
SUPREME COURT OF FLORIDA

500 South Duval Street
Tallahassee, FL 32399-1927

SUPREME COURT CASE NO.: 94,427

FIFTH DCA CASE NO.: 97-3506

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 16, AFL-CIO,

Petitioner,

v.

PUBLIC EMPLOYEES RELATIONS COMMISSION, ET.AL.,

Respondents.

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

CASE NO.: 97-3506

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS¹

On October 1, 1997, the Service Employees International Union Local 16, AFL-CIO (hereinafter “Petitioner” or “Local 16”) filed an unfair labor practice (“ULP”) charge against the Clerk of the Circuit and County Courts of the Ninth Judicial Circuit of Orange County (hereinafter “Respondent” or “Clerk”). (R. 1-7.)² On October 13, 1997, the General Counsel of the Public

¹ Pursuant to Fla. R. App. P. 9.210(c), the statement of the case and the statement of the facts *may* be omitted in the Clerk’s Answer Brief. Notwithstanding, the Clerk finds it necessary to include a Statement of the Case and Facts in its Answer Brief so it is not prejudiced by Local 16’s incomplete Statement of the Case and Facts. The Clerk’s Statement of the Case and Facts shall state only those facts and issues considered below that are relevant to the question certified as one of great public importance by the Fifth District Court of Appeal.

² For consistency, all citations to the record will be to the page number provided by PERC in its Index to Record on Appeal. In addition, because there is only one volume in the Index to Record on Appeal, the Clerk will omit reference to the volume in its citations to the Record on Appeal.

Employees Relations Commission (hereinafter “PERC”) summarily dismissed Local 16’s ULP charge. (R. 15-20.)

The General Counsel’s summary dismissal of Local 16’s ULP charge was grounded on the fundamental premise that “[a]s a prerequisite to receiving the statutory protection for engaging in concerted activities, a person must be a ‘public employee’ within the meaning of section 447.203(3), Florida Statutes.” (R. 17.) The General Counsel’s summary dismissal stated “[a]s Local 16 recognizes, the Commission has ruled that deputy court clerks appointed to their positions by a Circuit Court Clerk to act for the Clerk are not public employees” and “[t]his decision has been affirmed on appeal.” (citations omitted.)

On November 3, 1997, Local 16 appealed the General Counsel’s summary dismissal of Local 16’s ULP charge to PERC. (R. 21-28.) On November 19, 1997, PERC issued an Order Affirming General Counsel’s Summary Dismissal of Local 16’s ULP charge. (R. 29-32.) In affirming the General Counsel’s decision, PERC stated “[i]n order to establish a prima facie violation of section 447.501(1)(a) and (b), Fla. Stat., Local 16 must allege facts which demonstrate that O’Brien³ is a public employee within the meaning of section 447.203(3), Fla. Stat., and not an appointed deputy.” (citation omitted). (R. 30.) (footnote not in original.) PERC concluded that “Local 16 has failed to allege such facts.” *Id.* PERC gave Local 16 an opportunity to file an amended claim with additional facts, however, Local 16 elected not to do so and filed an appeal instead. *Id.*

On December 19, 1997, Local 16 appealed PERC’s decision affirming the General Counsel’s summary dismissal of its ULP charge to the Fifth District Court of Appeal. On November 6, 1998, the Fifth District Court of Appeal affirmed PERC’s decision affirming the General Counsel’s

³ Local 16 filed the ULP charge on behalf of Patricia O’Brien, a former deputy court clerk.

summary dismissal of Local 16's ULP charge. In support of its affirmation, the Fifth District Court of Appeal opined:

[t]he starting point of our analysis is, of course, *Murphy v. Mack*, [citation omitted]. In *Murphy*, the supreme court denied deputy sheriffs the status of public employees even though the sheriff was held to be a public employer. This was because sheriffs, by statute, appoint rather than employ their deputies and the deputies have the same power as the sheriffs, who are legally responsible for such deputies' neglect or default. Similarly, the Clerk of Court is authorized, by statute, to appoint, as opposed to employ, deputy clerks who have the powers of the Clerk and for whom the Clerk is liable. If the "appointed," as opposed to "employed" language in the statute relative to obtaining services of deputies and the fact that they have the power to act for the sheriff and subject the sheriff to liability for their misdeeds or maldeeds were the sole bases for the decision in *Murphy*, then clearly our task is at end. Indeed, *Federation of Public Employees v. Public Employees Relation Commission* [citation omitted] so interpreted the *Murphy* decision and held that deputy clerks are not public employees.

In dicta, the Fifth District Court of Appeal expressed concerns about the differences in the job responsibilities and duties of deputy sheriffs and deputy court clerks. Based on its dicta, the Fifth District Court of Appeal certified the following question to be of great public importance pursuant to Fla. R. App. P. 9.030(a)(2)(v):

ARE DEPUTY COURT CLERKS, UNLIKE DEPUTY SHERIFFS, PUBLIC EMPLOYEES WITHIN THE CONTEMPLATION OF ARTICLE 1, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 447.203(3), FLORIDA STATUTES?

On November 19, 1998, Local 16 filed a Notice to Invoke Discretionary Jurisdiction of Supreme Court. On December 7, 1998, this Court issued an Order Postponing Decision On Jurisdiction and Briefing Schedule, requesting briefs on the merits. Accordingly, pursuant to this Court's Order and Fla. R. App. P. 9.210(a) and (c), the Clerk respectfully submits its Answer Brief on the Merits.

SUMMARY OF ARGUMENT

The Clerk, like sheriffs, property appraisers and tax collectors, is an independently elected County Constitutional Officer with the power to appoint deputies. The Office of the Clerk of the Circuit Court derives its power and authority from Article V, Section 16 and Article VIII, Section 1(d) of the Florida Constitution.

In addition to its fundamental constitutional powers, the Clerk, like the sheriff, tax collector and property appraiser, is statutorily permitted to “appoint” deputies. See §§ 28.06, 34.032, Fla. Stat. (1997). Furthermore, like the sheriff, tax collector and property appraiser, the Clerk has been delegated portions of the sovereign power, and they are similarly authorized to appoint deputies to act on their behalf.

Article I, Section 6 of the Florida Constitution applies to public sector *employees*. Article I, Section 6 of the Florida Constitution speaks only of employees, not persons, and does not, therefore, have applicability to persons who are not defined as employees. Because deputy court clerks are not “employees,” a compelling state interest analysis is inapplicable.

Similar to Article I, Section 6, of the Florida Constitution, all “persons” are not “employees” within the definition of section 447.203(3), Fla. Stat. (1997), either. This Court’s well-established case law interpreting section 447.203, Fla. Stat. (1997), provides that constitutionally elected officers are not public employees under the statute.

In the seminal case of, *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978), this Court held that “[s]ince deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them within the definition of public employee without express language to this effect.” *Id.* at 826. This Court opined further that “[i]n the absence of

language including deputy sheriffs within the definition set forth in Chapter 447, Florida Statutes (1975), we find that they are not encompassed by the act.” *Id.*

This Court's holding in *Murphy v. Mack*, *supra*, has been extended properly by Florida's courts to constitutionally appointed deputy clerks, deputy property appraisers and tax collectors. To agree with Local 16's argument, this Court must be willing to believe that this Court, the First District Court of Appeal, the Fourth District Court of Appeal, the Fifth District Court of Appeal (in its decision below), the Eleventh Circuit Court of Appeal, and PERC have all misread and misapplied the law with regard to deputies. Further, this Court must also believe that the Florida Legislature has silently watched all of the above referenced courts misread and misapply the law without taking corrective action.

Since this Court's 1978 decision in *Murphy v. Mack*, the Florida Legislature has revisited and amended section 447.203, Fla. Stat. (1997), eleven times. The Florida Legislature's inaction with regard to amending the statute following the decision in *Murphy v. Mack* implicitly provides their acceptance of its holding. Thus, by its inaction, the Florida Legislature has implicitly adopted this Court's holding and rationale in *Murphy v. Mack*, and its progeny, and effectively merged their holdings into the statute.

The emphasis in *Murphy v. Mack* was on the relationship between the parties, i.e. principal/agent (deputy), the fact that there was a common law relationship was secondary. The key to this Court's *Murphy v. Mack* decision is the “principal/agent (deputy) relationship” and the “appointee status of the deputy.” Since deputy court clerks are appointed and their relationship with the Clerk is that of deputy/principal, they are not public employees within the meaning of section 447.203(3), Fla. Stat. (1997).

Since this Court's holding in *Murphy v. Mack*, the Florida Legislature has enacted Special Acts to cover deputy court clerks within the definition of public employee in section 447.203(3), Fla. Stat. (1997). The very fact that the Florida Legislature enacted such Special Acts to include constitutionally appointed deputies within the definition of public employee, demonstrates that they are otherwise exempted from such a definition.

ARGUMENT

I. ELECTED COUNTY OFFICERS DERIVE THEIR POWER DIRECTLY FROM THE FLORIDA CONSTITUTION.

The Clerk, like sheriffs, property appraisers and tax collectors, is an independently elected County Constitutional Officer with the power to appoint deputies. The Office of the Clerk of the Circuit Court derives its power and authority from Article V, Section 16 and Article VIII, Section 1(d) of the Florida Constitution. Article V, Section 16 of the Florida Constitution, entitled "Judiciary, Clerks of the circuit courts" provides:

There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII Section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

Article VIII, Section 1(d) of the Florida Constitution entitled "Local Government, Counties, County Officers" provides:

There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except when provided by county charter or special law approved by vote of the electors in the county, any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of

the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Clearly, there can be no question the Clerk derives its fundamental power directly from the Florida Constitution.

II. ELECTED COUNTY OFFICERS ARE STATUTORILY AUTHORIZED TO “APPOINT” DEPUTIES AND ARE DELEGATED A PORTION OF THE SOVEREIGN POWER.

In addition to its fundamental constitutional powers, the Clerk, like the sheriff, tax collector and property appraiser, is statutorily permitted to “appoint” deputies. Specifically, section 28.06, Fla. Stat. (1997) provides:

Power of clerk to appoint deputies—The clerk of the circuit court may appoint a deputy or deputies, for whose acts he shall be liable, and the said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk may exercise, excepting the power to appoint a deputy or deputies.

See also § 34.032, Fla. Stat. (1997) (providing for similar power in the clerk of the circuit court when acting as clerk of the county court.) The authority possessed by the Clerk can be contrasted with that of the clerk of this Court and District Court who statutorily may “employ” deputy clerks as opposed to “appoint.” See §§ 25.241(2), 35.22, Fla. Stat. (1997).

Furthermore, like the sheriff, tax collector and property appraiser, the Clerk has been delegated portions of the sovereign power. See §§ 28.06, 34.032(1), Fla. Stat. (1997). In *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1977), this Court correctly opined that:

The clerk is a county officer pursuant to Article VIII, Section 1(d), Florida Constitution and, as an officer, he [or she] is delegated a portion of the sovereign power. The clerk is responsible for the efficient and effective operation of his [or her] office and has the authority to appoint deputies to assist him [or her] in his [or her] Constitutional and statutory duties.

Id. at 42-43.

In addition, deputy court clerks, like deputy sheriffs, deputy tax collectors, and deputy property appraisers, are sworn pursuant to statute to act for the Clerk. They take loyalty oaths and may do all acts which the Clerk herself may do, except to appoint deputy court clerks. The offices of the sheriff, property appraiser, tax collector and the Clerk are all similarly authorized to appoint deputies to act on their behalf, and by doing so, are delegating portions of the sovereign power to their deputies.

III. ARTICLE I, SECTION 6 OF THE FLORIDA CONSTITUTION SPEAKS ONLY OF “EMPLOYEES,” NOT “PERSONS,” AND DOES NOT, THEREFORE, HAVE APPLICABILITY TO PERSONS WHO ARE NOT DEFINED AS EMPLOYEES.

Local 16 argues that deputy court clerks, as persons, are employees as contemplated by Article I, Section 6 of the Florida Constitution. Further, Local 16 argues that there is no compelling state interest that would justify denying the deputy court clerks their constitutional rights under the Florida Constitution. *Id.*

The Clerk does not dispute that Article I, Section 6 of the Florida Constitution applies to public sector *employees*. Specifically Article I, Section 6 of the Florida Constitution, provides:

[t]he right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of *employees*, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public *employees* shall not have a right to strike.

(emphasis added.)

Local 16's argument, however, presupposes that deputy court clerks are *employees* as defined by the Florida Constitution. As was recognized by the First District Court of Appeal in *Brevard County Police Benevolent Association, Inc. v. Brevard County Sheriff's Department*, 416 So. 2d 20, 21 (Fla. 1st DCA 1982), "Article I, Section 6 [of the Florida Constitution] speaks only of employees, not persons, and does not, therefore, have applicability to persons who are not defined as employees." *Id.*

Similarly, in *Sikes v. Boone*, 562 F. Supp. 74 (N.D. Fla. 1983), *aff'd mem.*, 723 F.2d 918 (11th Cir. 1983), deputy sheriffs claimed that this Court's interpretation of section 447.203(3), Fla. Stat. (1997), violated Article 1, Section 6, Fla. Const. *Id.* at 80. The *Sikes* court relied on *Brevard County Sheriff's Department, supra*, holding that this Court's interpretation of section 447.203(3), Fla. Stat. (1997) did not violate the Florida Constitution. *Id.* The *Sikes* court further held that [w]hen a challenge is made to a state statute, and that statute has been authoritatively construed by the state's highest court, the words of the court become the words of the statute. *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).)

Article I, Section 6 of the Florida Constitution is inapplicable to deputy court clerks as the plain language of the statute makes it applicable only to *employees*, not merely persons. Thus, despite Local 16's contentions, deputy court clerks are not employees and, therefore, the compelling state interest analysis is not applicable.

IV. DEPUTY COURT CLERKS, APPOINTED BY A CONSTITUTIONALLY ELECTED CLERK OF COURT, ARE NOT PUBLIC EMPLOYEES WITHIN THE STATUTORY MEANING OF SECTION 447.203(3), FLA. STAT. (1997).

A. All "persons" are not "employees" within the definition of section 447.203(3), Fla. Stat. (1997).

Local 16 argues simplistically that section 447.203(3) sets forth two criteria determining whether a person is a public employee: (1) the person must be an employee of a public employer; and, (2) the person's position must not fall into any of the exempted positions enumerated in section 447.203(3)(a)-(j). (Petitioner's Brief, p. 15.) In arguing that O'Brien, as a deputy court clerk, satisfies the first criteria, Local 16 makes the conclusory statement that "O'Brien was an 'employee' of a 'public employer.'" *Id.* In support of its statement, Local 16 quotes a general definition of "employee" as defined by this Court, and summarily asserts that O'Brien falls within the definition. *Id.* at 16. Local 16's underlying premise that all "persons" are "employees" ignores substantial compelling precedent to the contrary and thus, is fatally flawed.

Relative to the second prong, Local 16 claims that "O'Brien's position as deputy clerk did not fall into any of the categories of exempted positions enumerated in section 447.203(3)(a)-(j)." (Petitioner's Brief, p. 16). Local 16 asserts that since deputy clerks are not specifically excepted from section 447.203(3)(a)-(j), they must be included in the definition of "public employee." *Id.* at 17.

This argument ignores the historical treatment of deputies as outside the definition of public employee. Instead, Local 16 assumes the point at issue --that deputy court clerks are employees under section 447.203(3), Fla. Stat. (1997). Local 16's creative attempt to subsume deputies of constitutionally elected officers into the general class of public employees under section 447.203(3), Fla. Stat. (1997), is faulty in light of this Court's well-established case law interpreting the very statute that Local 16 is relying upon.

B. This Court in *Murphy v. Mack* held definitively that deputy sheriffs are not public employees as defined by section 447.203(3), Fla. Stat. (1997).

Local 16's exact argument that deputies (i.e. court clerks) are public employees was specifically rejected by this Court when it reversed the First District Court of Appeal's finding that deputy sheriffs, even though appointed, were public employees within the meaning of section 447.203, Fla. Stat. (1997). *Murphy v. Mack*, 358 So. 2d at 822, reversing 341 So. 2d 1008 (Fla. 1st DCA 1977). On review, this Court rejected the First District Court of Appeal's reasoning, holding that deputy sheriffs are not public employees, notwithstanding that sheriffs are public employers within the meaning of the Act. *Id.* In reversing the First District Court of Appeal's decision, this Court soundly noted:

[s]ince deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them within the definition of public employee without express language to this effect. In the absence of language including deputy sheriffs within the definition set forth in Chapter 447, Florida Statutes (1975), we find that they are not encompassed by the act.

Id. at 826.

C. This Court's holding and rationale in *Murphy v. Mack* and progeny, provide that appointed deputies of constitutionally elected officers are not public employees as defined by section 447.203(3), Fla. Stat. (1997).

Following *Murphy v. Mack*, and based on its holding and rationale, PERC and the Fourth District Court of Appeal dismissed a similar argument with regard to deputy court clerks. *Federation of Public Employees, a Division of District 1, Pacific Coast District, MEBA, AFL-CIO v. Clerk of the Circuit and County Courts of the Seventeenth Judicial Circuit of Broward County*, 10 F.P.E.R. ¶ 15287 (1984) (employees of the Clerk of the Circuit and County Courts of the Seventeenth Judicial Circuit of Broward County were not public employees insofar as they were appointed deputy clerks pursuant to statutory authority), *affirmed Federation of Public Employees, District No. 1, Pacific Coast District, M.E.B.A.*,

ALF-CIO v. Public Employees Relations Commission, 478 So. 2d 117 (Fla. 4th DCA 1985).

This Court, PERC and the Fourth District Court of Appeal made their decision even though there is no statutory language in section 447.203(3), Fla. Stat. (1997), excepting those persons appointed by constitutional officers.

Local 16 acknowledges the existence of another case wherein the court extended *Murphy v. Mack*'s rationale beyond deputy sheriffs and deputy court clerks to deputy property appraisers. (Petitioner's Brief p. 18-19) (citing *Florida Public Employees Council 79 AFSCME v. Martin County Property Appraiser*, 521 So. 2d 243 (Fla. 1st DCA 1985)). The court in *Martin County Property Appraiser* also correctly relied on *Murphy v. Mack* finding that deputy property appraisers were not public employees under Florida law. *Martin County Property Appraiser*, 521 So. 2d at 243. Specifically, the First District Court of Appeal held:

In concluding that the Property Appraiser's employees are not public employees, the Commission determined that it could not distinguish the authority bestowed upon those persons from that which the courts held to be sufficient to confer deputy status in *Murphy v. Mack*, . . . and *Federation of Public Employees v. Public Employees Relations Commission*. Adopting language from the decision in *Federation of Public Employees*, we also conclude that the "ratio decidendi of [*Murphy v. Mack*] is entirely applicable" to the deputy property appraisers in the instant case.

Id. at 243-44. The Court further held that it "agree[d] with the Commission's observation that the determinative factor is that the Deputy Property Appraisers may perform any act required by the Property Appraiser and not that they actually exercise a plenary range of duties required by him."

Id. at 244. This was so, even where the deputies "primarily exercise[d] clerical duties." *Id.* The First District Court of Appeal concluded that employees empowered to "act on [the property appraiser's] behalf in carrying out the duties prescribed by law for the office" are the "alter ego" of the property appraiser. *Id.*

Curiously absent from Local 16's brief is any reference to *Beauregard v. Olson*, 84 F.3d 1402 (11th Cir. 1996), an Eleventh Circuit Court of Appeal case that interpreted Florida law and extended the rationale announced in *Martin County Property Appraiser* to constitutionally appointed deputy tax collectors. *Id.* In *Beauregard v. Olson*, the court held that the tax collector, who held an office created by the Florida Constitution, was empowered by Florida law to appoint deputies. *Id.* at 1404. The court further held that the plaintiffs were "all appointed deputies," referencing the "special status Florida law affords deputies." *Id.* at 1404, fn. 2 (citing *Blackburn v. Brorein*, 70 So. 2d 293 (Fla. 1954); *Murphy v. Mack*, *supra*; *Martin County Property Appraiser*, *supra*.) The court concluded by stating that "as deputies, Plaintiffs were all authorized, by Florida law, to act on [the Tax Collector's] behalf in carrying out the duties of the Tax Collector's Office." *Id.*

To agree with Local 16's argument, this Court must be willing to believe that this Court, the First District Court of Appeal, the Fourth District Court of Appeal, the Fifth District Court of Appeal (in its decision below), the Eleventh Circuit Court of Appeal, and PERC have all misread and misapplied the law with regard to deputies. Further, this Court must also believe that the Florida Legislature has silently watched all of the above referenced courts misread and misapply the law without taking corrective action. Obviously, this is not the case. The Florida Legislature intended for deputies who are appointed by constitutionally elected officers not to be included within the definition of public employees within section 447.203, Fla. Stat. (1997).

D. The Florida Legislature has implicitly approved this Court's decision in *Murphy v. Mack* by not amending the statute.

Local 16's argument that deputies are included within the definition of

section 447.203(3), Fla. Stat. (1997), absent expressed statutory language to the contrary is erroneous. Since this Court's 1978 decision in *Murphy v. Mack*, the Florida Legislature has revisited and amended section 447.203, Fla. Stat. (1997), eleven times. As a general rule, since the Florida Legislature is presumed to know the status of the law in Florida, its inaction with regard to amending the statute following the decision in *Murphy v. Mack* implicitly provides their acceptance of its holding. If the Florida Legislature intended for appointed deputies to be included within the definition of section 447.203(3), Fla. Stat. (1997), it could have amended the statute following this Court's decision in *Murphy v. Mack*. Therefore, by its inaction, the Florida Legislature has implicitly adopted this Court's holding and rationale in *Murphy v. Mack*, and its progeny, and effectively merged their holdings into the statute.

E. The fundamental underpinning of *Murphy v. Mack* focused on the holding of an office by deputy sheriffs and their possession of the same sovereign power as the sheriff.

Local 16 asserts that the Fourth District Court of Appeal in *Federation of Public Employees*, “mechanically” and “reflexively” applied *Murphy v. Mack* beyond the deputy sheriff context. (Petitioner's Brief, p. 17.) Local 16 suggests that the Fourth District Court of Appeal failed to discharge its duties to render a carefully considered opinion. Specifically, Local 16 assumes that the court in *Federation of Public Employees* failed to consider carefully the common law status of deputy court clerks. *Id.* at 18. Local 16's argument misses the real basis for this Court's *Murphy v. Mack* decision. The common law status of deputy sheriffs is secondary to this Court's holding in *Murphy v. Mack*. Contrary to Local 16's assertion, the Fourth District Court of Appeal's decision recognizes the fundamental basis upon which *Murphy v. Mack* was decided. Simply because the Fourth District Court of Appeal's written opinion in *Federation of Public*

Employees was succinct, certainly does not lessen the court's sound reliance on this Court's well-founded rationale in *Murphy v. Mack*.

Historically, a deputy has been an individual appointed to act for another. In *Blackburn v. Brorein, supra*, this Court held that:

A deputy is a person appointed to act for another and he may do anything that his principal may do. A deputy is a substitute for another and is empowered to act for him in his name and behalf in all matters in which the principal may act. The principal is responsible for the acts of his deputy and the authority of the deputy ceases upon the latter's death or disqualification.

Id. at 296. In *Murphy v. Mack, supra*, this Court determined that section 447.203(3), Fla. Stat. (1975), did not reveal legislative intent to include appointed deputy sheriffs within the definition of public employee. The Court noted that:

A sheriff is authorized to appoint deputies, for whose acts he is responsible, to act in his stead. A deputy sheriff holds office by appointment rather than employment and is invested with the same sovereign power as the chief law enforcement officer of the county. The relationship between sheriff and deputy has not been recognized by this Court to be that of employer and employee. To the contrary, this Court has expressly held that a deputy is not an employee, which is consistent with the common law concept of deputy sheriffs.

Id. at 825. It is quite clear from even a cursory reading of *Murphy v. Mack* that this Court focused on the facts that the deputy sheriff held office by appointment and is invested with the same sovereign power as the sheriff.

As referenced above, PERC and the Fourth District Court of Appeal resolved this very issue regarding deputy court clerks that are appointed by a constitutionally elected Clerk of Court in *Federation of Public Employees, supra*. In *Federation of Public Employees*, 10 F.P.E.R. at ¶ 17288, the union submitted a request for recognition as a bargaining agent to the Clerk of Courts for Broward County. After an evidentiary hearing on the appropriateness of the proposed unit, PERC found that there was competent substantial evidence to support the hearing officer's

decision that deputy court clerks were not public employees within the meaning of section 447.203(3), Fla. Stat. (1997). *Id.* In so finding, PERC held:

Had this case arisen before the seminal Supreme Court case of Murphy v. Mack, 358 So.2d 822 (Fla. 1978), the Commission would undoubtedly have concluded that these individuals are public employees for the same reasons that the deputy clerks employed by the state attorney's office, the public defender's offices and the sheriff's office are public employees. However, Murphy v. Mack leaves us no reasonable alternative but to conclude that any constitutional officer who has the power to appoint deputies to act in his stead, as does the Clerk here, does not employ the individual, and consequently, those persons are not public employees. Under the rationale of Murphy v. Mack so long as a deputy may do any ministerial act that his principal may do, he holds an appointment as distinguished from employment, and is not a public employee as defined in section 447.203.

Id.

In unanimously affirming PERC's decision, the Fourth District Court of Appeal opined:

[t]he ratio decidendi of [Murphy] is entirely applicable to deputy clerks of the circuit court. They are appointed by the clerk to act for him and are not public employees in the statutory sense used in Chapter 447, Florida Statutes. Accordingly, we affirm the decision of the Public Employees Relations Commission on authority of Murphy v. Mack.

Federation of Public Employees, 478 So. 2d at 118.

Local 16 devotes a majority of its brief to arguing that *Murphy v. Mack*, should not apply to deputy court clerks because the decision was based upon the unique history and common law development between sheriffs and their deputies.⁴ (Petitioner's Brief, p. 19-25.) Local 16 reasons since there is no common law relationship for clerks of court and their deputies, the holding in *Murphy v. Mack* does not apply. *Id.* Local 16's entire argument is based upon a dissenting Commissioner's opinion in *Federation of Public Employees*, *supra*. PERC's majority opinion

⁴ Although the Clerk does not dispute that the job duties of deputy sheriffs may be different than the job duties of deputy court clerks, there is no factual record below to support any findings on this point.

in *Federation of Public Employees*, however, specifically addressed and rejected Local 16's argument stating:

We are not persuaded by his [dissenting Commissioner] narrow focus on the common law relationship between a sheriff and his deputies. Rather, we read *Murphy v. Mack* as emphasizing the historical meaning of the deputy/principal relationship whether that relationship involves deputy sheriffs or deputy clerks. In this regard, Section 28.06 and 30.12, Florida Statutes (1983), reflect and embody the historical and common law distinction between the authority of "deputies" and "employees." In light of the foregoing, the Federation's exception is denied.

Federation of Public Employees, District No. 1, 10 F.P.E.R. at ¶ 15289.

For the same reasons, Local 16's emphasis on the language in *Murphy v. Mack*, concerning the common law relationship is inappropriate. The emphasis in *Murphy v. Mack* was on the relationship between the parties, i.e. principal/agent (deputy), the fact that there was a common law relationship was secondary. The key to this Court's *Murphy v. Mack* decision is the "principal/agent (deputy) relationship" and the "appointee status of the deputy." *Fraternal Order of Police, Sheriffs' Lodge No. 32 v. Brescher*, 579 F. Supp. 1517 (S.D. Fla. 1984); *Sikes v. Boone, supra*. Since deputy court clerks are appointed and their relationship with the Clerk of Court is that of deputy/principal, they are not public employees within the meaning of section 447.203(3), Fla. Stat. (1997).

In reaching its decision, the General Counsel's Summary Dismissal in this case accurately stated that:

[a]s a prerequisite to receiving the statutory protection for engaging in concerted activities, a person must be a "public employee" within the meaning of section 447.203(3), Florida Statutes. Exhibit B in support of the charge identifies O'Brien's position at the time she was dismissed as a clerk v. As Local 16 recognizes, the Commission has ruled that deputy clerks appointed to their positions by a Circuit Court Clerk to act for the Clerk are not public employees. This decision has been affirmed on appeal. *Federation of Public Employees, District No. 1, Pacific Coast District, M.E.B.A., AFL-CIO Public Employees Relations Commission*, 478 So.2d 117 (Fla. 4th DCA 1985). See also Florida Public Employees Council 79 AFSCME

v. Martin County Property Appraiser, 521 So.2d 243 (Fla. 1st DCA 1988) (appointed deputy property appraisers held not to be public employees).

(R. 21-28).

F. The Florida Legislature’s enactment of subsequent legislation, including Special Acts to include constitutionally appointed deputies within the definition of section 447.203(3), Fla. Stat. (1997), demonstrates that deputies are otherwise exempted from the statute.

In *Federation of Public Employees, supra*, PERC suggested to the Federation of Public Employees that it should obtain an amendment to section 447.203(3), Fla. Stat. (1997), or a special act of the Florida Legislature granting collective bargaining rights to deputy clerks. In fact, such Special Acts of the Florida Legislature have been enacted in the past. See *Escambia County Sheriff’s Department v. Florida PBA*, 376 So. 2d 435 (Fla. 1st DCA 1979); 1988 Fla. Laws Ch. 88-522 (House Bill No. 1240) *subsequently repealed by* 1989 Fla. Laws Ch. 89-418 (Senate Bill No. 1483). The very fact that the Florida Legislature enacted such Special Acts to include constitutionally appointed deputies within the definition of public employee, demonstrates that they are otherwise exempted from such a definition.

Local 16 asserts that a deputy sheriff is an “employee” under the Workers’ Compensation Statute, therefore, a deputy sheriff must be an employee for purposes of section 447.203(3), Fla. Stat. (1997). (Petitioner’s Brief, p. 29.) In support of its argument, Local 16 cites the Workers’ Compensation Statute’s definition of employee in pertinent part as “any person engaged in any employment under any appointment.” *Id.* Contrary to Local 16’s position, the definition unequivocally demonstrates that the Florida Legislature intended to exclude constitutionally

appointed deputies from section 447.203(3), Fla. Stat. (1997). By its express language in the Workers' Compensation Statute, the Florida Legislature drafted a definition that would clearly cover appointed deputies, which the Florida Legislature has failed to do in section 447.203(3), Fla. Stat. (1997).

Additionally, Local 16 cites to other employment statutes, including, the Florida Occupational Safety and Health Act and the Unemployment Compensation Act which incorporate the definition of "employee" from the Workers' Compensation Act. Again, by specifically incorporating the Workers' Compensation Statutes's narrowly tailored definition of "employee" which expressly provides to include appointed deputies, demonstrates that the Florida Legislature intended to include appointed deputies under some of Florida's statutes and intended not to include appointed deputies under others, including section 447.203(3), Fla. Stat. (1997).

CONCLUSION

The Clerk respectfully requests that this Court answer the question certified of great public importance in the negative and to affirm the Fifth District Court of Appeal's decision that deputy court clerks who are appointed by a constitutionally elected Clerk of Court, are not employees for purposes of Article I, Section 6 of the Florida Constitution or section 447.203(3), Fla. Stat. (1997).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Answer Brief on the Merits, typed in nonproportionately spaced 12 point Helvetica, has been furnished by U.S. Mail Delivery to: Joseph Egan, Jr. Esquire and Kathryn Piscitelli, Esquire, Egan, Lev & Siwica, P.A., P.O. Box 2231, Orlando, FL 32802; Lorence Jon Bielby, Esquire, GREENBERG & TRAURIG, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and, Thomas W. Brooks, Esquire, MEYER AND BROOKS, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302, this 23rd day of March 1999.

Aaron L. Zandy