 So.2d 1158, 1160 (Fla. 1979)(what constitutes a public purpose for a revenue bond is, in the first instance, a question

for the Legislature to determine and its opinion should be given great weight).

The constitutional definition at issue in this appeal is the meaning of the word "departments" in Article IV, §6 of the Florida Constitution. By ruling AHCA unconstitutional, the trial court has essentially concluded that AHCA is not a "department" authorized by the constitutional provision in question. Amicus is unaware of any cases in which the Supreme Court has specifically determined the standards by which a "department" is defined under the constitutional provision at issue. However, by enacting Chapter 20 of the Florida Statutes, the Legislature has entered the field and interpreted the meaning of Article IV, §6. The Legislature has specifically defined "department" as "the principal administrative unit within the Executive Branch of state government." Fla. Stat. §20.03(2). The Legislature has made it clear that the intent of the constitutional provision is to "achieve maximum efficiency and effectiveness" in the Executive Branch. Fla. Stat. §20.02(2). Additionally, the Legislature has determined that "departments should be organized along functional or program lines." Fla. Stat. §20.02(5). The word "department" is susceptible of differing definitions.[3] These provisions indicate that the Legislature has construed "department" in Article IV, §6 along functional and programmatic lines rather than requiring any particular organizational structure. Under the previous cited authorities, the Legislature's interpretation of the term "department" is controlling" in the present proceedings.

As indicated by its Declaration of Policy that "structural reorganization should be a

---

[3] Black's Law Dictionary, (5th Ed.) defines "department" as "one of the major administrative divisions of the Executive Branch of the government usually headed by an officer of cabinet rank; e.g. Dept. of State. Generally a branch or division of governmental administration." Webster's New Collegiate Dictionary, (1980) defines "department" as "a major administrative division of a government."

continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to public needs," the Legislature has adopted a dynamic interpretation of the Article IV, §6 mandate to restructure the Executive Department. As part of that ongoing process, the Legislature has placed AHCA "within" the Department of Professional Regulation. Fla. Stat. §20.42. Pursuant to §3 Ch. 93-220, Laws of Florida, the Department of Professional Regulation has been abolished and a number of its divisions transferred to a newly created Department of Business and Professional Regulation (DBPR). The very creation of DBPR illustrates the Legislature's fulfillment of the Article IV, §6 mandate to streamline the Executive Department. In Ch. 93-220, §1, Laws of Florida, the Legislature set forth its rationale for consolidating the formerly separate Departments of Business Regulation and Professional Regulation in order to transfer those functions to DBPR:

> Regulatory Purpose. - The Legislature has previously found and continues to find that certain business activities and certain professions, when unregulated, endanger the health, safety, and welfare of the citizens of the state and has assigned the regulation of such businesses to the Department of Business Regulation and the regulation of such professions to the Department of Professional Regulation. However, the citizens of the state often find this division of responsibility confusing, especially when attempting to file a complaint. Therefore in an attempt to improve the efficiency of such regulation and to facilitate the filing and assessment of complaints, it is the intent of this Act to combine business and professional regulation into a single new state agency, the Department of Business and Professional Regulation, while preserving the body of law applicable to the regulated interests therein.

This legislative merger of two former departments illustrates the Legislature's understanding of how departments should be organized along functional or program lines rather than wooden structural categories.

The trial court has essentially supplanted the Legislature's definition of "department" for its own. The trial court effectively defined "department" to require a single agency head. Yet under the functional and programmatic definition of an Article IV, §6 "department" adopted by the Legislature, no particular authoritative hierarchy is required. Function has been defined as "the action for which a person or thing is specially fitted or used or for which a thing exists." (Webster's New Collegiate Dictionary, 1980). A "program" has been defined as "a plan or system under which action may be taken toward a goal." Id. AHCA's mission to ensure access to basic and affordable health care for all residents of the state well fits within DBPR. It is beyond dispute that the health care industry is both a business enterprise and is filled with various professional occupations. DBPR is consequently specially fitted toward the goal of regulating that industry. The Division of Medical Quality Assurance is a principal unit of DBPR and regulates and broad range of the health industry. Fla. Stat. §20.165(2)(f).[4] Therefore it was reasonable and fitting for the Legislature to place AHCA "within" DBPR in order to accomplish the intended regulation of the health care industry envisioned by the provisions of Fla. Stat. §20.42.

The trial court was apparently troubled that although AHCA had been created "within" DBPR, it was nevertheless not subject to the control, supervision or direction of DBPR. The trial court reasoned that a function cannot be "allotted" to a department if the department has

---

[4] The Division of Medical Quality Assurance is comprised of the Board of Acupuncture, Board of Chiropractic, Board of Clinical Laboratory Personnel, Board of Clinical Social Work, Marriage and Family Therapy, and Medical Health Counseling, Board of Dentistry, Board of Medicine, Board of Nursing, Board of Optometry, Board of Osteopathic Medicine, Board of Pharmacy, Board of Physical Therapy Practice, Board of Podiatric Medicine, Board of Psychological Examiners, Board of Speech-Language Pathology and Audiology. Fla. Stat. §20.165(4)(d)(1)-(14).

no control over the function. Apparently, the trial court relied on the dicta in Justice Ervin's dissenting opinion in Huber Distrib. Co. Inc. v. National Distrib. Co. Inc., 307 So.2d 1976 (Fla. 1974):

> The Constitution requires that the administration of each department be placed under the direct supervision of the head of the department. Article IV, §6, Constitution of the State of Florida. To allow division of a department to act independent of the department would render Article IV, §6 which limits the number of independent agencies or departments to twenty-five, meaningless.

Id. at 178. However, both the trial court and the dicta fail to give any regard to the functional and programmatic definition of "department" adopted by the Legislature. Contrary to Justice Ervin's statement, the Constitution does not expressly require that the administration of a department be placed under the direct supervision of the head of the department. Since Article IV, §6 is a grant of legislative power and a mandate to the Legislature to reorganize the Executive Branch to achieve maximum efficiency and effectiveness, it would be out of accord with the purpose of that constitutional provision to construe it in a way that required each department to have a single department head, or for that matter any specific structural hierarchy. The trial court and Justice Ervin's structural definition of "department" fail to do justice to the legislative mandate in Article IV, §6 to reorganize the Executive Branch of state government into an organized and comprehensive plan. Rather than promoting the Article IV, §6 purpose of calling the Legislative to streamline the Executive Branch in order to achieve maximum efficiency and effectiveness, the trial court's structural definition of "department" restricts the Legislature's flexibility to shape the Executive Department structure to changing social needs. Whether the head of AHCA is under the supervision and control of the head of DBPR is of no

constitutional significance so long as AHCA's essential mission fits reasonably into the function and programs of DBPR. The Florida Constitution expresses no limit on the Legislature to exercise its broad powers to internally structure a department in the exercise of its reasonable discretion. Since AHCA and DBPR satisfy the functional and programmatic definition, it is irrelevant whether AHCA is subject to the control, supervision or direction of DBPR. Therefore, AHCA is not unconstitutionally structured.

III. THE SUBJECT ORDER IS SUBJECT TO REVERSAL BECAUSE THE TRIAL COURT HAD NO BASIS TO SUPPORT ITS HOLDING THAT FLORIDA STATUTE §20.42 VIOLATES THE 25 DEPARTMENT REQUIREMENT.

It is well established that summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985). As this court stated long ago in the landmark case of Holl v. Talcott, 191 So.2d 40 (Fla. 1966) with respect to summary judgments:

> Before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party.

Id. at 43. (Citations omitted). It has also been held that a "material fact" is a fact that is essential to resolution of legal questions raised in the case. State of Fla. Dept. of Environmental Regulation v. C.P. Developers, Inc., 512 So.2d 258 (Fla. 1st DCA 1987). As noted previously, the issue before this court is whether there was sufficient competent substantial evidence before the trial court at the hearing on the Motion for Summary Judgment from which a jury could have lawfully drawn an inference against the prevailing party under the issues framed by the pleadings

in the case. Halavin v. Tamiami Trail Tours, Inc., supra.

The trial court had no factual basis to conclude that the 25 department limit of Article IV, §6 of the Florida Constitution has in fact been violated by the Legislature. Since that constitutional provision prohibits the Legislature from allotting the functions of the Executive Branch among not more than 25 departments, the burden of the appellees was to demonstrate that the 25 department limit has been exceeded. The critical "material fact" in this case is whether an amount in excess of 25 Article IV, §6 departments exist. Whatever limitation Article IV, §6 imposes upon the Legislature would, by its own terms, only be activated should the number of departments exceed 25. Absent that predicate, the trial judge's determination that AHCA is in violation of Article IV, §6 is not based on sufficient competent substantial evidence.

The appellees failed to put forth any proof whatsoever concerning how many departments presently exist.[5] Consequently there was not a substantial basis for the trial court to declare the unconstitutionality of Fla. Stat. §20.42. The Supreme Court will not decide a constitutional question when not absolutely necessary. Mayo v. Market Fruit Co. of Sanford, 40 So.2d 555 (Fla. 1949). Unless and until an unequivocal violation of the 25-department limitation of Article IV, §6 is demonstrated, any determination of the constitutionality of AHCA is premature and is in the nature of an advisory opinion. See, Interlachen Lakes Estates, Inc. v. Brooks, 341

---

[5] It should be noted that the question of how many Article IV, §6 "departments" exist is itself an open question. Amicus has located no cases where this court has ruled on that particular issue. One 23-year-old attorney general opinion put the total number of separate departments at 22, exclusive of those authorized by the constitution. Op. Att'y. Gen. Fla. 72-153 (1972). In any event, in order to determine whether the 25-department limit has been violated it would be necessary to canvass all of Florida law and also to analyze the practical functioning of the entire Executive Branch of the State of Florida. The necessary facts for such a determination simply were not set before the trial court.

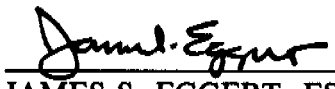
So.2d 993 (Fla. 1976)(holding that the Supreme Court may only render advisory opinions to the governor).

The trial court's order declaring AHCA unconstitutional is erroneous even if one assumes that an excess of 25 Art. IV, §6 departments presently exist. When it enacted Fla. Stat. §20.42, the Legislature obviously did not expressly provide that AHCA would be the 26th department of the executive branch of state government. On its face, the constitutional provision only states that the executive function shall be allotted among not more than 25 departments. The trial court's conclusion that AHCA, rather than any other executive department, is unconstitutional, cannot be derived from simple logic. The trial court implicitly assumed that Article IV, §6 required a chronological ordering of the executive departments for judicial determination of whether the 25-department limit has been exceeded. This premise is not expressly set out in the Constitution nor is Amicus aware of any authority to support it. In any event, there is simply not a sufficient basis established in the record to show that in excess of 25 departments exist. Therefore, the trial judge's ruling is subject to reversal.

CONCLUSION

For all the above enumerated reasons, Amicus respectfully requests this Court reverse the trial court's Final Order in Declaratory Judgment entered June 26, 1995, insofar as it holds that AHCA is unconstitutionally structured in violation of Article IV, §6 of the Florida Constitution.

Respectfully Submitted,



JAMES S. EGGERT, ESQUIRE
FBN: 949711
MICHAEL N. BROWN, ESQUIRE
FBN: 136180
Allen, Dell, Frank & Trinkle
Barnett Plaza, Suite 1240
101 East Kennedy Blvd.
P.O. Box 2111
Tampa, FL 33601
(813) 223-5351

And

FREDERICK B. KARL, ESQUIRE
FBN: 041450
Post Office Box 1289
Tampa, FL 33601

Attorneys for Amicus Curiae,
The Hillsborough County
Hospital Authority.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amicus Brief of the Hillsborough County Hospital Authority in favor of Appellants/Cross-Appellees, has been furnished by U.S. Mail this 5th day of September, 1995, to the following counsel:

ARTHUR J. ENGLAND, JR., ESQ.
BARRY SCOTT RICHARD, ESQ.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quental, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302

ALAN C. BUNDBERG, ESQ.
A. BROADDUS LIVINGSTON, ESQ.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
500 First Flroida Bank Tower
215 South Monroe Street
Tallahassee, FL 32301

MURRAY R. GARNICK, ESQ.
Arnold & Porter
555 Twelfth Street N.W.
Washington, D.C. 20004

JODI CHASE, ESQ.
Associated Industries of Florida, Inc.
516 N. Adams Street
Post Office Box 784
Tallahassee, FL 32302

ROBERT A. BUTTERWORTH, ESQ.
Attorney General
JAMES A. PETERS, ESQ.
Assist. Attorney General
CHARLIE McCOY, ESQ.
Assist. Attorney General
ERIC J. TAYLOR, ESQ.
Assist. Attorney General
Office of the Attorney General
Koger Executive Center
Alexander Building, Room 102
Tallahassee, FL 32399

(CERTIFICATE OF SERVICE - continued)

PROFESSOR LAWRENCE H. TRIBE
Special Counsel
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Mass. 02138

WAYNE HOGAN, ESQ.
Brown, Terrell, Hogan, Ellis,
McClamma & Yogelwel, P.A.
804 Blackstone Bldg.
233 East Bay Street
Jacksonville, FL 32202

ALAN R. ROMAN, ESQ.
Senior Attorney
AHCA - Medicaid Division
Building B, Room 234
1317 Winewood Blvd.
Tallahassee, FL

JONATHAN S. MASSEY, ESQ.
Special Counsel
3920 Northhampton Street N.W.
Washington, D.C. 20015

BRIAN KOUKOUTCHOS, ESQ.
Special Counsel
9 Avon Road
Bedford, Massachusetts 01730

W. DEXTER DOUGLAS, ESQ.
General Counsel
Office of the Governor
The Capitol, Suite 209
Tallahassee, FL 32399-0001

HAROLD D. LEWIS
Chief Inspector General
2107 The Capitol
Tallahassee, FL 32399-0001

F. TIM HOWARD, ESQ.
215 S. Monroe, Suite 668
Tallahassee, FL 32301

JAMES S. EGGERT, ESQUIRE