

IN THE
SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO. 94,427

v.
PUBLIC EMPLOYEES RELATIONS
COMMISSION, et. al.,

[Lower Tribunal Case No. 97-3506]

Respondents.

_____ /

AMENDED ANSWER BRIEF OF AMICUS CURIAE

FLORIDA ASSOCIATION OF COURT CLERKS, INC.

LORENCE JON BIELBY
GREENBERG TRAUIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(850) 222-6891 Phone
(850) 681-0207 Facsimile

CERTIFICATE OF INTERESTED PERSONS

Counsel for Florida Association of Court Clerks, Inc., as *amicus curiae*, certifies that the following persons and entities have or may have an interest in the outcome of this case:

Service Employees International,
Local 16, AFL-CIO
(Appellant)

Honorable Linda W. Chapin
Clerk of the Circuit and County Courts
Ninth Judicial Circuit
Orange County, Florida
(Appellee)

Lorence Jon Bielby, Esquire
Greenberg, Traurig, P.A.
(counsel for Amicus,
Florida Association of Court Clerks, Inc.)

Florida Association of Court Clerks, Inc.
(Amicus Curiae)

Joseph Egan, Jr., Esquire
Egan, Lev & Siwica, P.A.
(counsel for Appellant)

Alan J. McKenna, Esquire
Aaron L. Zandy, Esquire
Garwood, McKenna, McKenna & Wolf, P.A.
(counsel for Appellee, Clerk)
Christi Gray Sundberg, Esquire
Staff Counsel, PERC
(Counsel for Appellee, PERC)

Public Employees Relations Commission (PERC)
(Appellee)

Patricia O'Brien
(Dismissed employee)

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

STATEMENT OF THE CASE AND FACTS 6

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. DEPUTY COURT CLERKS ARE NOT PUBLIC EMPLOYEES. 2

A. Deputy Court Clerks, appointed by constitutionally elected clerks of court, are not public employees within the statutory meaning of Section 447.203(3), Florida Statutes. 2

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases

Alachua County v. Powers, 351 So.2d 32 (Fla. 1977) 5

Beauregard v. Olson, 84 F. 3d 1402 (11th Cir. 1996) 8

Blackburn v. Brorein, 70 So 2d. 293 (Fla. 1954) 10, 11

Federation of Public Employees v. Public Employees
Relations Commission, 478 So. 2d 117 (Fla. 4th DCA
1985)
7

Florida Public Employees Council v. Martin County
Property Appraisers, 521 So. 2d 243 (Fla. 1st DCA
1985)
8

Fraternal Order of Police, Sheriff's Lodge No. 32, et.
al. v. Brescher, 579 F.Supp. 1517 (S.D., Fla., 1984)
12

Murphy v. Mack, 341 So. 2d 1008 (Fla. 1st DCA, 1977),
Quashed in part, 358 So.2d 822 (Fla. 1978)
4, 6, 7, 11

Murphy v. Mack, 358 So 2d. 822 (Fla. 1978), cert. den.
359 So.2d 1217 (Fla. 1978)
6

Sikes, et. al. v. Boone, et. al., 562 F.Supp. 74 (N.D.
Fla., 1983), cert. den., 466
12

State ex. rel. Holloway v. Sheats, 83 So. 508 (Fla.
1919)
5

State, ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So.
721 (1897)
4

Tanner v. McCall, 625 F.2d 1183 (5th Cir., 1980), reh.
den., 629 F.2d 1350, cert. den., 451 U.S. 907 (1981)
9

Statutes

Section 35.22(2), Florida Statutes (1997) 4, 9
Chapter 447, Florida Statutes (1997) 7
Section 28.06, Florida Statutes (1997) 3
Section 30.07, Florida Statutes (1997) 9
Section 34.032, Florida Statutes, (1997) 3
Section 447.203(3), Florida Statutes (1997) 3, 1, 6, 13
Sections 25.241(2), Florida Statutes (1997) 3, 9

Constitutional Provisions

Article I, Section 6, Florida Constitution 11
Article V, Section 16, Florida Constitution 2
Article VIII, Florida Constitution 3
Article VIII, Section 1(d), Florida Constitution 2, 5

STATEMENT OF THE CASE AND FACTS

The Florida Association of Court Clerks, Inc., as *amicus curiae* [hereinafter "FACC"], joins in and adopts the statement of the case and facts submitted by Appellee, Honorable Linda W. Chapin, as Clerk of the Circuit and County Courts of the Ninth Judicial Circuit, Orange County, Florida [hereinafter "Clerk"]. FACC, by joining in and adopting the Clerk's statement of the case and facts, will not be filing its own separate statement of the case and facts herein.

Appellant will be referred to as "Local 16;"

Appellee, Honorable Linda W. Chapin, will be referred to as "Clerk;"

Appellee, Public Employees Relations Commission, will be referred to as "PERC;"

Amicus, The Florida Association of Court Clerks, Inc., will be referred to as "FACC."

SUMMARY OF THE ARGUMENT

FACC requested to intervene herein and provides argument herein, as amicus, to address the issue of whether or not an appointed Deputy Clerk is a "public employee" within the statutory meaning of Section 447.203, Florida Statutes. Based upon clear constitutional and statutory provisions, and based upon established Florida law, a Deputy is delegated a portion of the sovereign power and authority in Florida, and therefore a Deputy holds an "office" and is not an "employee." An appointed Deputy Clerk, therefore, who is empowered to have and to exercise each and every power of whatsoever nature and kind as the elected Clerk may exercise (excepting the power to appoint a deputy or deputies), is not a "public employee" under Section 447.203, Florida Statutes. As such, Chapter 447 is not applicable to the Clerk's office. This Court is urged to affirm the decision below of the 5th District Court of Appeal, and the decision of the Commission.

ARGUMENT

I. DEPUTY COURT CLERKS ARE NOT PUBLIC EMPLOYEES.

A. Deputy Court Clerks, appointed by constitutionally elected clerks of court, are not public employees within the statutory meaning of Section 447.203(3), Florida Statutes.

The Office of the Clerk of the Circuit Court derives its powers and authority from Article V, Section 16, and Article VIII, Section 1(d) of the Florida Constitution. Article V creates the office as part of the judicial branch; Article VIII provides that the Clerk is a County Officer, who, along with the sheriff, tax collector, property appraiser, and supervisor of elections, is elected by the electors of the county for a term of four years. As an independent, elected constitutional officer of local government, the Clerk serves as Clerk of the Circuit and County Court¹ and both Article V and Article VIII provide that the Clerk also serves as the ex officio clerk of the Board of County Commissioners, Auditor, Recorder and Custodian of all county funds.²

Pursuant to Section 28.06, Florida Statutes, originally enacted in 1834 prior to Florida's statehood and carried forward without

¹ Article V, Section 16, Florida Constitution provides that: "...there may be a Clerk of the County Court if authorized by general or special law."

² ...when not otherwise provided by county charter or special law approved by vote of the electors...

substantive change, the Clerk of the Circuit Court is statutorily permitted to appoint deputies. Section 28.06, Florida Statutes (1997), provides as follows:

28.06 Power of Clerk to Appoint Deputies. - The Clerk of the Circuit Court may appoint a deputy or deputies, for whose acts the Clerk 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.

Additionally, the Clerk of the Circuit Court is statutorily permitted to appoint deputy clerks of the County Court. Section 34.032, Florida Statutes, (1997), provides as follows:

34.032 Power of Clerk to Appoint Deputies. -

(1) With the concurrence of the Chief Circuit Judge of the Circuit, the Clerk of the Circuit Court, in his or her capacity as Clerk of the County Court, may appoint a deputy clerk or clerks of the County Court for whose acts the Clerk 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 as Clerk of the County Court, except the power to appoint a deputy or deputies.

Local 16 blurs the distinction between Clerks of the Circuit Court, and the Clerk of the Florida Supreme Court or the Clerks of the District Courts of Appeal. The Clerk of the Supreme Court and the five Clerks of the District Courts of Appeal are not elected constitutional officers, and are not county officers pursuant to Article VIII, Florida Constitution. Sections 25.241(2), and 35.22(2), Florida Statutes (1997), statutorily authorize the Clerk of the Supreme Court and the Clerks of the District Courts of Appeal to

employ such deputies and clerical assistants as may be necessary. In contrast, Clerks of the Circuit Court, as elected constitutional officers, are delegated a portion of the sovereign power. The Clerk of the Supreme Court, and the Clerks of the District Courts of Appeal, are not elected constitutional officers, and therefore they cannot delegate portions of the sovereign power to their employees or otherwise.

The Clerks of the Circuit Court are elected and therefore hold an "office." As early as 1897, this Court defined the term "office" as follows:

The term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office...every "office," in the constitutional meaning of the term, [implies] an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws.

State, ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721 (1897) [cited by the 1st DCA in Murphy v. Mack, 341 So. 2d 1008 (Fla. 1st DCA, 1977), the lower court decision leading up to the central precedent in the case at bar, Murphy v. Mack, 358 So. 2d 822 (Fla. 1978)].

It is the nature of the powers and duties exercised by a particular position which determines whether it is an "office" or an "employment." This Court stated as early as 1919 in State ex. rel. Holloway v. Sheats that:

The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person

filling the office, while an "employment" does not comprehend and delegation of any part of the sovereign authority. The term "office" embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; this constitutes, perhaps, the most decisive difference between an employment and an office.

State ex. rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919).

This Court later specifically applied this distinction to the Office of Clerk of the Circuit Court. In the seminal case of Alachua County v. Powers, this Court stated that:

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

Alachua County v. Powers, 351 So.2d 32, 42-43 (Fla. 1977).

Despite this strong constitutional and statutory backdrop, Local 16 suggests to this Court that an appointed Deputy Clerk, who is empowered to have and to exercise each and every power of whatsoever nature and kind as the elected Clerk may exercise, excepting the power to appoint a deputy or deputies, and who is therefore delegated portions of the sovereign power of the State of Florida, is a "public employee," under Section 447.203, Florida Statutes. Local 16's

assertions are contrary not only to constitutional and statutory provisions, but also clearly contrary to established Florida law.

As set forth by the Clerk in her Answer brief, Florida courts have, on several occasions, closely examined the precise issue before this court. Beginning with Murphy v. Mack, this Court held that a deputy who holds office by appointment rather than employment and is invested with the same sovereign power as the elected official, is not an employee, and further, the Mack court held that the Florida Legislature intended to exclude deputies from the definition of "public employee" found in Chapter 447. Murphy v. Mack, 358 So 2d. 822 (Fla. 1978).

The Mack court scrutinized the position of appointed deputy sheriff to determine whether the deputy sheriff, who holds office by appointment rather than employment, was, in fact, a "public employee" for purposes of Chapter 447. The Mack 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.

Murphy v. Mack, 358 So 2d. at 825.³

The Fourth District Court of Appeal, relying upon the decision in Murphy v. Mack, specifically found that deputy clerks of the Circuit Court are not included within the definition of "public employee" and therefore are not public employees, under Chapter 447, Florida Statutes. In Federation of Public Employees v. Public Employees Relations Commission, the court held that:

The Hearing Officer, the Commission and Appellee relied upon the case of Murphy v. Mack, 358 So. 2d 822 (Fla. 1978), which held that, although the sheriff is a public employer under Florida law, deputy sheriffs are not public employees - they are appointed pursuant to Section 30.07, Florida Statutes (1975). Therefore, deputy sheriffs are not governed by the provisions of Chapter 447, Florida Statutes (1975). The *ratio decidendi* of that case 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.

Federation of Public Employees v. Public Employees Relations Commission, 478 So. 2d 117 (Fla. 4th DCA 1985).

The rationale of the Mack court has been found to be applicable to appointed deputies of property appraisers [Florida Public Employees Council v. Martin County Property Appraisers, 521 So. 2d 243 (Fla. 1st DCA 1985)], and appointed deputies of county tax

³ The Mack court quoted, with favor, this Court's important decision in Blackburn v. Brorein, 70 So.2d 293 (Fla. 1954) where the earlier court examined both the common law and the Florida Constitution and statutes and concluded that deputy sheriffs were not employees.

collectors [Beauregard v. Olson, 84 F. 3d 1402 (11th Cir. 1996) (a Florida decision)]. Thus, the argument presented by Local 16 has been consistently held to the contrary regarding not only deputy clerks of the Circuit Court, but also regarding deputy sheriffs, deputy property appraisers, and deputy tax collectors. The determinative factor in each of those cases is that the Deputy has been delegated a portion of the sovereign power and "stands in the shoes" of the elected official, and therefore may perform any act required of the elected official and have and exercise each and every power of whatsoever nature as the elected official may exercise.

Local 16 urges this Court to limit such delegation of the sovereign power to the deputy sheriff context, suggesting that the common law as it may apply to the office of sheriff is different from or, perhaps, more substantive than, the constitutional office of the Clerk. Local 16's position ignores the equal footing of the constitutionally created county officers. Article VIII, Section 1(d), Florida Constitution, equally provides for each of the elected county offices of Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections, and Clerk of the Circuit Court. Section 28.06, Florida Statutes, first enacted while Florida was a territory, statutorily provided the office of the Clerk with the power to appoint a deputy or deputies. Such statutory provision uses the terms "power" and "appoint." The later statutory provisions which

allow for the Clerk of the Supreme Court and the five Clerks of the District Courts of Appeal to provide for deputies or assistants specifically use the term "employ" [Sections 25.241(2), and 35.22(2), Florida Statutes (1997)], clearly signifying purposeful legislative clarity.

Further, Section 30.07, Florida Statutes (1997), statutorily allows a sheriff to "appoint" deputies and for such deputies to "...have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible." ⁴ Interestingly, Section 30.07, Florida Statutes, was first enacted in 1868, well after enactment of the statute providing the Clerk with power to appoint his deputy or deputies. Further, and perhaps most importantly, Section 28.06, Florida Statutes, as it applies to the Clerk, and Section 30.07, Florida Statutes, as it applies to the sheriff, are virtually identical in using the terms *appoint* and in stating that the deputy or deputies will have the same *power* as the office holder, and for whom their principal will be responsible. Such clear statutory language cannot be interpreted other than as purposefully precise legislative language.

⁴ A Deputy Sheriff is the Sheriff's alter ego and has all the sheriff's sovereign powers, except the power to appoint other deputies. Tanner v. McCall, 625 F.2d 1183 (5th Cir., 1980), reh. den. 629 F.2d 1350, cert. denied, 451 U.S. 907 (1981).

On a related yet relevant item, the 5th DCA below, at oral argument and in its opinion, referenced that the exclusion of all Deputy Clerks from the provisions of Chapter 447 would distort or somehow thwart the purposes of the legislature in allowing public employees to collectively bargain and enjoy the other interests and privileges as set forth therein. It should be noted, however, that the constitutional office of Clerk of the Circuit Court is granted the power to appoint a deputy or deputies, and that the Clerk does not, as a matter of course, deputize all persons employed by his or her office. Similarly, and as set forth by this Court in Blackburn v. Brorein, there are numerous persons within a Clerk's office who are not deputized and who therefore remain employees. The Blackburn court stated:

"...there may be such persons employed by the Sheriff as typists, stenographers, bookkeepers, cooks for the jail, janitors, or others who are not deputy sheriffs, and whose duties and powers constitute no part of the sovereign power."

Blackburn v. Brorein, 70 So.2d 293 (Fla., 1954), at 299. Similarly, certain persons employed by the Clerk of the Circuit Court are not deputized and do not, therefore, hold duties and powers which constitute a part of the sovereign power. Deputy Court Clerks, like Deputy Sheriffs, Deputy Tax Collectors, and Deputy Property Appraisers, are sworn pursuant to statute to act for the Clerk of Circuit Court. Such deputies take loyalty oaths and may do all acts

which the Clerk of Circuit Court herself may do, except to appoint Deputy Court Clerks. Thus, the rationale of Murphy v. Mack is equally applicable to all deputies of each such county office, to-wit: Sheriff, Tax Collector, Property Appraiser, and Clerk.

This Court's interpretation of Section 447.203, Florida Statutes from the Mack decision, was later challenged as being in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and, additionally, that the Court's interpretation violated Article I, Section 6 of the Florida Constitution. In Sikes, et. al. v. Boone, et. al., 562 F.Supp. 74 (N.D. Fla., 1983), the Plaintiffs' contended that this Court's holding in Murphy v. Mack (that Deputy Sheriffs were excluded from Section 447.03, Florida Statutes, due to Deputy Sheriffs being appointees, rather than employees), violated such Deputy's constitutional rights. The District Court (Judge H. Paul), upheld the constitutionality of the Mack Court's decision, and provided an excellent constitutional analysis of the underlying rationale of Mack. The Sikes Court addressed and rejected most of the same arguments raised in this appeal by amicus, Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees. Sikes, et. al., v. Boone, et. al., 562 F.Supp. 74 (N.D. Fla. 1983), cert. den.; 466 U.S. 959 (1984). The Sikes' decision was later included in reaching the same conclusion in Fraternal Order of

Police, Sheriff's Lodge No. 32, et. al. v. Brescher, 579 F.Supp. 1517
(S.D., Fla., 1984).

CONCLUSION

Based upon clear constitutional and statutory provisions, an appointed Deputy Clerk is not a "public employee" under Section 447.203, Florida Statutes, and therefore the constitutional Office of the Clerk is not subject to Chapter 447, Florida Statutes. FACC, therefore, respectfully requests for this Court to affirm the decision below.

CERTIFICATION

Pursuant to this Court's July 13, 1998 Administrative Order, Counsel hereby certifies that this brief has been prepared using 12 point Courier New.

Respectfully submitted,

GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891 Phone
(850) 681-0207 Facsimile

LORENCE JON BIELBY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/Fed.Ex./Telecopy to Joseph Egan, Jr., Esquire, and Kathryn S. Piscitelli, Esquire, Egan, Lev & Siwica, P.A., Post Office Box 2231, Orlando, Florida 32802, by U.S. Mail/Federal Express/Telecopy to Christi Gray Sundberg, Esquire, Public Employees Relations Commissions, 2586 Seagate Drive, Suite 100, Turner Building, Tallahassee, Florida 32301-5032, by U.S. Mail/Federal Express/Telecopy to Allen J. McKenna, Esquire, Aaron L. Zandy, Esquire, Post Office Box 60, Orlando, Florida 32802-0060 and to Thomas W. Brooks, Esq., Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, P.O. Box 1547, Tallahassee, Florida 32302 this ____ day of _____, 1999.

LORENCE JON BIELBY

TALL/BIELBYL/125213/2_m501!.DOC/8/11/99/13556.016000