

# Legal Advisor

Leon County's Source for Legal Information

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## Election of Herb Thiele International Municipal Lawyers Association (IMLA)

Leon County Attorney, Herbert W.A. Thiele, has been serving as in-house counsel for Leon County since 1990. Herb was recently elected by his peers to serve as President-Elect of the International Municipal Lawyers Association for 2014-15, the first-ever County Attorney to hold this position, and is on track to serve as its President the following year. The International Municipal Lawyers Association is a "non-profit organization dedicated to advancing the interests and education of local government lawyers... championing the development of fair and realistic legal solutions." Herb is very active in the

association, having served on its Board of Directors since 2009 and as the Chairman of the Counties



and Special Municipal Districts Department for three consecutive years, as well as being on numerous committees, including the

Legal Advocacy and Membership Committees.

Herb is in high demand as a speaker on numerous local government topics, and has just ended an unprecedented fourth term as President of the Florida Association of County Attorneys, a Florida organization whose purpose is to "provide a forum for research, advice and discussion in the development of local government law."

We are happy to take this opportunity to inform you of this event and to congratulate Herb on this accomplishment!

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**United Way Fundraiser  
Thursday, October 30th!!!**

It's that time of year again!!! Join the CAO for its annual breakfast bake sale and pumpkin bowling contest in support of the United Way.

We will have a delicious assortment of breakfast foods and yummy goodies for sale.

You can also enter our raffle by playing everyone's favorite game **PUMPKIN BOWLING!!!** This year we will again be raffling off a great movie basket as the prize. There will also be a raffle for an amazing gift card basket.

Looking forward to seeing you all then!



## Supreme Court Refuses to Hear Appeal of Case Involving Random Drug Testing of Public Employees

*By: Patrick Kinni, Deputy County Attorney*

On March 22, 2011, Governor Scott directed that all state agencies provide for mandatory drug testing of all prospective new hires and random drug testing for all current employees via Executive Order 11-58. That Executive Order was immediately challenged in Federal District Court by the American Federation of State, County and Municipal Employees Council 79 (“AFSCME”). AFSCME argued that the random drug testing of employees constituted a violation of the Fourth Amendment to the United States Constitution, which provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ....”<sup>1</sup>

The District Court ruled in favor of AFSCME and enjoined implementation of Governor Scott’s Executive Order as to all 85,000 current state employees.<sup>2</sup> However, the Governor appealed that ruling to the Eleventh Circuit Court of Appeals. On May 29, 2013, the Court of Appeals determined that the drug testing policy did violate the Fourth Amendment, but also held that the lower court’s Order, which covered all state employees, should be reviewed to distinguish between safety-sensitive and non-safety-sensitive positions, and remanded the case back to the District Court.<sup>3</sup>

The Court of Appeals reasoned that the type of drug testing contemplated by the Executive Order was one that has been found by the U.S. Supreme Court to “implicate privacy interests” and is therefore deemed a search for Fourth Amendment analysis purposes.<sup>4</sup> Thus, the basic question the Court was required to analyze was whether the random drug testing policy, which constitutes a search, was reasonable. Searches in criminal matters require a showing of probable cause in order to obtain a search warrant. However, this case involved the assertion by a government employer of the right to drug test individuals simply due to their status as governmental employees.

As recently as 2010, the Supreme Court, has stated

that “[t]he [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,’ without regard to whether the government actor is investigating crime or performing another function.”<sup>5</sup> The Fourth Amendment applies as well when the Government acts in its capacity as an employer. Simply put, “[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.”<sup>6</sup>



Governor Scott argued that state employees had consented to such drug testing by submitting to the request rather than voluntarily terminating their employment, and thus, the employees had consented to the drug test. The Court of Appeals found that “[i]n effect, the State is offering its employees this Hobson’s choice: either they relinquish their Fourth Amendment rights and produce a urine sample which carries the potential for termination, or they accept termination immediately.”<sup>7</sup>

In rejecting the Governor’s argument, the Court of Appeals stated that “we do not agree that employees’ submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law.”<sup>8</sup> While consent to a search is constitutionally permissible, “[e]mployees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress and coercion.”<sup>9</sup> “Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law.”<sup>10</sup> Further, “[i]f a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment.”<sup>11</sup>

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In response to the Court of Appeals ruling, the Governor sought relief from the U.S. Supreme Court. However, on April 21, 2014, that Court declined to review the constitutionality of the Executive Order requiring random drug-testing of state government employees.<sup>12</sup> Such refusal to hear the appeal answers the question of whether the government may require each and every employee

to submit to a random search. In the absence of a warrant, such a policy would be in violation of the Fourth Amendment to the United States Constitution. Thus, the issue of whether a public employer may force all employees to submit to random searches without some good cause is decidedly settled in the negative.

<sup>1</sup>See, *American Federation of State, County and Mun. Employees Council 79 v. Scott*, 857 F.Supp.2d 1322 (S.D. Fla. 2012) and U.S. Const. amend. IV.

<sup>2</sup>*American Federation of State, County and Mun. Employees Council 79 v. Scott*, 857 F.Supp.2d 1322. (However, the judgment and injunction did not address the application of the Executive Order to drug testing of prospective new hires).

<sup>3</sup>*American Federation of State, County and Mun. Employees Council 79 v. Scott*, 717 F.3d 851 (11<sup>th</sup> Cir. 2013), cert. den. \_\_\_ U.S. \_\_\_ (April 21, 2014).

<sup>4</sup>*Id.* at 866, citing *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989).

<sup>5</sup>*City of Ontario, Cal. v. Quon*, 560 U.S. 746, 756 (2010) (citation omitted).

<sup>6</sup>*O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

<sup>7</sup>*American Federation of State, County and Mun. Employees Council 79 v. Scott*, 717 F.3d at 873.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 874.

<sup>10</sup>*Id.* at 875.

<sup>11</sup>*Id.*, citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

<sup>12</sup>*Scott v. American Federation of State, County and Mun. Employees Council 79*, \_\_\_ U.S. \_\_\_ (April 21, 2014).

## Escheatment Tax Deeds: The End of the Road For Unwanted Properties

*By: Dan Rigo, Assistant County Attorney*

The term “escheat” generally refers to the reverting of property to the State or County when there is no one legally qualified to inherit or otherwise claim the property. In the statutory tax collection process, when there are no bidders at a tax deed sale, and no one is otherwise interested in purchasing the property in the intervening three years, the property escheats to the County. Upon the Clerk of Courts’ issuance of an escheatment tax deed, the County becomes a reluctant owner of a property that typically has been abandoned by its previous owner. This article summarizes the complicated process that the County must navigate in handling these unwanted properties.

On April 1<sup>st</sup> of each year, unpaid property taxes become delinquent and the statutory collection process begins. In accordance with Chapter 197, Florida Statutes, it begins in June with the Tax Collector’s sale of tax certificates to interested investors and, if the taxes remain unpaid, typically comes to an end approximately two years later

when the tax certificate owner applies for a tax deed sale to be held by the Clerk of Courts. Generally, the properties involved in the tax collection process are desirable enough to generate bids from interested real estate investors. The tax certificate is sold to the bidder requesting the lowest interest rate, who then recoups his investment when (i) the property owner pays the delinquent taxes, plus interest, or (ii) when application is made for a tax deed sale and the property is either sold to the highest bidder or conveyed to the tax certificate owner if no bids are received. As long as it involves a desirable property, the tax collection process works well to keep a property on the tax roll while delinquent taxes are being collected. However, for those properties that are unwanted, the process becomes much more complicated.

When taxes remain unpaid on an undesirable property, the Tax Collector oftentimes receives no bids in the auction sale of the tax certificates. In such instances, the Tax Collector is required to issue

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the unwanted tax certificates to the County, and the County is reluctantly pulled into the statutory tax collection process. In the aftermath of the real estate crash and economic downturn in 2008, the number of County-held certificates on such unwanted properties is staggering. After the most recent auction in June 2014, the total number of County-held certificates with outstanding unpaid taxes stood at 1,820. Although many of those certificates have since been cancelled after being redeemed with the owner's payment of the taxes, there were still 965 certificates that remained held by the County as of October 2<sup>nd</sup> of this year.

Fortunately, with the creation of the County's Real Estate Division in January 2012, our office has had the opportunity to work directly with a designated real estate staff person to keep track of the hundreds, and sometimes thousands, of these unwanted properties to assure that they are properly accounted for throughout the tax collection process. Working in conjunction with the Tax Collector's Office and the Clerk of Courts, the County's real estate staff is responsible for complying with the statutory process that requires the County, within a reasonable time after 20 months have passed since the issuance of the tax certificate, to apply for a tax deed on all County-held certificates on property valued at \$5,000 or more. As with the number of County-held certificates, the number of these applications is overwhelming. As of October 13<sup>th</sup> of this year, the number of such applications pending with the Clerk and awaiting the scheduling of a tax deed sale was 238. Although the majority of these County-held certificates will be redeemed and cancelled before the tax deed sale, many of them will make it through the sale with no bids received by the Clerk. If no bids are received, the Clerk will place the property on the list of lands available for taxes where it remains for up to three years and is available for purchase by the County or any other interested party willing to pay the outstanding taxes and fees in exchange for a tax deed on the property. After three years on the list of lands, the property

escheats to the County and the Clerk issues an escheatment tax deed.

For the year 2014, the County has been issued escheatment tax deeds on five properties, with six additional properties scheduled for escheatment before the end of the year. In addition, the Clerk's list of lands available for taxes contains 32 properties that, unless purchased, will eventually escheat to the County between 2015 and 2017. It is expected that the number of properties added to the list of lands will significantly increase in the coming years as the Clerk implements its new computer software resulting in a much more efficient and productive tax deed process.

As these properties have been added to the County's real estate portfolio, our office has been working with the Real Estate Division to determine the best use of the properties and to get them back on the tax roll as productive properties. Working in conjunction with the County's Housing Division, many of the properties have been determined to be appropriate for use as affordable housing. As the number of these properties continue to grow in the County's portfolio, they will be presented to the Board of County Commissioners annually and, upon the adoption of a Resolution in accordance with Section 125.379, Florida Statutes, they will be placed on the County's list of properties suitable for affordable housing. Over the past few months, our office worked with the Real Estate Division to utilize this statutory provision in the donation of two such properties to the Big Bend Habitat for Humanity. In addition, we are currently working with the County's Housing staff to clear up various title issues on two other such properties in anticipation of donating the properties to the Housing Finance Authority for use in its affordable housing programs. With this continued focus on the escheatment tax deed process, the hope is to transition these properties back on to the tax roll and into the marketplace. In turn, these previously unwanted properties will become desirable again and help bring to the community a much-needed increase in the availability of affordable housing.

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