IN THE SUPREME COURT
STATE OF FLORIDA

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

Appellants,

vs.

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' REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE LL04
TALLAHASSEE, FL 32399-1050
PHONE: (904) 487-3852

COUNSEL FOR APPELLANTS

TABLE OF AUTHORITIES

SUMMARY OF THE ARGUMENT IN REPLY

The right of public employees to collectively bargain does not supercede the Legislature's exclusive power to appropriate funds. The Legislature is not required to demonstrate that "compelling state interests" exist for its appropriations decisions, even those which effect wages, terms or conditions of employment of public employees. The appellants need not prove that the Legislature had a compelling state interest for enacting Section 9.3.A(5) of Chapter 88-555, Florida Statutes. The proviso language contained in that provision of the 1988 Appropriations Act was within the scope of the Legislature's exclusive power to appropriate funds for benefits.

The agreements between appellants and appellees contained Savings Clauses, which contemplated the possibility that subsequent legislative action could alter or amend the terms of the agreements. Section 9.3.A(5) was a legislative enactment within the meaning of those Savings Clauses. This Court should not permit appellees to avoid the plain meaning and effect of the Savings Clauses, but should uphold the constitutionality of the enactment of Section 9.3.A(5) as a condition subsequent within the meaning of the agreements.

Finally, the appellees should not be permitted to challenge actions of the Florida Legislature as violations of their collective bargaining rights, without naming the Florida Legislature as a party and permitting the Legislature to respond. The lower courts erred in overlooking appellees' failure to name the proper party in this action.

ARGUMENT IN REPLY AND REBUTTAL

1. THE RIGHT TO COLLECTIVELY BARGAIN DOES NOT SUPERCEDE THE LEGISLATURE'S EXCLUSIVE POWER TO APPROPRIATE

Appellees are in error when they assert that the right to collectively bargain supercedes the Legislature's exclusive power to appropriate funds. Neither the state constitution nor existing caselaw require that the Legislature have a "compelling state interest" for its appropriation decisions, even those which, consequently, effect terms and conditions of employment of public employees. The power to appropriate funds is exclusively vested in the Legislative Branch of government. Placing the power to appropriate in representatives, duly elected by the people, is fundamental to our democratic form of government and the cornerstone of the concept of Separation of Powers.

Contrary to appellees' assertion, the right to collectively bargain, guaranteed by Article I, section 6, does not supercede the Legislature's exclusive authority to appropriate funds, established by Article 11, section 3. Neither the Executive Branch, nor the unions which represent collective bargaining unit public employees, can bind the hands of the Legislature in matters of appropriations simply by entering into a collective bargaining agreement. Further, there is no requirement under existing law that the exclusive Legislative

prerogative over appropriations be burdened by the necessity of proving that a compelling state interest exists to justify appropriations decisions.

Appellees had ample notice of the manner in which Article I, section 6 and Article 11, section 3 were to be interpreted to give force and effect to each of these provisions of the State constitution. Section 447.309(2), Florida Statutes, expressly states that:

> 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.

However, appellees now contend that the right to collectively bargain supercedes the Legislature's exclusive power to appropriate funds, Specifically, appellees assert that:

> Appellants' [sic] conduct in the case is unconstitutional since it abrogates the collective bargaining process. This court should hold, as did the lower courts, that legislative prerogative, regardless of its origin, may not be exercised in violation of the fundamental right of the State career service employees to collectively bargain.
>
> * * *
>
> It is the position of the Appellants that such a prerogative rests inherently with the Florida Legislature if it is exercised via the legislature's appropriation power. It is the position of the Florida P.B.A. and the F.N.A. that the legislature may not, in the absence of a compelling state interest, unilaterally alter terms and conditions of employment without violating the constitutional right of

the employees to engage in collective bargaining.

Answer Brief, p. 5; 6.

Implicitly, appellees' argument requires a finding by this Court that Section 447.309(2) is unconstitutional; although appellees have never expressly challenged the constitutionality of that statute in the lower courts, Further, this argument expressly requires that the Court overturn the holding in United Faculty of Florida v. Board of Regents, 365 So.2d 1073 (Fla. 1st DCA 1979), also not expressly challenged by appellees below, The Court should do neither.

11. THE APPELLEES SHOULD NOT BE PERMITTED TO AVOID THE EFFECT OF THE PLAIN MEANING AND INTENT OF THE SAVINGS CLAUSES CONTAINED IN THE COLLECTIVE BARGAINING AGREEMENTS WITH APPELLANTS

Appellees attempt to avoid the effect of the express terms of the contracts entered by appellees and appellants. All of the contracts between the Executive Branch [appellants] and appellees, contained "Savings" Clauses which expressly contemplated the possibility and validity of "subsequently

enacted legislation", altering terms of the contracts. See e.g. R: 47, Article 33; R: 66, Article 33; R: 84, Article 33)[1]

Appellees suggest that, "Clearly, the severability provision in the present case does not constitute the waiver of the right to collectively bargain." Appellees' Answer Brief in the First District Court of Appeal, p. 21. In the order granting appellees summary judgment, drafted by appellees for the trial court, the court stated that "There is no clear and unmistakable waiver on the part of Plaintiffs of the right to negotiate annual and sick leave benefits." R: 191. However, there was plain, clear and unmistakeable recognition in the Savings Clauses contained in appellees' agreements with appellants that the Legislature could modify the terms of the agreements by enactment of subsequent legislation. The practical effect of appellees' interpretation of their collective bargaining rights renders these Savings Clauses meaningless.

---

1 If any provision of the Agreement, or the application of such provision, should be rendered or declared invalid, unlawful, or not enforceable, by any court action or by reason of any existing or subsequently enacted legislation; . . . then such provision shall not be applicable, performed or enforced, but the remaining parts or portions of this agreement shall remain in full force and effect for the term of the Agreement.

If proviso language contained in a subsequently enacted appropriations bill fails to fall within the meaning of the Savings Clauses and fails to constitute a legitimate legislative amendment of the terms of the contract, appellants are at a loss to contemplate what, if any, subsequent legislative enactment could ever legitimately amend the contract without "violating" appellees' collective bargaining rights. Clearly, the parties intended for this Savings Clause to have meaning. Appellees seek an order from this Court to avoid that plain meaning.

The Legislature was not a party to appellees' collective bargaining agreements with appellants. Statutory law and case law which existed at the time those agreements were executed expressly preserved the power of the Legislature to underfund the benefits conferred by those agreements, through the appropriations process. The Savings Clauses contained in the collective bargaining agreements codified the parties' recognition of the Legislature's power to amend the contract through subsequent enactments, including, implicitly, appropriations provisos.

By invoking alleged collective bargaining rights, appellees now attempt to avoid the plain meaning of the Savings Clauses and retroactively modify terms of the contract which they bargained for and agreed to. The Court should not permit appellees to avoid their obligations under the agreements with

appellants, including those contained in the Savings Clauses. Appellees had notice at the time the agreements were entered that all terms of the contracts were contingent upon adequate funding by the Legislature, The failure of the Legislature to fully fund annual and sick leave benefits as a result of the 9.3.A(5) proviso language was a condition subsequent within the Contemplation of the parties at the time the agreements were executed. The lower courts erred in failing to apply the Savings Clauses to deny appellees the relief requested.

III. APPELLEES SHOULD NOT BE PERMITTED TO CHALLENGE OR NULLIFY THE ACTIONS OF THE LEGISLATURE WITHOUT NAMING THE LEGISLATURE AS A PARTY

Appellees assert that, in the absence of a showing by the Legislature of a "compelling state interest," the Legislature violated appellees' collective bargaining rights by enacting proviso language in an appropriations bill which, consequently, altered a term or condition of employment. *See* generally Appellees' Answer Brief, p. 6. However, the Florida Legislature has never been given an opportunity to address this argument or the underlying challenge of Section 9.3.A(5), because the Legislature has never been named as a party in this action.

The circuit court dismissed the Legislature's motion to intervene in the trial court as "moot" in its order granting appellees' motion for summary judgment. R: 193. That order did

not place the Legislature on notice that its power to appropriate was being held to constitutionally abridge appellees' collective bargaining rights. Rather, the suit below was premised on the notion that the State of Florida, the Governor, and the Department of Administration had violated the appellees' collective bargaining rights because the Legislature enacted an appropriations proviso which altered a term and condition of employment for Career Service employees.

Appellants appealed the trial courts order, stating that:

> The trial court erred in holding that the Appellants violated Appellees' collective bargaining rights under Article I, section 6, . . . as a direct and proximate result of the Legislature's enactment of this qualifying language on the Health Insurance Appropriation.

Appellant's Initial Brief in the District Court, p. 19 (emphasis added).

Appellees now assert in this Court that "Appellants' conduct'' violated appellees' collective bargaining rights; however, appellees have never cited any act or omission committed by any of the named appellants which violated their collective bargaining rights. Rather, appellees continue to challenge the actions by the Florida Legislature without ever naming the Legislature as a party to this action.

The lower courts erred in holding that the actions of the Legislature violated collective bargaining rights, without requiring appellees to name the Legislature as a party to this case or permitting the Legislature to respond to this suit. The lower court decisions should be reversed on the grounds that appellees failed to name the proper party to this action. If the Legislature is required to prove a compelling state interest for its appropriations decisions, surely the Legislature must be afforded an opportunity to participate in the litigation and present its case.

CONCLUSION

WHEREFORE, for the foregoing reasons the Court should reverse the lower courts' determination that Section 9.3.A(5) is unconstitutional and Appellants request that this Court vacate the trial court's order with respect to returning the bargaining unit employees to "status quo ante."

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KIMBERLY J. TUCKER
Assistant Attorney General
Fla. Bar #0516937

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite LL04
Tallahassee, Florida 32399-1050
(904) 487-3852
Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy of the foregoing has been served on GENE "HAL" JOHNSON, Esquire, 300 East Brevard Street, Tallahassee, Florida 32301; DONALD D. SLESNICK II., Esquire, 10680 N.W. 25th Street, Suite 202, Miami, Florida 33172-2108; BENJAMIN R. PATTERSON, III., Esquire, P.O. Box 4289, Tallahassee, Florida 32315-4289; KEN ROUSE, Esquire, General Counsel, Office of Secretary of State, The Capitol - Room LL10, Tallahassee, Florida 32399; and KEVIN X. CROWLEY, Esquire, 315 South Calhoun Street, Suite 500, Tallahassee, Florida 32301, GREGORY C. SMITH, Esquire, Office of the Governor, State of Florida, The Capitol - Room 209, Tallahassee, Florida 32399-0001, by mail, this 3rd day of September, 1991.

KIMBERLY J. TUCKER

PBA-REPLY/CKT