

SUPREME COURT OF FLORIDA

SERVICE EMPLOYEES INTERNATIONAL,
LOCAL 16, AFL-CIO,

Petitioner,

CASE NO. 94,427

vs.

District Court of Appeal,
5th District - No. 97-3506

PUBLIC EMPLOYEES RELATIONS
COMMISSION, et al.,

Respondents.

On Appeal from the Fifth District Court of Appeal

AMENDED REPLY BRIEF OF PETITIONER

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ARGUMENT

I. DEPUTY COURT CLERKS ARE “EMPLOYEES” UNDER ARTICLE I, SECTION 6, FLORIDA CONSTITUTION

In her answer brief, the Clerk contends that deputy court clerks are not “employees” within the meaning of Article I, Section 6, Florida Constitution, and that, therefore, depriving them of the rights guaranteed to public employees under that provision need not be justified by a compelling state interest. (Clerk’s Answer Brief, pp. 8-10.)

However, the Clerk sidesteps addressing the Petitioner’s contentions that deputy court clerks are “employees” within the common meaning of the term and that, under the rule of construction that words in a constitution should be given their plain and ordinary meaning, they are “employees” as that term is used in Article I, Section 6.¹ Similarly, despite the Clerk’s assertion that Article I, Section 6 does not apply to “persons,” the Clerk makes no attempt to respond to Petitioner’s observation that this very provision uses the word “persons” in granting the right to be free from job impairment based on union membership and that this was the particular right that was

¹ It is fair to say that both Petitioner and the Clerk view Patricia O’Brien as an “employee” as that term is commonly used. *See* pp. 34-35 of Petitioner’s brief on the merits.

abridged in the instant case.² Nor does the Clerk respond to the point made by Petitioner that *Murphy v. Mack*, 358 So.2d 822 (1978), did not address Article I, Section 6 when it held that deputy sheriffs were exempt from coverage as “public employees” under Section 447.203(3), Florida Statutes.³

In support of her position that deputy court clerks are not covered employees under Article I, Section 6, the Clerk cites two decisions that hold that deputy sheriffs are not employees for purposes of Article I, Section 6—*Brevard County Police Benevolent Ass’n, Inc. v. Brevard County Sheriff’s Dep’t*, 416 So.2d 20 (Fla. 1st DCA 1982); and *Sikes v. Boone*, 562 F.Supp. 74 (N.D. Fla. 1983), *aff’d without opinion*, 723

² As explained in Petitioner’s brief on the merits at pp. 45–46, the use of the term “persons” instead of “employees” in the first sentence of Article I, Section 6 was necessary to ensure that job applicants—not just individuals who have a job—are protected from discrimination on the basis of their membership or nonmembership in a union.

³ *Murphy* was decided prior to decisions holding that the rights granted under Article I, Section 6 may not be denied or abridged in the absence of a compelling state interest that is implemented in the least intrusive means. *See Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority*, 522 So.2d 358 (1988); *City of Tallahassee v. Public Employees Relations Commission*, 410 So.2d 487 (1981); *United Faculty of Florida v. Board of Regents, State University System*, 417 So.2d 1055, 1059 (Fla. 1st DCA 1982), *as clarified and modified*, 423 So.2d 429 (Fla. 1st DCA 1982); *Chiles v. State Employees Attorneys Guild*, 714 So.2d 502 (Fla. 1st DCA 1998), *appeal pending*, Fla. Sup. Ct. Case No. 93,665. However, the Court now has the benefit of these later decisions to assist it in determining whether deputy court clerks are entitled to the rights and protections of Article I, Section 6.

F.2d 918 (11th Cir. 1983), *cert. denied*, 466 U.S. 959 (1984). The courts in those decisions relied on *Murphy* in reaching that result, even though *Murphy* never expressly addressed the Article I, Section 6 coverage issue. They accepted that they were bound by this Court’s determination in *Murphy* that deputy sheriffs were not “employees.” However, these courts’ decisions appear to be misguided not only because *Murphy* never expressly decided the Article I, Section 6 issue, but also because they overlooked post-*Murphy* decisions holding that Article I, Section 6 rights cannot be impaired in the absence of a compelling state interest.⁴

More importantly, deputy court clerks are sufficiently different from deputy sheriffs to preclude application of the *Sikes* and *Brevard County* decisions to them. These decisions relied on the underlying rationale of *Murphy*—that in view of the strong common law history of treating deputy sheriffs as “officers” rather than employees of the sheriff, they were not “public employees” under the statute in the absence of language expressly including them within the definition of the term. (See Petitioner’s brief on the merits, pp. 19–21.) In explaining its reliance on *Murphy*, the court in *Brevard County* reasoned that *Murphy* “was not based simply on the statute, but was an interpretation of the common law.” *Brevard County Sheriff’s Dep’t*, *supra*, 416 So.2d at 21. Similarly, the *Sikes* court concluded that while, as a federal court, it

⁴ See footnote 3, above.

was bound by this Court’s determination that a deputy sheriff is not an “employee” for purposes of Florida law,⁵ “[t]his is especially true where, as here, the worker enjoys a unique historical status such as that enjoyed by deputy sheriffs in the State of Florida.” *Sikes, supra*, 562 F.Supp. at 77. In this regard, the *Sikes* court noted that “[i]t is well settled in Florida and several other states . . . that the office of deputy sheriff is a common-law office.”⁶ *Id.*

However, as discussed in Petitioner’s brief on the merits, and as recognized by the Fifth District Court of Appeal in its opinion below, the common law has no present force and effect in Florida with respect to deputies of elected court clerks. (Petitioner’s Brief on the Merits, pp. 21–24; 5th DCA decision, p. 2.) There is thus no common-law basis for treating deputy court clerks as non-employee “officers” for purposes of construing their coverage under either Article I, Section 6 or Chapter 447, Part II.⁷

⁵ See *NAACP v. Button*, 371 U.S. 415 (1963).

⁶ That the *Sikes* and *Brevard County* recognized the common-law status of deputy sheriffs as being the key basis for the *Murphy* decision undercuts the Clerk’s contention that “[t]he common law status of deputy sheriffs is secondary to this Court’s holding in *Murphy v. Mack*. (Clerk’s answer brief, p. 15.)

⁷ To illustrate the difference between an “officer” and an “employee” under the Florida Constitution, see Op. Att’y Gen. Fla. 88-56 (1988) (deputy circuit court clerk’s position was an “employment” rather than an “office” for purposes of the dual office prohibition of Article II, Section 5(a), Florida Constitution) and Op. Att’y Gen. Fla. 98-31 (1998) (correctional officers are not “officers” for purposes of Article II, Section 5(a), Florida Constitution).

Consequently, the *Sikes* and *Brevard County* are weak precedents for the Clerk's position that deputy court clerks are not employees within the contemplation of Article I, Section 6.

The *Sikes* and *Brevard County* decisions are all the Clerk can muster to counter the persuasive arguments of Petitioner that deputy court clerks are covered employees under Article I, Section 6. This paltry offering is clearly insufficient to carry the day on the issue. In view of the Clerk's inability to show that deputy court clerks lack Article I, Section 6 coverage, the task then falls upon the Clerk to demonstrate a compelling state interest to exclude them from enjoyment of the rights otherwise granted to them under the provision. However, complacently believing that she is not required to demonstrate any compelling state interest, the Clerk has offered none. Accordingly, the Clerk has failed to meet this burden.

II. ELECTED COURT CLERKS' CONSTITUTIONAL POWERS DO NOT OVERRIDE THEIR DEPUTIES' RIGHTS UNDER ARTICLE I, SECTION 6, FLORIDA CONSTITUTION

By placing great emphasis on the fact that clerks of the circuit courts derive their power from the Florida Constitution, the Clerk is apparently suggesting that her constitutional powers override the fundamental union membership and collective bargaining rights granted to public employees under Article I, Section 6, and implemented by Chapter 447, Part II, Florida Statutes. If indeed the Clerk is suggesting

such an argument, the argument has no merit.

Article V, Section 16, Florida Constitution, and Article VIII, Section 1(d), Florida Constitution, are the constitutional provisions from which the Clerk derives her power. Article V, Section 16 requires that there be a circuit court clerk in each county; allows for county court clerks if authorized by general or special law; and authorizes division, by general or special law, of the duties of court clerks 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. Article VIII, Section 1(d) provides for the election in each county of a clerk of the circuit court and other county officers. There is nothing in the language of these two provisions to warrant a construction of them as overriding or in any way limiting Article I, Section 6 rights. *See In re Advisory Opinion of Governor, Appointment of County Commissioners, Dade County*, 313 So.2d 697, 701 (Fla. 1975) (Florida Constitution shall be construed in such a manner as to give effect to every clause and every part thereof); *Advisory Opinion to the Governor*, 96 So. 2d 541 (Fla. 1957) (a construction of the constitution that nullifies a specific clause therein should not be adopted unless absolutely required by the context).

Furthermore, it must be remembered that the rights under Article I, Section 6 are among the fundamental rights guaranteed in the Florida Constitution's Declaration of

Rights. In contrast, the rights of the Clerk under Article V, Section 16 and Article VIII, Section 1(d), although important, are not fundamental. Consequently, the Clerk's constitutional powers of office cannot be construed as superceding her employees' rights under Article I, Section 6. Any denial or infringement of her employee's rights under Article I, Section 6 would be permissible only upon a showing of compelling state interest and then only if it can be implemented in the least intrusive manner. *See Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority*, 522 So.2d 358 (1988) (holding that a civil service board established pursuant to Article III, Section IV, Florida Constitution, cannot abridge employees' Article I, Section 6 rights in the absence of a showing of a compelling state interest).

Moreover, although holding that deputy sheriffs were exempt from the definition of "public employee" in Chapter 447, this Court in *Murphy* concluded that sheriffs are "public employers" within the meaning of the statute. Significantly, the Court reached this conclusion despite a sheriff's protestations that his status as an independently elected county constitutional officer required his exclusion from coverage. *Murphy, supra*, 358 So.2d at 823-24.⁸ If this Court found nothing in the constitutional status

⁸ Although declining to hold that deputy sheriffs were "public employees," the *Murphy* Court said other employees of the sheriff would be "public employees." *Id.* at 826.

of sheriffs to preclude them from being subject to Chapter 447 as public employers, surely other independently elected county constitutional officers, such as the Clerk, are not excluded from public employer coverage under the statute because of their constitutional status.

III. LEGISLATIVE INACTION IS AN INSUFFICIENT BASIS FOR DENYING DEPUTY COURT CLERKS' COVERAGE UNDER CHAPTER 447, PART II, FLORIDA STATUTES

The Clerk argues that “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.” (Clerk’s Answer Brief, p. 15.) This argument is insufficient to justify exclusion of deputy court clerks from enjoyment of the rights and protections under Chapter 447, Part II for several reasons. First, whatever the legislature’s intent with respect to *Murphy*, such intent would relate to deputy sheriffs only, not deputy court clerks. Second, the court decisions extending *Murphy* to deputy court clerks—the Fifth District’s ruling below, which certified the coverage question to this Court, and the Fourth District’s cursory per curiam decision in *Federation of Public Employees, Dist. No. I, Pacific Coast Dist., M.E.B.A, AFL-CIO v. PERC*, 478 So.2d 117 (Fla. 4th DCA 1985)—have scant weight under a

legislative inaction theory because they are not definitive rulings on the issue.⁹ Third, and most important, legislative inaction has absolutely no weight where as here fundamental constitutional rights are at stake. *See Satz v. Perlmutter*, 379 So.2d 359, 360 (1980) (“Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.”); *Dade County Classroom Teachers Ass’n, Inc. v. Legislature*, 269 So.2d 684, 687-88 (Fla. 1972) (legislative opposition to collective bargaining by public employees is not grounds for denying implementation of rights under Article I, Section 6). Indeed, Petitioner addressed this very topic in the specific context of Article I, Section 6 rights in part I.F.4. (pp. 41–43) of its brief on merits. The Clerk in her answer brief ignored that discussion.

IV. SPECIAL ACTS GRANTING DEPUTIES “PUBLIC EMPLOYEE” STATUS EFFECT NO CHANGE IN THE EMPLOYMENT RELATIONSHIP, AND THEY RAISE SERIOUS EQUAL

⁹ For the same reason, the property appraiser decision that the Clerk cites, *Florida Public Employees Council 79, AFSCME v. Martin County Property Appraiser*, 521 So.2d 243 (1st DCA 1988), would have little weight under a legislative inaction theory. Nor would the tax collector decision cited by the Clerk, *Beauregard v. Olson*, 84 F.3d 1402 (11th Cir. 1996). In fact, *Beauregard* would have no weight because that decision did not concern coverage of deputy tax collectors under Chapter 447, Part II. Further weakening any possibility of support of these two decisions for a legislative inaction analysis in the instant case is that neither concerned deputy court clerks.

PROTECTION CONCERNS

Citing two “past” special acts that conferred “public employee” status on deputies, the Clerk argues that “[t]he very fact that the Florida Legislature enacted such Special Acts to include constitutionally appointed deputies within the definition of public employee, demonstrates that they were otherwise exempted from such a definition.”¹⁰ (Clerk’s Answer Brief, pp. 19–20, citing *Escambia County Sheriff’s Dep’t v. Florida Police Benevolent Ass’n*, 376 So.2d 435 (Fla. 1st DCA 1979) (citing Ch. 27537, Laws of Florida (1951)), and Ch. 75-369, Laws of Florida). Contrary to the Clerk’s contentions, the legislature’s enactment of such special acts fails to demonstrate that deputy court clerks are excluded from the definition of “public employee.”

In view of the fact that deputy court clerks are granted fundamental rights under Article I, Section 6, as well as the fact that this Court has made clear that the legislature has an affirmative obligation to enact legislation implementing those rights,¹¹ the

¹⁰ Petitioner objects to the misleading reference to deputy court clerks as being “constitutionally appointed” that the Clerk makes in this statement. The term incorrectly implies that the Florida Constitution grants the Clerk the power to appoint deputies. However, as discussed in Petitioner’s brief on the merits, statutes, not the Florida Constitution, authorize the Clerk to “appoint” deputies. (Petitioner’s Brief, p. 32.)

¹¹ See *Dade County Classroom Teachers Ass’n v. Legislature*, *supra*, and *Dade County Classroom Teachers Ass’n v. Ryan*, 225 So.2d 903 (Fla. 1969), and

Clerk’s notion that deputies in each locale must await enactment of a special act (if one is ever forthcoming) before they can enjoy those rights is absurd. Because fundamental constitutional rights are at stake, the legislature does not have discretion to withhold from deputy court clerks coverage under Chapter 447, Part II, which implements public employees’ Article I, Section 6 rights, until such time as it desires to bestow such coverage.

Furthermore, permitting the legislature to grant collective bargaining rights through special acts to some deputies while denying it to similarly situated deputies raises serious equal protection concerns. *See State of Florida v. Leicht*, 402 So.2d 1153 (1981) (“To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to a legitimate state objective.”)¹²

Moreover, a look at such special acts reveals that their conversion of deputies

Petitioner’s discussion of those decisions at pp. 41-43 of its brief on the merits.

¹² Indeed, it is doubtful that this Court would have sanctioned enactment of a patchwork of such special acts in response to its conclusion in *Murphy* that legislative action would be necessary to include deputy sheriffs within the definition of “public employee.” Rather, *Murphy* contemplated an amendment to Section 407.203(3), Florida Statutes, that would expressly include deputy sheriffs. *See Murphy*, 358 So.2d at 826 (“[W]e 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.”)

to employee status is little more than a semantic exercise. In *Escambia County Sheriff's Dep't, supra*, the First District found that the legislature had “transformed deputy sheriffs into employees” for purposes of Chapter 447 by including them with other county personnel as “classified employees” under the county’s civil service system and amending the county’s civil service act to grant collective bargaining rights to classified employees.¹³

Similarly, the 1988 special act cited by the Clerk—1988 Fla. Laws Ch. 88-522, subsequently repealed by 1989 Fla. Laws Ch. 89-418—provided for removal of the “deputy” title of 75 percent of the persons employed as deputies of the Clerk of the Circuit Court of Broward County and granted them “all the rights of an employee of any other county officer.” The act also limited to 25 percent the number of persons whom the Clerk could designate as deputy clerks. According to the measure’s legislative history, approximately 500 persons were employed by the Clerk at the time of enactment, all of whom (including secretaries, administrators and mail room clerks) were designated as “deputies.” HB 1240, House of Representatives, Committee on Community Affairs, Final Staff Analysis (Storage No. h1240-f.ca, August 18, 1988). As a result of the act, approximately 375 of these deputy clerks metamorphosed into

¹³ However, coverage under a civil service system has been held to be insufficient by itself to confer public employee status upon deputy sheriffs. *See Ison v. Zimmerman*, 372 So.2d 431 (Fla. 1979).

“employees” who “would be treated as other county employees with the right to collectively bargain benefits they should desire.” *Id.* Apparently, selection of these persons for transformation was arbitrary because the act provided no criteria to use as a basis for choosing them from among the rest of the deputy clerks.

Significantly, the special acts effected no change in the employment relationship between the sheriff and clerk and their “transformed” employees. These acts did not divest the employees of their previous job duties—which were, in the Clerk’s terms, the “portions of the sovereign power” that had been “delegated” to them. (Clerk’s Answer Brief, p. 8.) Nor did these measures reduce the authority of the sheriff or clerk over the employees’ work performance. What did change was that these employees acquired the ability to engage in collective bargaining over their terms and conditions of employment, and nothing more.

The arbitrariness surrounding such special acts is further highlighted by the fact they have been repealed at the whim of the legislature. The Broward County act was repealed only a year after enactment. 1989 Fla. Laws Ch. 89-418. Moreover, the portion of the Escambia County civil service act conferring collective bargaining rights upon classified employees was deleted four years after enactment of the special act that added it. *See Florida Police Benevolent Ass’n, Inc. v. Escambia County Sheriff’s Dep’t*, 14 FPER (LRP) ¶19,170 (1988) (citing 1979 Fla. Laws Ch. 79-453). The

Escambia County deputy sheriffs unsuccessfully challenged the resultant loss of their collective bargaining rights.¹⁴ *See id.*

That the legislature by special acts can transform “deputies” without collective bargaining rights into “employees” entitled to those rights and then transform them back to their original status—while never making any material change in their responsibilities or their employment relationship with their employer—underscores the arbitrariness of the “deputy”/“appointee”/“officer” versus “employee” distinction as a gauge in determining “public employee” coverage.¹⁵ Indeed, contrary to supporting the Clerk’s position, these special acts only serve to illustrate the lack of any meaningful difference between these labels that would warrant relying upon them as

¹⁴ However, the Public Employees Relations Commission noted that it had previously determined that personnel other than deputy sheriffs who were classified employees under the county’s civil service system retained their right to collectively bargain. 14 FPER (LRP) ¶19,170 p. 445. (citing *Hotel, Motel, Restaurant Employees v. Escambia County School Bd.*, 7 FPER ¶12395 (1981), *aff’d*, 426 So.2d 1017 (Fla. 1st DCA 1983).) In explaining the inconsistent rulings, the Commission said the other employees, but not deputy sheriffs, enjoyed constitutional bargaining rights implemented by Chapter 447, Part II. Arguably, this conclusion was incorrect because once the legislature granted the Escambia County deputy sheriffs collective bargaining rights, it recognized them as full-fledged “public employees” for purposes of Chapter 447, Part II, a status that cannot be removed in the absence of a showing of a compelling state interest. *See* decisions cited at footnote 3, above.

¹⁵ That the distinction has little real substance is also well-illustrated by *Martin County Property Appraiser*, *supra*, where the First District Court of Appeal extended *Murphy* to deputy property appraisers, even though these employees were unaware that they were “deputies” and had never taken any oath of office.

a basis for deciding whether her deputies are entitled to the rights and protections of Article I, Section 6 and Chapter 447, Part II. In *Ison v. Zimmerman*, 372 So.2d 431,436 (Fla. 1979), this Court itself recognized that a deputy is an “employee” as that term is commonly understood, and that the labels “deputy” and “officer” are merely “precisionist refinement” upon the common meaning of “employee.” In these circumstances, there can be no compelling state interest, much less any rational basis, for depriving deputy court clerks of the enjoyment of the fundamental unionization and collective bargaining rights that are guaranteed to other public employees.

CONCLUSION

For the foregoing reasons, in conjunction with the reasons stated in Petitioner’s brief on the merits, Petitioner respectfully requests that the Court hold that deputy court clerks are “public employees” within the contemplation of Article I, Section 6 of the Florida Constitution and Section 447.203(3), Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief of Petitioner, **typed in proportionately spaced 14 point Times New Roman**, was furnished via U.S. Mail this 3rd day of May 1999 to Allen McKenna, Esq., and Aaron L. Zandy, Esq., GARWOOD, MCKENNA, MCKENNA & WOLF, P.A., Post Office Box 60, Orlando, Florida 32802; Lorence Jon Bielby, Esq., GREENBERG & TRAURIG, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and Thomas W. Brooks, Esq., MEYER AND BROOKS, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302.

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