IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA;
LAWTON CHILES, Governor of the
State of Florida; and FLORIDA
DEPARTMENT OF ADMINISTRATION,

Appellants,

v.

FLORIDA POLICE BENEVOLENT
ASSOCIATION, INC.; FLORIDA
NURSES ASSOCIATION; and
FLORIDA PUBLIC EMPLOYEES
COUNCIL 79, AFSCME,

Appellees.

CASE NO. 77,842
Appeal from District Court
of Appeal, First District

APPELLANTS' INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRIAN S. DUFFY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 180007

KIMBERLY J. TUCKER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 516937

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE 1501
TALLAHASSEE, FL 32399-1050
(904) 488-1573

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

FLORIDA CONSTITUTION

STATUTES

OTHER AUTHORITIES

pba.roman/BSD

STATEMENT OF THE CASE AND FACTS

The Governor entered into collective bargaining agreements with the appellees ("the Unions"). (Appendix L, exhibits 2, 3 and 4) The agreements provided that Chapter 22A-8, Florida Administrative Code, which governs attendance and leave of Career Service employees, would apply to all bargaining unit employees. (App. L, ex. 2, page 21, ex. 3, p. 19, ex. 4, p. 18) When the agreements were executed, the rules provided that Career Service employees would receive 17.333 hours per month annual leave (App. B, para. (1)(a)) and 4 hours 20 minutes per month sick leave (App. C, para (1)(a)); if the employee accumulated more than 240 hours of annual leave, then at the end of the year the employee had the option of either receiving a *cash* payment for one half of the excess hours or could convert the annual leave to sick leave (App. B, para. (1)(g)); and, finally, sick leave could only be used when illness was verified in *writing by a physician.* (App. C, para. (2)(c))

The Legislature enacted Chapter *88-555*, Laws of Florida (1988), the 1988 General Appropriations Act, in which there was an appropriation of $59,394,653 for the State Health Insurance Trust Fund; proviso language in Section 9.3.A(5) turned back the clock, not on Chapter 22A-8 in its entirety, but only on provisions for earning, using, and retaining annual and sick leave credits by all Career Service employees. The effect of the Legislature's action was to decrease annual leave credits (17.333 hours to 13 hours per month); to increase sick leave credits (from 4 hours 20 minutes to 8 hours per month); to

cancel annual leave hours in excess of 240 per year, which eliminated the options of either immediate cash payment or sick leave credits; and, to eliminate the requirement of written physician verification in order to use sick leave credits. The state would save money in two direct ways: cash payments for annual leave credits would be prohibited and physicians would no longer be paid by the state's health self-insurance fund to verify an illness. (The underlined language in Chapter 22A-8.010 and 22A-8.011 was in effect when the collective bargaining agreements were signed; the stricken language, restored by the Legislature, is challenged by the Unions. (App. B and C))

The Unions contended below that the Legislature abridged their right to collectively bargain by this proviso language. (App. L, p.6) The trial court agreed, entering summary judgment accordingly. (App. I) The First. District Court of Appeal concurred, finding that Section 9.3.A(5) is unconstitutional as a violation of the right to collectively bargain afforded by Article I, section 6, Florida Constitution. (App. F) Rehearing was denied. (App. D)

By order entered May 10, 1991, this Court directed that the case be processed as an appeal. Appellate jurisdiction lies under Article V, section 3(b)1, because the decision of the First District declared invalid a state statute; this Court also has discretionary review jurisdiction pursuant to Article V, section 3(b)3, because the First District's decision expressly construed a provision of the State Constitution (Art. I, 86).

SUMMARY OF ARGUMENT

The Legislature, not the Governor, holds the pawer of the purse. The powers reserved to the legislative branch may not be exercised by the executive branch. Art. 11, §3, Fla. Const.

The Governor, as the statutory public employer, is permitted by law to enter into a collective bargaining agreement with the collective bargaining agent for public employees. The Governor may not bind the Legislature to an appropriations formula that satisfies the economic demands of every provision of the agreement,

The proviso language of Section 9.3.A(5), Chapter 88-555, Laws of Florida (1988), specifies that the public's money may not be used to pay cash benefits when employees do not take vacations, and will not be used to pay for unnecessary visits to obtain a doctor's excuse.

It is ultimately the prerogative (and responsibility) of the legislative, not the executive, branch to spend or save taxpayer dollars. By its proviso language, the Legislature enacted proper restrictions upon the use *of* public funds. The two constitutional provisions (Art. I, §6 and Art. 11, §3) should be construed harmoniously, leading to the conclusion that Section 9.3.A(5) is constitutional and no twisted interpretation of the Governor's agreement renders that law unconstitutional.

ARGUMENT

THE LEGISLATURE PROPERLY EXERCISED ITS EXCLUSIVE APPROPRIATIONS POWER AND DID NOT ABRIDGE COLLECTIVE BARGAINING RIGHTS BY ITS ENACTMENT OF PROVISO LANGUAGE IN SECTION 9.3.A(5), CHAPTER 88-555, LAWS OF FLORIDA (1988).

Appellants do not take issue with the Unions as to the importance of their constitutional right to collectively bargain. Likewise, we do not anticipate that the Unions will directly challenge the Legislature's appropriations power. The issue here is whether the Legislature properly exercised its appropriations power in passing the proviso language of Section 9.3.A(5), Chapter 88-555, Laws of Florida (1988); if it did so, the Unions' rights were not abridged and the law survives.

Article I, section 6, Florida Constitution, provides in pertinent part that:

> The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.

The Governor is "deemed to be the public employer." §447.203(2), Fla. Stat. (1987). The Governor is designated the "chief executive officer." §447.203(9), Fla. Stat. (1987). The State Legislature is the "legislative body" for purposes of implementation of Article I, section 6. Here, the "bargaining agents" are the Unions. §447.203(12), Fla. Stat. (1987). As required by law, the Governor and the Unions "bargain[ed] collectively in the determination of wages, hours, and terms and condi-

tions of employment." §447.309(1), Fla. Stat. (1987). The Governor and the Unions reduced their agreements to writing (App. L, ex. 2, 3 and 4), as required by law. §447.309(1), Fla. Stat. (1987).

As with any contract, a collective bargaining agreement incorporates, and must not violate, existing laws and statutes. *Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco,* 503 So.2d 396 (Fla. 1st DCA 1987); *Local No. 234 v. Henley & Beckwith, Inc.,* *66 So.2d 818 (Fla. 1953); Edwards v. Trulis,* 212 So.2d 893 (Fla. 1st DCA 1968). Pertinent here is Section 447.309(2), Florida Statutes (1987), which provides:

> Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropsiated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

The Governor's budget request is not challenged. The Legislature's proviso language, directing that its appropriation not be used to pay cash for excessive annual leave credits and not be drawn for bureaucratically-required doctor visits, is attacked. The Governor has administered the collective bargaining agree-

ment in compliance with the appropriations proviso language. The Unions may be expected to contend that the proviso language amended substantive law, thereby amending the collective bargaining agreement, and was not an exercise of the appropriations power. (The Unions do not argue that Article I, section 6, prohibits the Legislature from refusing to fund specific elements of a collective bargaining agreement, or that Section 447.309(2) is unconstitutional.) Thus, the issue before the Court is whether the Legislature's proviso language was within the scope of the appropriations power.

The appropriations power has long been held by the legislative branch, according to *Humbert v. Dunn,* 84 Cal. 57, 24 P.lll, 111-112 (1890):

> The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops.Atty.Gen. 670. It had its origin in parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by parliament, (Hall. Hist. 555;) and the system worked so well in correcting the abuses complained of, that our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the

> legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year. . . .

This same provision is found in the Florida Constitution: Article VII, section 1(c) (1968 Rev.), formerly Article IX, section 4 (1885). Further delineation is found in *State ex rel. Kurz v. Lee*, 121 Fla. 360, 163 So. 859 (1935):

> An appropriation of money is the setting it apart officially, out of the public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and use that money, and no more, for that object, and for no other. The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. Such a provision secures to the Legislature (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.

121 Fla. at 383-4, 163 So. at 868 (citations omitted). The Governor is not permitted to exercise the power of appropriations "unless expressly provided" in the Constitution. Art. II, §3, Fla. Const. Thus, the collective bargaining agreement could not be construed in a manner that would result in an encroachment by the executive branch upon the Legislature's appropriations power.

Here the Legislature decided that public funds would not be used for the purposes expressed in the proviso. "Proviso" is explained in *State v. State Racing Commission,* 112 So.2d 825 (Fla. 1959):

> In interpreting the effect of a proviso it should be remembered that the purpose of a proviso is to either except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation.

Id. at 829 (footnote omitted). The Court's understanding of the term is in accord with the contemporary dictionary definition: "an article or clause (as in a statute, contract, or grant) that introduces a condition, qualification, or limitation and usually begins with the word 'provided'." Webster's Third New Intl. Dictionary (1981).

The proviso here does not conflict with Article 111, section 12, Florida Constitution:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no othar subject.

In other words, "a general appropriations bill must deal only with appropriations and matters properly connected therewith." *Brown v. Firestone,* 382 So.2d 654, 663 (Fla. 1980). The Court seasoned that substantive laws should not be incorporated in a general appropriations bill, with a proviso by the Court:

> [A]n appropriations bill must not change or amend existing law on subjects other than appropriations. This is, of course, subject to our statement in *In re Advisory Opinion*

> *to the Governor,* 239 So.2d at 10, that a general appropriations bill may make "allocations of State funds for a previously authorized purpose in amounts different from those previously allocated or [substitute] adequate specific appropriations for prior continuing appropriations."

Id. at 664. *In re Aduisory Opinion to the Governor,* 239 So.2d 1 (Fla. 1970), had examined an appropriation that had been "'in lieu of Sections 236.071(1), 236.071, 236.075 and 231.53, F.S.'" *Id.* at 10.

Here the proviso treats matters connected with appropriations by imposing a restriction (a classic function of a proviso) upon the appropriation. Use of the shorthand reference to a chapter of the Florida Administrative Code does not amount to amendment of existing law, nor does it pertain, except incidentally, to matters beyond the ambit of appropriations. The subject proviso satisfies the first test of *Brown* and squarely fits the *Aduisory Opinion* exception.

Brown prescribed and explained the second prong of its test of the sufficiency of an appropriation as follows:

> **Second,** article 111, section 12, will countenance a qualification or restriction only if it **directly** and rationally relates to the purpose of an appropriation and, indeed, if the qualification or restriction is a major motivating factor behind enactment of the appropriation. That is to say, has the legislature in the appropriations process determined that the appropriation is worthwhile or advisable only if contingent upon a certain event or fact, or is the qualification or restriction being used merely as a device to further a legislative objective unrelated to the fund appropriat-

> ed? This test possesses the dispositive virtue of permitting the legislature reasonably to direct appropriation use without hampering the gubernatorial veto power or abusing the legislative process.

382 So.2d at 664.

The particular proviso language at issue in this case is but one restriction in a comprehensive set of legislative directions for the expenditure of public funds. Examination of the context of this proviso is in order. Section 9 of Chapter **88-555** (App. A), entitled "SALARIES AND BENEFITS", carries a "Statement of Purpose" providing in part (59.1):

> This section provides instructions for implementing salary and benefit **increases** appropriated within this act. All allocations and distributions of these adjustments are to be made in strict accordance with the provisions of this act.

The Unions do not challenge Section 9.2.A, regarding "Salary Increases", which contains the following introductory **language (e.s.):**

> 1) Funds are provided to implement *provisions* ***of*** **the** collective bargaining agreements between the State and (1) the American Federation of State, County, and Municipal Employees, Council 79, and **(2)** the Florida Nurses Association. Funds are also provided for salary increases for Career Service employees not covered by a collective bargaining agreement and for employees subject to the Career **Service.** Funds are to be distributed as noted in the following paragraphs,

Section 9.3 ("Benefits"), which includes **the** challenged paragraph A(5), "directly and rationally relates" to employee benefits and

the appropriations made to fund those benefits. Section 9.3.A(5) is a constitutionally permissible limitation upon the funding of (other provisions of) the collective bargaining agreements (Section 9.2.A(1) quoted above) and upon the benefits to be provided state employees generally.

While not reaching the precise issue addressed here, the Court did sustain similar legislative proviso language against a gubernatorial veto in *Florida* House *of Representatives v. Martinez,* **555 So.2d ,839, 844 (Fla. 1990):**

> Similarly, veto number five was directed at a proviso establishing conditions under which certain workers will be paid for unused annual leave credits on termination. This proviso does not identify an exact sum of money, nor does the Governor attempt to disclose such a sum in his Veto Message. Accordingly, this veto fails under the analysis in *Brown.*

This conclusion followed the Court's analysis that proviso language "that does not identify a sum of money at all, but merely specifies that some unidentified portion of the line item shall or may be used for particular purposes" is the sort of proviso that "lies at the very heart of the legislative power to appropriate funds, as representatives of the people, and to attach qualifications to the use of those funds." 555 So.2d at 844 (emphasis by the Court).

This case presents the question of whether the Legislature overstepped its appropriations bounds and in the process impinged upon the rights of the Unions to collectively bargain. There is

no conflict between constitutional provisions (Art. I, §6 and Art. 11, 83) because the Legislature acted within its constitutional parameters. (Art. III, §12; Art. VII, §1(a)) The issue would be clearer had the Legislature declined to fund *salaries* or salary increases, of Career Service employees, including those represented by the Unions, at the levels agreed upon by the Governor, instead of *benefits* (both are subject to bargaining as "wages, hours, and terms and conditions of employment" under Section 447.309(1)). That issue was decided in *United Faculty of Florida, Etc. v. Board of Regents, 365* So.2d 1073 (Fla. 1st DCA 1979), where the court concluded:

> The collective bargaining agreement was negotiated within the existing legal framework. Among the controlling laws was F.S. 447.309(2), by which the Legislature explicitly reserved the right to appropriate "less than the amount requested" to fund the agreement. That statute operates to make all collective bargaining agreements subject to the approval, through the medium of appropriations, of the legislative body. That the Legislature might not provide full funding for the collective bargaining agreement was a contingency well known to the parties before, during and after negotiations. The agreement was entered into with full knowledge and in contemplation of the Legislature's appropriative prerogatives vis-a-vis the negotiated product. The agreement embodied the contingency of underfunding just as surely as if it had been expressly recited therein.
>
> *The collective bargnining agreement to which the petitioner is a party did not divest the Legislature of its constitutional powers in the appropriation of public monies.* It did not reconstitute the exercise of legislative discretion a simple ministerial function. The agreement

> subsumed the Legislature's appropriations authority. It depended, as the parties knew full well from the outset, upon an appropriation in the amount requested, failing which the agreement was to be administered within the appropriation made. (F.S. 447.309(2)) The respondent was required to request monies from the Legislature sufficient to fund the agreement in full. It did precisely that, but its efforts before the 1977 Legislature were only partially successful.
>
> In short, the collective bargaining agreement in question incorporated the Constitution and laws of this State, the provisions of which commit to the Florida Legislature the final say in the appropriation of State monies. That reservation of powers was a part of the agreement. The petitioner was expressly put on notice thereof by the terms of F.S. 447.309(2).

Id. at 1078-79 (emphasis supplied).

The Unions may rely upon *Department of Education v. Lewis,* 416 So.2d 455 (Fla. 1982), but their reliance would be misplaced. In *Lewis* the Court found that proviso language (prohibiting funding for educational facilities where groups that advocate sexual relationships among unmarrieds are permitted to meet) was an attempt

> to make substantive policy on the governance of postsecondary educational institutions. Thus it amends a whole host of statutes pertaining to the operation of public colleges and universities and the regulation of private colleges and universities. By effecting such a de facto amendment of existing substantive law, the proviso violates the first principle announced in *Brown v. Firestone,*

The second principle of *Brown* was also not satisfied because the legislative objective was unrelated to funding of postsecondary institutions. The Court held, therefore, that the proviso violated Article III, section 12. The Court explained that the proviso also violated freedom of speech. *Lewis* demonstrates that when the Legislature neglects to confine its appropriations bills to their proper scope, it may run afoul of other rights; but what is equally apparent is that an appropriations law that complies with Article 111, section 12, is unlikely to violate other constitutional rights.

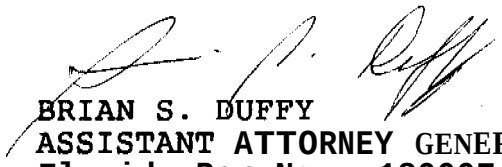
Employees may know the amount of their "take-home pay" to the penny, but often forget that their benefits package, including health and other insurance, vacation leave, sick leave and retirement, requires *funding* by their employer. Salaries and benefits packages are not sacrosanct: and may be adjusted by employers as a consequence of current economic conditions. Here the Legislature, not the Governor, and certainly not the employees, had the exclusive power to determine the extent public dollars would be used to fund the salaries *and benefits* of public employees. This is not an abridgement of the right to collectively bargain; it is a proper exercise of the duty to govern.

CONCLUSION

Section 9.3.A(5) of Chapter 88-555, Laws of Florida (1988), does not abridge the constitutional right of the Unions to collectively bargain, but is proper proviso language and within the Legislature's power to restrict, limit, qualify or condition appropriations. The decision below, concluding that this law violated Article I, section 6, Florida Constitution, should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



BRIAN S. DUFFY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 180007

KIMBERLY J. TUCKER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 516937

The Capitol - Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief with Appendix has been furnished by U. S. Mail this 24th day of June, 1991, to:

GENE "HAL" JOHNSON
300 East Brevard St.
Tallahassee, FL 32301

BENJAMIN R. PATTERSON, III
P.O. Box 4289
Tallahassee, FL 32315-4289

KEVIN X. CROWLEY
315 South Calhoun St.
Suite 500
Tallahassee, FL 32301

DONALD D. SLESNICK II
10680 N.W. 25th St., Suite 202
Miami, FL 33172-2108

KEN ROUSE, General Counsel
Office of Secretary of State
The Capitol - Room LL10
Tallahassee, FL 32399

GREGORY C. SMITH
Office of the Governor
State of Florida
The Capitol - Room 209
Tallahassee, FL 32399-0001

BRIAN S. DUFFY

pba.brief.BSD