IN THE SUPREME COURT OF FLORIDA

UNITED TEACHERS OF DADE,
FEA/UNITED, AFT, LOCAL 1974,
AFL-CIO, et al.,

Petitioner,

v.

DADE COUNTY SCHOOL BOARD,
SUPERINTENDENT LEONARD BRITTON,
and THE STATE BOARD OF EDUCATION
OF THE STATE OF FLORIDA,

Respondents.
_____/

CASE No. 67,430
First DCA Docket no. BG-39
On Appeal from the Circuit Court,
Second Judicial Circuit, In and
For Leon County, Case No. 85-169

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

In this answer brief, the following references and signals will be employed:

The United Teachers of Dade, FEA/United, AFT, Local 1974, AFL-CIO, will be referred to as "UTD." The nine other FEA/United, AFT affiliated teacher unions which were granted intervenor status below will not be separately identified, but rather, identified collectively as "the Invervenors." Together with UTD, they will be referred to collectively as "the Unions" in the interest of brevity.

The State Board of Education, the only active defendant below and the real party in interest on review, will be referred to as "the State Board." Nominal Appellees Superintendent Leonard Britton and the Dade County School Board will be referred to as "Superintendent Britton" and "the Dade County School Board" or "School Board," respectively.

All references to Florida Statutes are to Florida Statutes (Supp. 1984) unless otherwise indicated. Reference to the "State Master Teacher Program" signifies the state-wide teacher incentive award program established under Section 231.533 and implemented through Section 231.534, Florida Statutes (Supp. 1984), and Florida Administrative Code Rule 6A-4.46.

References to the record on appeal are indicated by (R-). No sworn oral testimony was received during the proceedings below; no verbatim record of oral argument was preserved. Accordingly, there will be no references to any transcript of testimony or argument, since none exists.

References to the opinion of the trial court and to the decision of the District Court are indicated by (R-) followed by the page number of the record where the trial court opinion appears. The District Court's decision incorporates the trial court's opinion verbatim.

STATEMENT OF THE CASE AND OF THE FACTS

Fla.R.App.P. 9.210(c) requires the omission from an answer brief of a statement of the case and of the facts "unless there are substantial areas of disagreement." The "Statements of the Case" found in the Unions' briefs fail to accurately set forth either the facts or the history of the case. Accordingly, the State Board of Education tenders the following record-based statement which separately sets out the basic provisions of the State Master Teacher Program and the pertinent chronology of the Unions' challenge to it.

A. The State Master Teacher Program

The 1984 Florida Legislature, by the passage of Chapter 84-336, created Section 231.533, Florida Statutes (Supp. 1984) as the "State Master Teacher Program." The present version of the statute is the successor to Section 231.533, Florida Statutes (1983), the "Florida Meritorious Instructional Personnel Program."

The legislative intent underlying the State Master Teacher Program is explicitly set out in the preamble to Section 231.533:

> There is established the State Master Teacher Program, the purpose of which is to recognize superior achievement among Florida's instructional personnel and to provide an economic incentive to such personnel to continue in public school instruction. A person may participate in the program as an associate master teacher or as a master teacher; such participation shall be voluntary.

The statute establishes an annual incentive award of no less than $3,000 per year for an eligible associate master teacher. § 231.533(5)(a)(b), Fla. Stat. The award is to be paid directly to the associate master teacher by the State Comptroller, in two

installments of $1,500 each. § 231.533(4), Fla. Stat. The installments are to be paid in June and September of the calendar year of program eligibility, with the first installment being paid in June of 1985. § 231.533(5)(a), Fla. Stat.

An associate master teacher designation is valid for a three year term, contingent upon successful performance of assigned responsibilities. The designation is transferable among the school districts of Florida. § 231.533(1)(c)(2), Fla. Stat. It may be renewed, subject to continuing demonstration that the associate master teacher meets the eligibility criteria for the Program, including the achievement of a superior score on any subsequently approved subject area examination. § 231.533(1)(c)(2), Fla. Stat.

Detailed statutory criteria govern qualifications for the associate master teacher designation. § 231.533(1), Fla. Stat. Qualifying criteria for master teacher status include three years as an associate master teacher. § 231.533(2)(b), Fla. Stat. Inasmuch as the 1984-85 year is the initial year of the State Master Teacher Program, there are no presently eligible master teacher candidates. § 231.533(6), Fla. Stat.

To qualify as an associate master teacher, a candidate must hold a continuing or professional service contract and document four years teaching experience, at least two of which took place in Florida. § 231.533(1)(a), Fla. Stat. She must also either document an appropriate masters degree, valid post-standard certificate, or regular vocational certificate, § 231.533(1)(b)(1), Fla. Stat.; or document a superior score on the appropriate subject area examination applicable if an examination has been approved for her subject area. § 231.533(1)(b)(2), Fla. Stat. When a subject area examination has been approved under Section 231.534 for a given subject area, the master's degree requirement of Section 231.533(1)(b)(1) is superseded with respect to the instructional personnel to which

the subject area examination applies. § 231.533(1)(b)(2), Fla. Stat. Finally, a candidate must document a superior performance evaluation conducted by her principal using a reliable, valid, and normed performance evaluation system approved by the State Board of Education. § 231.533(1)(c)(1), Fla. Stat.

The Governor is authorized to recommend, and the State Board of Education is authorized to adopt rules for the administration of the various components of the State Master Teacher Program. § 231.533(5), Fla. Stat. Exercising this authority, on the recommendation of the Governor, the State Board promulgated Florida Administrative Code Rule 6A-4.46 on September 20, 1984. (R-22-41.) Rule 6A-4.46 specifies the application, endorsement, and award procedures for associate master teacher candidates. FAC Rule 6A-4.46(4), (7) and (8) (R-29-30; 39-40). The rule provides detailed regulations in areas of the Program where the statutes confer specific approval authority on the State Board, most notably performance evaluation systems, FAC Rule 6A-4.46(5) (R-30-36); and subject area examinations, FAC Rule 6A-4.46(6) (R-36-38). The Rule contains specifications governing determinations as to which master's degrees and master's course work meet the requirements of Section 231.533(1)(b)(1), Florida Statutes. FAC Rule 6A-4.46(3)(f)(1) (R-25-29). Finally, the rule implements the Section 120.57 review rights of candidates, FAC Rule 6A-4.46(10); and grants the Commissioner of Education decision-making authority in cases of extenuating circumstances. FAC Rule 6A-4.46(11) (R-41).

The ultimate authority for approval or disapproval of a candidate's associate master teacher documentation rests with the Commissioner of Education. § 231.533(1)(c)(2), Fla. Stat. The Commissioner also has the authority to select an

appropriate endorsement to identify the successful candidate. § 231.533(3), Fla. Stat.; FAC Rule 6A-4.46(7) (R-39).

The second statute bearing on the State Master Teacher Program is Section 231.534, Florida Statutes (Supp. 1984). Like Section 231.533, Section 231.534 was amended by the 1984 Florida Legislature to reflect its present configuration. The statute confers responsibility upon the Institute for Instructional Research and Practice and Student Educational Evaluation and Performance, established by Section 231.65, Florida Statutes, for the development and revision of the subject area examinations required by Section 231.533(1)(b)(2), Florida Statutes. § 231.534(1), Fla. Stat. It confers upon the Governor and the State Board of Education responsibility for the approval by February 15 of each year of subject area examinations prepared by the Institute and recommended by the Governor. § 231.534(2), Fla. Stat. It also provides that, in the event that the Governor determines that no appropriate subject area examination is available, the requirements of Section 231.533(1)(b)(2) are waived until such time as an appropriate examination is approved. § 231.533(2), Fla. Stat. Finally, teachers, school districts, and the Department of Education are enjoined to cooperate to the fullest extent possible in assuring that subject area examinations are available within the mandated statutory time lines. § 231.534(3), Fla. Stat.

B. The Challenge to the State Master Teacher Program

On December 5, 1984, the United Teachers of Dade, FEA/United, AFT, Local 1974, AFL-CIO (UTD), filed a complaint in the Eleventh Judicial Circuit, in and for Dade County, Florida, seeking declaratory and injunctive relief against the Dade County School Board, its Superintendent, Leonard Britton, and the State Board of Education.

(R-8-41). The UTD is presently the exclusive bargaining agent certified under Section 447.307, Florida Statutes, to represent approximately 18,000 instructional, paraprofessional, and clerical employees of the the Dade County School Board in collective bargaining. UTD was and is party to a collective bargaining agreement with the Dade County School Board covering teachers and other certificated personnel; the contract became effective July 1, 1982 and extended through June 30, 1985. (R-9, ¶ 2).

The Dade County School Board (School Board) is the duly elected board established under the Florida Constitution, Article IX, Section 4, and Florida Statutes 230.03(2). The School Board is the public employer of the members of the UTD-represented bargaining unit. § 447.203(2), Fla. Stat. (1983). It is the body which is empowered to negotiate with and to enter into contracts with the UTD in order to fix, for the duration of the contract, the "wages, hours, and terms and conditions of employment" in accordance with Florida Statutes, Chapter 447, Part II. The School Board employs a Superintendent of Schools, Dr. Leonard Britton, and grants to him authority over the daily administration of the Dade County Public Schools. The Superintendent's constitutional authority flows from the Florida Constitution, Article IX, Section 5. (R-10-11, ¶ 4).

The State Board of Education (State Board), composed of the Governor and Cabinet of the State of Florida, is the executive-administrative body constitutionally and statutorily defined as the body corporate which has supervision over the system of public education as provided by law. Florida Constitution, Article IX, Section 2. The State Board has been given the responsibility under Section 231.533 and Section 231.534 to promulgate rules and to recommend subject area examinations and qualifying scores for the State Master Teacher Program. On September 20, 1984, the State Board adopted

Florida Administrative Code Rule 6A-4.46 which establishes the methodology by which the State Master Teacher Program will be implemented. (R-11, ¶ 5).

As initially filed, Count I of the UTD's complaint requested a declaratory judgment that the State Master Teacher Program contravened Article I, Section 6 of the Florida Constitution, that the Master Teacher Program was "facially unconstitutional." (R-12). Count II alleged that the passage of the statutes in question somehow constituted tortious interference with the existing UTD-Dade County School Board collective bargaining agreement. (R-15). Count III requested the trial court to issue a writ of mandamus compelling Superintendent Britton to submit to the Legislature and State Board unspecified "amendatory actions" demanding changes in the State Master Teacher Program. (R-16-19).

The Dade County School Board served its answer to the UTD's complaint on December 20, 1984. The School Board denied that the challenged statutes were unconstitutional, denied that there had been a breach of contract, and denied that Superintendent Britton had any duty to submit proposed amendments to the State Master Teacher Program. (R-62-68). On January 2, 1985, the UTD served a response to the affirmative defenses contained in the answer of the School Board. Also on January 2, the UTD served a Motion for Summary Judgment limited to Count I of its Complaint and a Motion to Expedite the proceeding, noticing the motion for hearing on January 10, 1984. (R-69-70).

On January 4, 1985, the State Board of Education served a Motion to Dismiss all three counts of UTD's complaint (R-74-88); a Motion to Strike portions of the complaint as scandalous or immaterial (R-89-90); and a Motion for Change of Venue from Dade to Leon County (R-91-92). On January 9, 1984, the State Board served a response in

opposition to UTD's motion to expedite the case (R-129-131). A hearing by telephone conference call was conducted on January 10, 1985, regarding the UTD's Motion to Expedite and the State Board's Motion for Change of Venue; no verbatim record was made of this hearing. Both UTD's and the State Board's motions were granted by Judge Joseph P. Farina of the Eleventh Judicial Circuit. The trial court's order to expedite, entered January 11, 1985, transferred the proceeding to the Second Judicial Circuit, in and for Leon County (R-3-5).

On January 23, 1985, UTD served notice of its voluntary dismissal of Counts II and III of its complaint. (R-104-105). On the same date, UTD noticed the State Board's pending Motions to Dismiss and to Strike for hearing on February 5, 1985. (R-100-101).

On February 5, 1985, the State Board's pending motions were heard before Judge Charles E. Miner, Jr., of the Second Judicial Circuit. Also heard and granted without objection were nine pending Motions to Intervene in the proceeding filed by other AFT-affiliated teacher unions who, like UTD, represent Florida teachers in collective bargaining with school boards. (R-38-61; 93-96). These unions, along with UTD, constitute the Appellants in this appeal.[1/]

1/ The nine teacher unions granted intervention below were the Martin County Education Association, AFT Local 3615; the Lake County Education Association, AFT Local 3783; the Sarasota Classified/Teachers Association, AFT local 4322; the Brevard Federation of Teachers, AFT Local 2098; the Charlotte County Classified and Teachers Association, AFT Local 3841; the St. Lucie Classroom Teachers Association, AFT Local 3616; the Pasco Classroom Teachers Association, AFT Local 3600; the Broward Teachers Union, AFT Local 1975; and the Alachua Education Association. No written order reflects the grant of intervenor status to these unions.

Following the unreported oral argument which took place on February 5, 1985, the State Board of Education, on February 6, 1985, requested leave to withdraw its Motion to Dismiss and to answer Count I of the UTD complaint. (R-106-109). By order dated February 7, 1985, the motion was granted and the State Board was ordered to answer Count I of the complaint no later than February 18, 1985. (R-110). The State Board's answer was filed on February 13, 1985. (R-111-114).

On February 15, 1985, the UTD filed an "Alternative Motion for Judgment on the Pleadings." (R-115-119). Previously, by notice of hearing served on January 23, 1985 (R-102-103), the UTD had called up for hearing on February 19, 1985, a Motion for Summary Judgment and a Motion for Judgment on the Pleadings "to be filed after pleadings are closed." (R-103). Also on February 15, 1985, UTD filed a response to the affirmative defenses reflected in the State Board's answer of February 13, 1985, (R-120-121) and an "Affidavit in Support of Plaintiff's Motion for Summary Judgment" (R-122-128).

The final hearing in the cause was held on February 19, 1985. No verbatim record was made of the proceeding. Prior to the hearing, the parties exchanged memoranda of law. UTD's memorandum is shown at R-140-156; the State Board's memorandum is shown at R-157-167. No memorandum of law was filed by the Dade County School Board or Superintendent Britton.[2/] Two affidavits in opposition to UTD's Motion for Summary Judgment were presented to the parties and to the trial court by the State Board.

2/ The State Board's memorandum appears to have been included in the record twice. Cf R-156-167 with R-168-178. Moreover, all memoranda of law were exchanged on February 19, 1985, not on March 19 as reflected in the index to the record on appeal.

(R-132-135; 179-188). Both of these affidavits were submitted on February 19, 1985, and not on March 19, 1985 as reflected in the Index to the Record on Appeal.

At the final hearing, both parties represented to the trial court that a judgment on the pleadings was appropriate. Each party disavowed the existence of disputes of material fact which would render judgment on the pleadings unavailable. This agreement was reflected in the trial court's order of March 19, 1985. See R-184: "At the hearing held on Plaintiff's Motion for Judgment on the Pleadings, the parties represented that the constitutional issue raised in the complaint and answer was purely a matter of law and ripe for determination without the taking of testimony."

On March 19, 1985, the trial court entered its "Order on Motion for Judgment on the Pleadings." (R-184-187). The Court declared that the State Master Teacher Program did not contravene Article I, § 6 of the Florida Constitution (R-187). By Notice of Appeal filed April 9, 1985, UTD instituted an appeal to the First District Court of Appeal. (R-188-189).

On April 9, 1985 the UTD filed a motion styled "Motion for Expeditious Preparation of the Record, Briefing and Hearing." Its initial brief was served on or about April 22, 1985. On April 26, 1985, the First District granted UTD's motion to expedite. On May 2, 1985, the State Board moved to strike portions of the UTD's brief which attempted to argue facts not of record. On May 10, 1985, the First District issued an order to show cause why the motion to strike should not be granted, which was responded to by the UTD by motion served May 20, 1985. On that date, UTD also filed a motion to supplement the record. By order dated May 29, 1985, the court granted both the motion to strike and motion to supplement.

The Dade County School Board and Superintendent Britton served its brief on May 9, 1985. The State Board's brief was served on May 31, 1985. No reply brief was filed. Pursuant to notice issued May 13, 1985, oral argument was heard on June 20, 1985. On July 3, 1985, the First District affirmed the decision of the trial court and certified the following question as being of great public importance:

> IS FLORIDA'S MASTER TEACHER PROGRAM (FLORIDA STATUTES SECTIONS 231.553 AND .534 (SUPP. 1984) AN ABRIDGMENT OF THE CONSTITUTIONALLY GUARANTEED RIGHT TO COLLECTIVE BARGAINING?

UTD invoked the discretionary jurisdiction of this court to review the certified question by notice filed July 29, 1995; on the same date, UTD filed a suggestion for immediate review. By order dated August 6, 1985, the court granted immediate review, and the instant proceeding ensued.

CERTIFIED QUESTION

IS FLORIDA'S MASTER TEACHER PROGRAM (FLORIDA STATUTES SECTIONS 231.533 AND .534 (SUPP. 1984) AN ABRIDGEMENT OF THE CONSTITUTIONALLY GUARANTEED RIGHT TO COLLECTIVE BARGAINING?

SUMMARY OF ARGUMENT

No provision of Section 231.533 or 231.534 precludes or abridges any aspect of bargaining between public employees and their own public employers. The fixing of a $3,000 recognitional award to be provided to successful candidates for the program has no effect on the bargaining rights of any public employee who is not actually selected as an associate master teacher and who will not therefore receive the $3,000 award. No wholesale intrusion upon public employee rights to bargain "wages" is even theoretically at issue.

Teachers who choose to participate in the Master Teacher Program and to qualify as associate master teachers are free to bargain, concerning the amount of the Master Teacher award with their local school boards, in accordance with Section 447.309(3), Florida Statutes. Section 447.309(3) permits parties to negotiate collective bargaining agreements which conflict with existing statutes and to submit proposed statutory amendments to validate their agreements. However, because the Master Teacher Program is voluntary, there is no lawful way that participation in the program by individual teachers can be controlled directly by a collective bargaining agreement. An individual teacher's decision to become a candidate is a consensual event affecting individual rather than collective interests in the workplace. Absent collective impact, no duty to bargain properly exists as to any subject. No public employer or public employee

union possesses the right to compel voluntary acts by public employees through a collective bargaining agreement.

The real contention of the Unions is that the Florida Legislature may not provide extra funds directly to teachers without bargaining about it with teacher unions. The Unions thus claim an enhanced right not enjoyed by private employees: the right to bargain with an entity which is not the employer of employees whom they represent. The First District properly affirmed the trial court's correct conclusion that neither the Department of Education nor the State Board of Education is a "public employer" with a statutory duty to negotiate with employee representatives. Only the Legislature possesses the power to control the amount of the Master Teacher Program award. Thus, only bargaining with the Legislature would satisfy the Unions' claim that the award is bargainable "wages". The State Board of Education possesses no more power over the amount or timing of the award than does any local school board.

Only two alternatives would satisfy the Unions' claims. First, that the Legislature be held powerless to fix the amount of the award or to otherwise control by statute any arguably negotiable "wages, hours, terms and conditions of employment." Such a result is clearly both absurd and unconstitutional. The second alternative would be to require the Legislature to bargain as if it were a "public employer" as defined. This alternative too would displace the valid constitutional prerogatives of the Legislature, elevate teacher union power to paramount status, and work a fundamental change in the legislative process not contemplated under existing organic law.

All provisions of the Florida Constitution must be read in pari materia, as the trial court held. Articles III and IX of the Florida Constitution confer upon the Legislature

discretion to control public education by statute. Employee bargaining rights secured by Article I, Section 6 must coexist with the valid constitutional authority of the Legislature. The trial court and the First District correctly declined to elevate employee bargaining rights to preeminence and to create a radically different and unprecedented series of relationships not heretofore contemplated in law or policy.

The Unions have not shown, and can never show, any constitutional infirmity in Section 231.534 or Florida Administrative Code Rule 6A-4.46. The creation of subject area tests is not a conceivable subject of bargaining. Employee bargaining rights are thus not implicated by Section 231.534. Furthermore, none of the Unions had standing to challenge Rule 6A-4.46 by an original circuit court declaratory judgment action.

ARGUMENT

THE MASTER TEACHER PROGRAM DOES NOT CONTRAVENE ARTICLE I, SECTION 6, FLORIDA CONSTITUTION.

Introduction

The trial court's "Order on Motion for Judgment on the Pleadings" (R-184), adopted verbatim by the First District Court of Appeal (A—1-4), incisively sets forth both the essence of the State Master Teacher Program and the essence of UTD's alleged constitutional objection to it:

> [T]his program would confer a three-thousand dollar grant/award on selected superior teachers who voluntarily satisfy certain statutory criteria. This amount is payable directly from the State Comptroller to the teacher twice each year in increments of fifteen-hundred dollars. Plaintiff asserts that such a program, bypassing as it does the collective bargaining process guaranteed public employees under Article I, Section 6 of the Florida Constitution and implemented under the provisions of Chapter 447, Part II, Florida Statutes, amounts to an abridgment of the right of those employees to bargain collectively.

The trial court went on to conclude that the Master Teacher Program did not abridge the right of public employees to bargain collectively (R-185). That conclusion is correct for two independent reasons. First, neither Section 231.533, Florida Statutes, nor Section 231.534, Florida Statutes, interferes in any way with the right of public employees to negotiate with their own public employer concerning any subject of bargaining. Secondly, public employees have no constitutional right to negotiate with anyone but their own employer.

A. The Master Teacher Program does not abridge public employee bargaining rights in any manner.

At no stage in the proceedings have the Unions contended that any provision of Section 231.533 or 231.534 prohibits any public employee from engaging in collective bargaining with his or her own public employer concerning any subject whatsoever. No one can point to any provision of the challenged statutes which prohibits, inhibits, or otherwise places a charge on the free exercise of bargaining between teachers and district school boards, or between any other "public employee" and "public employer", as defined in Section 447.203(3) and (2), Florida Statutes (1983), respectively.[3/]

It is indisputable that the bargaining rights of the overwhelming majority of "public employees" remain entirely unaffected by the State Master Teacher Program. The maximum possible impact of the State Master Teacher Program upon the universe of Florida "public employee" collective bargaining rights cannot extend beyond the limited class of continuing contract public school instructional personnel who voluntarily qualify as associate master teachers but who are "compelled" to accept a fixed $3,000 incentive award without being able to bargain over it. Even assuming arguendo the validity of the

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3/ Teachers are "public employees." Section 447.203(3) defines the term "public employee," with exceptions not pertinent here, as "any person employed by a public employer." District school boards, granted plenary powers over the employment of teachers and other personnel by Section 230.23(5), Florida Statutes, are specifically denominated "public employers" by Section 447.203(2): "The district school board shall be deemed to be the public employer with respect to all employees of the school district." It is significant that the Florida Legislature chose to define itself not as a "public employer" but as a "legislative body." § 447.203(10), Fla. Stat. See pp. 29-30, infra.

Unions' theory that the incentive award constitutes bargainable "wages", it is clear that no non-instructional employee of any description, and no instructional employee who fails to meet the statutory Program eligibility criteria, is in any possible danger of receiving extra, unbargained "wages" through the Program. The closely circumscribed reach of the Master Teacher Program in comparison to the "public employee" population of Florida buttresses the conclusion that no indiscriminate State intrusion on employee bargaining rights is even theoretically involved here, contrary to the inflated rhetoric of the Unions' briefs. (E.g., UTD's Brief at pp. 36-37.)

That the impact of the Master Teacher Program can extend no further than actually-selected associate master teachers may seem paradoxical, but the proposition can easily be demonstrated. All public employees possess the statutory right to negotiate with their public employer in the determination of "wages, hours, terms and conditions of employment." § 447.301(2), Fla. Stat. (1983). The State Board believes that this Court may safely take judicial notice that the exercise of public employee rights to negotiate "wages" generally manifests itself in demands for higher "wages." Even if it is assumed that an associate master teacher award represents higher "wages," as the Unions insist, no "public employee" of any sort is even theoretically hindered by any provision of Section 231.533 or 231.534 from lawfully negotiating with his or her public employer for higher "wages". Whether such higher "wages" take the form of an award program like the Master Teacher Program, or some other form, is in no way delimited by the State Master Teacher Program. In short, the statutes in question place no constraint whatsoever upon "wages" bargaining by "public employees," including teachers who, for whatever reason, are ineligible for the associate master teacher award.

If the Unions' inchoate theory is pushed to its logical extension (as the Unions have conveniently neglected to do), only teachers who choose to and do qualify as associate master teachers are greeted with a theoretical constraint on their "wages" bargaining. Only these teachers are entitled to receive the specified $3,000 "wage" increase, the amount of which has not been bargained with anyone. But, theory aside, the legislative specification of the amount of the master teacher award does not actually constrain local bargaining for a different award amount.

Even though a $3,000 associate master teacher award is required by Section 231.533(5), Florida Statutes, the statute does not prohibit bargaining between teachers and district school boards concerning proposals for a different award amount. The fact that district school boards control neither the amount of the award nor the timing and method of its payment does not signify that the Master Teacher Program abridges teacher bargaining rights, as the Unions contend. Chapter 447, Part II already contains a procedure through which public employees may negotiate concerning matters outside the control of the local public employer. § 477.309(3), Fla. Stat. (1983).

Section 447.309(3), Florida Statutes (1983), represents clear legislative recognition that parties to local bargaining obligations would likely encounter controlling statutory provisions in conflict with bargaining agreements they desired to enter. Section 447.309(3) provides a procedure which preserves the rights of parties to bargain concerning matters of interest to them, while at the same time preserving the legislative prerogative to say what the law is:

> If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule, or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power a proposed

> amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or becomes effective, the conflicting provision of the collective bargaining agreement shall not become effective.

Furthermore, the Unions have consistently ignored the voluntary nature of the Master Teacher Program. With good reason: the implications of voluntariness fatally undermine their thesis that teacher bargaining rights are abridged by the Program. An individual teacher's voluntary participation in the Program, including the ultimate receipt of a recognitional award, if available, is a matter which is not amenable to determination through the bargaining process. It is a consensual event affecting individual rather than collective interests in the workplace.

The Florida PERC has stated as follows in finding no duty on the part of a school board to bargain over the reassignment of a single teacher to a different class:

> The obligation to bargain, though, arises only when the impact is upon the collective interests of the represented employees. Where the impact is confined to a single employee, there is no duty to bargain under Section 447.309(1), Florida Statutes (1979). Collectivity is, after all, the "heart and soul" of Chapter 447, Part II, Florida Statutes. (Footnotes omitted) (emphasis original).

Manatee Education Association v. School Board of Manatee County, 7 FPER ¶ 12017 (1980); Accord, IAFF Local 1403 v. Metropolitan Dade County, 9 FPER ¶ 14256 (1983); Federation of Public Employees v. Broward County Sheriff's Department, 8 FPER ¶ 13089 (1982).

In the case of an employer's reassignment of an employee, the employee has no choice but to acquiesce in the matter if he or she desires to remain employed. But no aspect of the Master Teacher Program is compulsory. No district school board could lawfully require either participation or non-participation in the program. Likewise, no

teacher union may preclude a teacher from entry into the program (or compel it, for that matter) by negotiated agreement. Any negotiated restriction on employee constitutional rights is only valid to the extent that the school board has the lawful power to agree to it. E.g.., Lake County Education Association v. School Board of Lake County, 360 So.2d 1280 (Fla. 2d DCA 1978) (no power to delegate annual contract teacher reappointment to arbitrator by collective bargaining agreement); see also Board of Public Instruction of Dade County v. Dade Classroom Teachers Association, 243 So.2d 210 (Fla. 3d DCA 1971) (no power in collective bargaining agreement to condition teacher contract renewal on compulsory testing when not authorized by statute).[3/]

Florida courts have consistently recognized that a public employer and union may not by collective bargaining agreement compel acts designated as voluntary by law. AFSCME, Local 3032 v. Delaney, 458 So.2d 372 (Fla. 1st DCA 1984) (forced contribution of sick time to "union time pool" unlawful); see generally Schermerhorn v. Local 1625, Retail Clerks International Association, 141 So.2d 269 (Fla. 1962); aff'd 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed. 2d 678 (1963). The Fourth District has recently held that the waiver of a statutory right is not a mandatory subject of bargaining. Palm Beach Jr. College Bd. of Trustees v. United Faculty of Palm Beach Jr. College, 468 So.2d 1089 (Fla. 4th DCA

3/ At page 19 of their brief, Intervenors make the dubious suggestion that "increased or more stringent standards [for the Master Teacher Program] than those established by the state . . ." could be established through local bargaining. Yet, on the same page, Intervenors assert: "Appellants in this case have never argued that it was their intent to negotiate stateside (sic) standards." The juxtaposition of these wholly irreconcilable notions exemplifies the Unions' consistent inability to articulate precisely how mandatory local bargaining could accomplish anything but the destruction of a uniform state-wide award plan. See pp. 29—31, infra.

1985). And, within the past fortnight, this Court has given its unqualified approval to the notion that a waiver of statutory rights possessed by employees is a non-mandatory subject for bargaining which cannot be imposed by a public employer through the impasse procedure of Section 447.403, Florida Statutes. Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 10 F.L.W. 450 (Fla. August 30, 1985).

Any attempt by a teacher union to negotiate control over individual teacher participation in the Master Teacher Program would unavoidably involve an attempt to compel the employees to waive, to a greater or lesser degree, their unquestionable statutory right to compete for, or refrain from competing for, an award. For example, a collective bargaining agreement providing that no (or every) employee would participate in the program would almost certainly be unenforceable. See Palm Beach Junior College, supra, 10 F.L.W. at 453, fn 7. An agreement that successful candidates would waive some or all of the $3,000 award would be similarly unenforceable as an infringement upon individual rights. In contrast, an agreement between a local school board and a teacher union as to what the State Board will award sucessful candidates would simply be advisory until such time as the Legislature amended Section 234.533(5)(a), Florida Statutes (Supp. 1984), in accordance with the procedures of Section 447.309(3), Florida Statutes.

The inherent unsuitability of the local bargaining process to govern a statewide award program is not the result of any defect drafted into the challenged pieces of legislation. Instead, it is a function of the delicate balance required to preserve the constitutional rights of all concerned. For example, the Intervenors' brief, at page 7,

makes much of the fact that only Florida, alone among the several states, provides a constitutional guarantee of employee collective bargaining rights. Art. I, §6, Fla. Const. But it is also true that only Florida, alone among the several states, possesses a constitutionally-empowered State Board of Education. Art. 9, §2, Fla. Const. Recognition that there are competing constitutional concerns involved is only the beginning of the required analysis, not its solution. In City of Tallahassee [4/] this Court squarely held that a constitutional requirement for actuarially sound retirement systems, standing alone, did not justify wholesale prohibition of local bargaining concerning retirement. Ironically, the Unions' heavy reliance on City of Tallahassee is undermined by their adherence to the same fallacious reasoning properly rejected in Tallahassee: that the free and unhindered exercise of our preferred constitutional right requires that the free exercise of your potentially conflicting constitutional right be taken away.

The foregoing discussion underscores what both the trial and appellate courts clearly recognized — that what the Unions are complaining about is not an inability to negotiate with their own public employer concerning "wages," but rather an inability to hold the Florida Legislature and State Board accountable to bargain as if they were "public employers" as defined. Unlike the statutory provisions prohibiting negotiations concerning retirement invalidated in the landmark City of Tallahassee decisions, the challenged statutes here do not in any way interfere with the sort of traditional bargaining concerning any traditional subject of bargaining which is permissible in

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4/ City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1982), affirming 393 So.2d 1147 (Fla. 1st DCA 1981).

Florida. The trial court correctly concluded that the fact that the challenged statutes failed to provide for state-wide bargaining by local teacher representatives was not a fatal constitutional deficiency of the Master Teacher Program, as will be discussed more fully in the next section of this brief.

B. Teachers possess no constitutional right to bargain statewide educational standards with the Florida Legislature.

The greater portion of the trial court's declaratory judgment order examines whether Florida law contemplates the imposition of a duty to negotiate with local teacher unions upon entities which are not "public employers". The trial court correctly understood the complementary constitutional roles played in the operation of Florida's system of public education by the Legislature, the State Board of Education, local school districts, and local bargaining agents:

> This court is unable to find anything in Florida's Public Labor Act which envisions a species of bargaining designed to negotiate statewide instructional standards between the State and local instructional employees acting through their public sector labor organization.

(R-186).

Both before the trial court and on review the Unions have insisted that the $3,000 award at issue is a "merit raise," constituting "wages" which are subject to mandatory bargaining. This contention apparently assumes that the relationship between the State of Florida and the sixty-seven district school boards is analogous to that of a private

parent company and its wholly-owned subsidiaries. In their briefs, the Unions place all but exclusive reliance upon private sector case law such as NLRB v. Katz, 369 U.S.736, 82 S.Ct. 1107 (1962), and Queen Mary Corp. v. NLRB, 560 Fd.2d. 403, 408 (9th Cir. 1977). But they persistently gloss over the salient factual distinction between the present case and cases which proscribe an employer's grant of unbargained pay increases to its unionized employees: the Master Teacher award is not paid by an employer to its own employees.

The trial court, however, paid proper attention to this dispositive distinction:

> One normally thinks of wages as flowing from the employer/employee relationship. However, the recognitional award under attack in this litigation springs from a determination by a stranger to the employment relationship that perceived excellence in public school teaching should be monetarily rewarded. Coming as it does from a non-employer, it seems to the Court that it would be an unreasonable and unwarranted extension of Florida's public sector labor act to characterize this grant as "wages" for the purpose of collective bargaining. (R-186).

The UTD's brief, at page 30, disparages the court's statement as "semantic gamesmanship." The Intervenors' brief, at page 13, claims that the quoted statement: "flies to (sic) the face of both the spirit and letter of Article I, Section 6 of the Florida Constitution." The Unions, however, never offer a theory of how they propose to effectuate bargaining with an entity which is not the employer of the employees they represent. The Unions simply have no meaningful rejoinder to the trial court's correct observation that:

> Even assuming arguendo that these awards are "wages," the duty to bargain attaches to the public employer which, under the public labor act is defined to be the District School Board with respect to district level instructional personnel. As to these public employees, there is no state level employer. Given the present language of the Florida Public Labor Act, neither the State Board of Education nor the Department of Education is a public employer and hence, there is no duty on the part of these entities to

bargain statewide policies with representatives of the employees of a local school board. (R-186).

The foregoing quote points out the fallacious premise which underlies the Unions' theory here. Had the trial court found the unbargained award constitutionally repugnant and assigned to the State Board of Education, for example, a duty to negotiate concerning the award with the UTD, or with any of the Intervenors, such a result would not have constituted a meaningful enhancement of teacher bargaining rights. The State Board's ability to control the amount and timing of the award is no greater than that possessed by the Dade County School Board or any other district school board. Any bargaining which took place concerning the matter, given the State Board's lack of control over the award, would necessarily be in accordance with the model set by Section 447.309(3), Florida Statutes: the parties would negotiate concerning proposed amendments to the Master Teacher Program for eventual submission to the Legislature after agreement. Of course, the Legislature could decline to enact the negotiated amendments, if it so desired. There would be no practical change to teachers under this scenario, for the Unions already possesses the unhindered authority to request Section 447.309(3) bargaining with their district school boards. In this context, it is noteworthy that Count III of UTD's original complaint sought a writ of mandamus to compel Superintendent Britton to demand amendments to the Master Teacher Program, despite UTD's failure to negotiate such amendments. (Cf. R-16-18; 66-67.)

In the final analysis, only two scenarios would satisfy the Unions' demand for bargaining over the amount of the Master Teacher award. The first would be a judicial prohibition against <u>any</u> legislative enactment which arguably fixes "wages, hours, terms and conditions of employment" which <u>could</u> be determined through local bargaining. If

such a drastic curtailment of legislative authority were to be decreed, local bargaining autonomy would be "saved" at the cost of the termination of the Legislature's right to regulate public employment. The Court in City of Tallahassee recognized the Legislature's right to regulate by statute the collective bargaining process itself. 410 So.2d at 491. It would be nothing short of absurd to conclude that the Legislature of the State of Florida must be rendered powerless to regulate public employment statewide to prevent it from intruding upon local collective bargaining. The trial court was not impressed by the concept. See R-186.

The Intervenors actually urge adoption of this scenario. The Intervenor's brief espouses the essentially circular argument that if the $3,000 award is "wages," and if public employees cannot bargain with the Legislature about these "wages," then Article I, Section 6 prohibits the Legislature from requiring payment of the "wages" by statute because employees cannot bargain about the "wages" with their public employer. Intervenor brief, at p. 11. This meritless theory is the product of an examination of the issue through the "wrong end of the telescope," so to speak, by focusing on bargaining for its own sake, irrespective of the identity of the employer. The theory rests on the assumption that the Legislature has power to furnish money to district school boards but not directly to employees — a wholly unfounded assumption devoid of any basis in law or policy.

The other alternative scenario was phrased by the trial court as:

> [A] species of bargaining designed to negotiate statewide instructional standards between the state and local instructional employees acting through their public sector labor organization. (R-186).

The trial court was not impressed with this alternative either, for the court recognized it to be equally incompatible with the valid constitutional prerogatives of the Legislature as the law giver of our democracy in general and as the arbiter of state educational standards in particular:

> It is axiomatic that the Legislature and the State Board of Education, the latter acting at the direction of the former, subject to only constitutional limitation, has the constitutionally mandated authority, indeed the responsibility, to unilaterally establish, in the public interest, uniform statewide standards of quality for Florida's public school system. (R-185).

The UTD's brief invokes the notion that the inability of teachers to collectively bargain with the Legislature over the amount of the associate master teacher award relegates teachers to second class bargaining rights. To the contrary, the State Board submits that the right that the Unions claim here is not a minimal, constitutionally-guaranteed right, but rather an expanded and unprecedented right, enjoyed by no private employees: the right to bargain the implementation of legislative enactments with the Legislature. At issue, in the final analysis, is not whether the Legislature should be required to act like a "public employer" as defined by the Legislature (as the Unions insist throughout their briefs), but whether the Legislature will be permitted to act as a Legislature and exercise the constitutional authority conferred on it by Articles III and IX of the Florida Constitution without being required to bargain about it with teachers.

The UTD's brief makes no secret of the parochial motivation underlying the assault on the Master Teacher Program. Hyperbolically-professed fears of "union busting" notwithstanding,[5/] the UTD brief, at page 35-36, states clearly (if breathlessly) just what

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5/ E.g. UTD Brief at pp. 13-14. Precisely the same invidious assertions were made in paragraph 15 of the UTD's complaint. (R-14). See State Board's Motion to Strike (R-89-90).

the Unions' objection is to public funds flowing to teachers except under the aegis of collective bargaining:

> This is the ultimate subject matter of the collective bargaining process — this is what terms and conditions of employment are all about — this is . . . . money that an employee joins a union to assure is paid fully in return for his labors. (emphasis original)

However evident the motives of perceived self-interest which impel teacher representatives to seek the destruction of a program which can confer economic benefit on teachers without union blessing, it is indisputable that the most the Unions could possibly achieve through this proceeding is the end of the Master Teacher Program. That result would be no more than a Pyrrhic victory for the proponents of collective bargaining since, as explained in Section A above, the Program has no impact on local collective bargaining whatsoever. The polemics interspersed throughout the UTD brief, e.g., at pp. 15, 32-33, 36, leave no doubt that this proceeding is viewed as a "turf fight" in constitutional trappings.

The trial court correctly recognized that the teacher collective bargaining process, defined and implemented by Chapter 447, Part II, is essentially a local process unsuited to the creation of statewide educational standards. (R-187). If the State Master Teacher Program were subjected to negotiations with sixty-seven separate district teacher bargaining units, the prospects for a uniform program would be dim, to say the least. Moreover, in the almost inevitable event of impasse, and if Chapter 447, Part II is held to control bargaining procedures (as it surely would be), the Legislature itself (by its own definition a "legislative body" under Section 447.203(10)) would be permitted to resolve the impasse under Section 447.403, Florida Statutes, and implement unilaterally its original statute. The net result would be, at best, a tremendous waste of time for all

concerned. Moreover, local bargaining agreements would likely be stifled pending resolution of statewide issues, contrary to the intent underlying Section 447.201, Florida Statutes.

But the most insidious consequence flowing from the creation of a legislative bargaining obligation relative to statewide educational standards such as the Master Teacher Program would be the unavoidable alteration of our representative system of government, at least in matters relating to education. The same alteration would result if either of the two conceivable models for such bargaining were adopted. It is apparent that such bargaining could only take place at two times: before a statute is enacted, or afterwards. Irrespective of <u>when</u> such bargaining would occur, however, teachers and their collective bargaining representatives would become the most potent factor in the democratic equation.

A species of "bargaining" is already inherent in the legislative process. It is the multilateral interplay of citizens, special interest groups, and elected legislators in accordance with law. It is no understatement to say that teachers and their unions are already experienced participants in such "bargaining," today. UTD's complaint reveals that UTD and its allies participated in the legislative process leading to the enactment of the Master Teacher Program, if unsuccessfully, in their view. See R-8. Formal pre-legislation "bargaining" would only represent a change from present practice if teachers and their union representatives were permitted a <u>definitive</u> role in shaping a proposed statute arguably affecting "wages, hours, terms and conditions of employment" of public school teachers. Presumably, through "good faith" bargaining, with a "bargaining team" selected by the Legislature, teacher unions would negotiate proposed educational

standards prior to their passage by the Legislature. Little or no room for input from other interest groups would be left under such a process, however. Moreover, given the requirement of good faith bargaining, the ability of the Legislature to amend negotiated statutes would appear problematic.

The alternative, "post-legislation" bargaining model would permit leeway for diverse input, including floor amendments, in the pre-enactment legislative process. But it presumably would relegate actually-enacted education legislation to a "holding tank" while it was being bargained with teacher unions. Following negotiations with such unions, and consequent alterations to the statute, the revised statute would then take effect, presumably without further legislative scrutiny. (No further amendments would be permissible if the "good faith bargaining" requirement of Section 447.203(17) is held to apply.)

Under either model, teachers and their unions would achieve an unheard of power over legislation not presently contemplated under the Florida Constitution's system of checks and balances. In short, public employees and their unions would hold paramount status in representative democracy compared to other citizens, in complete contravention of the doctrine of "one man, one vote." This anomaly, standing alone, demonstrates why the claim of the Unions is for preeminence, not for minimal due process.

The UTD brief makes this claim by asserting undeserved preeminence and potency for Article I, Section 6 based upon its inclusion in the Constitution's "Declaration of Rights." UTD Brief at pp. 23-24; Contrary to the contention at page 24 of the UTD"s brief, and page 15 of the Intervenor's, the State Board does not assert a special status for

Article IX or for any other Article of the Florida Constitution. Rather, the State Board urges that the Articles of the Constitution be read in pari materia, just as the trial court did in the order under review, in accordance with settled rules of construction:

> Article I, Section 6 must co-exist with Article IX and all other constitutional provisions. All must be given effect to the extent possible under the doctrine of separation of powers. (R-185).

In re Advisory Opinion to Governor, 374 So.2d 959 (Fla. 1979); Askew v. Game and Fresh Water Fish Commission, 336 So.2d 556 (Fla. 1976); Hall v. Strickland, 170 So.2d 827 (Fla. 1964); Barrow v. Holland, 125 So.2d 749 (Fla. 1960); In re Advisory Opinion to Governor, 12 So.2d 876 (Fla. 1943); Scarborough v. Webb's Cut-Rate Drug Co., Inc., 8 So.2d 913, 150 Fla. 754 (1942).

Having failed to persuade both lower tribunals, the Unions now invite this Court to declare that local school districts, not the Legislature, should possess the ultimate authority over state standards bearing on teacher employment, despite the fact that the reverse is and has been true, as the trial court correctly noted (R-185). The Unions ignore that local school boards did not possess unfettered discretion to govern teacher employment before the recognition of collective bargaining, State ex rel Glover v. Holbrook, 129 Fla. 241, 176 So. 99 (1937), (special legislative act providing tenure system for Orange County Teachers not unconstitutional); or after it. Board of Public Instruction of Dade County v. Dade Classroom Teachers Assn, 243 So.2d 210 (Fla. 3d DCA 1971). (Dade School Board could not lawfully condition teacher contract renewal on competency testing when not authorized by statute.) Moreover, if the Master Teacher Program is deemed to be constitutionally repugnant because it preempts bargaining about the $3,000 award, then numerous other statutory provisions must also fall, since each

represents a legislative act which arguably fixes a term or condition of employment without giving room for collective bargaining. The trial court was wisely aware that to invalidate the Master Teacher Program would ultimately implicate many other statutory provisions (R-186).

The Florida School Code is full of provisions which represent the determination through legislation of employment matters which could be determined through collective bargaining in the absence of statute. The most important examples of such provisions are the teacher certification requirements, Section 231.17, Florida Statutes; and teacher contract specifications, Section 231.36, Florida Statutes. Both of these clearly fall within the ambit of matters subject to mandatory negotiations under Section 447.301(2), Florida Statutes. Furthermore, in light of the heavy reliance which the Unions place upon the City of Tallahassee decision and its rationale, it is worth noting that the Supreme Court did not invalidate Chapter 121, Florida Statutes, which makes compulsory "as a condition of employment" participation in the Florida Retirement System by public employees, including both state employees and school board personnel. § 121.051(1)(a), Fla. Stat. Despite its City of Tallahassee holding that public employees were constitutionally entitled to bargain concerning retirement, the Supreme Court did not throw out Chapter 121's existing provisions, or declare that the Legislature was powerless to change retirement conditions through subsequent legislative enactments without obtaining the consent of the affected public employees and their union representatives.

As the trial court held, the Legislature is entrusted by Article IX of the Florida Constitution with discretion to control public education in the public interest. The

constitutional requirement of a "uniform system of free public schools" requires the Legislature to take into account considerations which may not be compelling to local educators in a particular district. If the parochial concerns of a particular local special interest group are permitted to hold hostage legislative action taken in the interest of the general public, "work-place democracy," by and for teachers and their unions, will put an end to control of public education by the citizens and their democratically elected legislative representatives. Such a result can only be justified if the provisions of Article IX are improperly relegated to secondary status compared to Article I, Section 6, in contravention of settled rules of constitutional construction.

The declaratory judgment of the trial court struck a sensible balance between the divergent constitutional forces which shape public education in Florida. The trial court simply declined UTD's invitation to create a radically new series of collective bargaining relationships never heretofore contemplated by legislative or judicial authority. The trial court wisely refused to play havoc with the existing realities of Florida's uniform system of free public schools:

> To effectuate a policy of statewide bargaining requires clear legislative intent and the means to implement such a policy. The Court is of the view that existing law does not contemplate such a policy. If such should be deemed to be desirable and appropriate, it would require substantial amendments to the public sector labor law as well as the school code. (R-187).

In the final analysis, the judgment of the trial court reflects the traditional and salutary judicial reluctance to impede legislative efforts to promote the general welfare by giving unwarranted credence to legalistic constitutional arguments offered for destructive rather than constructive purposes. Mr. Justice Terrell expressed this

principle of judicial restraint in his own inimitable fashion in State v. State Board of Administration, 25 So.2d 881, 884 (Fla. 1946):

> [C]onstitutional questions should be approached from a pragmatic rather than a legalistic point of view. Courts can do this and not transgress the bounds of constitutional framework. The constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to be a strait-jacket but contemplated experimentation for the common good . . . . The question here involves new complexes that must be thought through in light of the purpose designed to be accomplished and not in the light of outworn dogmas that do nothing more than throw our means of administering justice into a stalemate. Reasoning in this way, we find no constitutional objection to the act assaulted.

The State Board submits that the Unions are not attempting to vindicate legitimate teacher collective bargaining rights, but are merely attempting to destroy a program with which they disagree as a matter of policy.

C. The Unions cannot show how either Section 231.534 or Florida Administrative Code Rule 6A-4.46 contravenes Article I, Section 6, Florida Constitution.

The Unions point to no conceivable constitutional infirmity in Section 231.534 or Florida Administrative Code Rule 6A-4.46, let alone show how the provisions violate teacher bargaining rights. The subject area tests established pursuant to Section 231.534 are clearly essential to implementing the Master Teacher Program. So are the application process, appeal process, and other procedural aspects of the Program amplified by Rule 6A-4.46. The Unions seem to rely only upon this necessary interdependence of Section 231.533, .534, and the rule to invalidate all three, apparently on a theory that "sauce for the goose is sauce for the gander."

The State Board has shown above that the trial court's judgment upholding Section 231.533 is correct. Nevertheless, even in the event that this Court should disagree with the reasoning of the trial court, a conclusion that Section 231.534 contravenes Article I, Section 6, does not necessarily follow from a conclusion that Section 231.533 does.

The primary thrust of Section 231.534 is to require the Institute for Educational Research and Practice and Student Educational Evaluation and Performance to be responsible for development and revision of subject area tests for review and recommendation to the State Board of Education by the Governor. None of these entities occupies a bargaining relationship with the teachers represented by UTD. Further, neither the Institute's development of tests, the Governor's review of them, or the State Board's approval thereof, represents even theoretically a bargainable matter. None of these events has any unavoidable impact or effect on the "wages, hours, terms or conditions of employment" of teachers. See Hillsborough CTA v. School Board of Hillsborough County, 423 So.2d 969 (Fla. 1st DCA 1983); School Board of Indian River County v. Indian River County Ed. Assn., 373 So.2d 412 (Fla. 4th DCA 1979); Orange County School Board v. Palowitch, 367 So.2d 733 (Fla. 4th DCA 1979). Finally, the State Master Teacher Program is voluntary. No public employee's continued employment is conditioned upon the Program or subject area tests administered thereunder. In short, even implemented tests are not "conditions of employment" triggering bargaining rights under Section 447.309(1), Florida Statutes.

There is no inexorable interrelationship between the validity of Sections 231.533 and 231.534. Even if the $3,000 award of the Master Teacher Program is invalidated as an abridgement of teacher bargaining rights, no similar conclusion is possible as to the

development and approval of subject area tests. Accordingly, whatever disposition is made of Section 231.533, Section 231.534 must stand.

As to Rule 6A-4.46, Section 231.533 confers clear and specific statutory rulemaking power on the State Board. § 231.533(1), (5), Fla. Stat. If Section 231.533 falls, the rule will speedily become moot. However, if Section 231.533 is upheld, as certainly is warranted, no basis exists to invalidate Rule 6A-4.46.

None of the Unions had standing to challenge the rule via an original circuit court declaratory judgment action. Key Haven Association Enterprises v. Board of Trustees, 427 So.2d 153 (Fla. 1982). Accordingly, the Unions may lawfully offer no independent arguments against the validity of the rule, and therefore can never show any independent basis for invalidation of it.

CONCLUSION

Based on the foregoing, the certified question should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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