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IN THE SUPREME COURT OF FLORIDA

Case No. 77,850

FLORIDA ASSOCIATION OF COUNTIES, INC., a non-profit Florida corporation; FLORIDA LEAGUE OF CITIES, INC., a non-profit Florida corporation; and SANDRA GLENN and ROBERT ANDERSON, citizens and taxpayers of the State of Florida and respectively of Seminole County and Sarasota County, Florida,

Petitioners,

vs.

DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT, an agency of the State of Florida; FLORIDA PROFESSIONAL FIREFIGHTERS, a labor organization; and FLORIDA POLICE BENEVOLENT ASSOCIATION, a labor organization,

Respondents.

BRIEF OF RESPONDENT, FLORIDA PROFESSIONAL FIREFIGHTERS

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STATEMENT OF THE CASE AND FACTS

The Respondent, Florida Professional Firefighters (FPF), does not accept the Statement of the Case and Facts made by the Petitioner, Florida Association of Counties, Inc. (which was accepted by the Petitioner, Florida League of Cities, Inc.) as their Statement of the Case and Facts contains substantial argument in its text and copious footnotes.

History of the Case

The Petitioners/Plaintiffs are a taxpayer in Sarasota County and the Florida Association of Counties, Inc. and the Florida League of Cities, Inc. The Florida Association of Counties, Inc. is a Florida non-profit corporation whose members are counties in Florida which pay dues consisting of taxpayers' dollars. (R. 46, 52, 57-59). The Florida League of Cities, Inc. is a Florida non-profit corporation consisting of cities in Florida which pay dues consisting of taxpayers' dollars. (R. 54-55, 57). No county in Florida or no city in Florida authorized this lawsuit. (R. 1-52, 58).

The Circuit Court found that the Florida Association of Counties, Inc. and the Florida League of Cities, Inc. have standing to bring this lawsuit. (R. 107). The First District Court of Appeal affirmed on this point. *Florida Association of Counties, Inc. v. Department of Administration, Division of Retirement,* 580 So. 2d 641, at 646 (Fla. 1st DCA 1991).

The Plaintiffs filed suit challenging the constitutional validity of Ch. 88-238, Laws of Florida [which prior to passage was the Committee Substitute for Senate Bill 150] and which is now contained in §121.071(1)(b) and (c), Fla. Stat. as to employer contributions, and §121.091(1)(a)(1-8), Fla.

Stat. (1990)[1] as to employee benefits. *Fla. Assoc. of Counties v. Dept. of Admin.,* 580 So. 2d 641 (Fla. 1st DCA 1991).

The Plaintiffs argued that Ch. 88-238, Laws of Fla., violated Art. X, §14 of the Florida Constitution and the statement of intent of the Florida Protection of Public Employee Retirement Benefits Act, §112.61, Fla. Stat., in that the methodology used by the Legislature to fund the benefit increase contained in Ch. 88-238, Laws of Fla., was constitutionally invalid. Ibid. They did not challenge the validity of the amount of funding provided for and required. (A. 30). (Petitioner's Brief ix-x).

The Defendants were the State of Florida, Department of Administration, Division of Retirement, and the Interveners, Police Benevolent Association (PBA) and the Professional Fire Fighters of Florida (PFFF), now called the Florida Professional Firefighters (FPF).

At the hearing before the Circuit Court, the evidence consisted of the testimony of two taxpayers, the State Retirement Director, and five actuaries, three called by the Plaintiffs and two by the Defendants. There were also numerous documentary exhibits. These included correspondence received by the Department of Administration which was admitted into evidence over the hearsay objection of the Defendants on the ground that they were within the business records exception to the hearsay rule. (R. 102 - 124). After hearing the evidence, the Circuit Court Judge, J. Lewis Hall, entered his Order holding that Ch. 88-238, Laws of Fla., was constitutionally valid. (R. 106-111). He held that the phrase "funded on a sound actuarial basis" contained in Art. X, §14, Fla. Const. does have

[1] The dates contained in §121.091(1)(a)(5-8), Fla. Stat. beginning with December 31, 1989, were changed by a revision bill prior to that date having been reached by §121.091(1)(a)(5-8), Fla. Stat. (1989). The difference in such dates is not material and is not in issue in the present case. (A. 27-28)

application within the field of actuarial science, but is not defined with specificity within the actuarial field, but that a consensus definition or understanding of the phrase is:

> A retirement fund must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature. (R. 108).

The Circuit Court further held that no evidence of a significant character was presented to show that the funding method contained in Ch. 88-238, Laws of Fla., would cause the fund, as it relates to the increase in benefits, to be unable to meet its obligations. (R. 108). The Court further held that the phase-in of benefits and contributions set forth in Ch. 88-238, Laws of Fla., does not result in discriminatory treatment of taxpayers. (R. 108). The Circuit Court held that the phase-in of benefits in conjunction with the payment of contributions are reasonably coordinated with each other and that there is no significant disparity between what today's taxpayers pay with what future taxpayers pay. (R. 108-109).

The Court determined that the Florida Retirement System is based on the entry age normal cost method and that the funding method employed in Ch. 88-238, Laws of Fla., is a departure from that method. (R. 109). However, the Court further held that the Legislature does have the prerogative to depart from the entry age normal cost method and adopt another funding method so long as it is not violative of the provisions of the Florida Constitution. (R. 109). The Circuit Court specifically held that the funding scheme employed by Ch. 88-238, Laws of Fla., does not violate Art. X, §14 of the Florida Constitution and that the methodology employed therein is consistent with the constitutional provision and results in the increase in benefits being funded on a sound actuarial basis. (R 110). The

Circuit Court stated that questions of wisdom, need or appropriateness are for the Legislature, not for the Court. (R. 109).

Apart from its written Final Order, the Circuit Court Judge said at the hearing, after announcing his decision, that his personal view was that this change was an unwise and imprudent basis. (R. 586). The Court explained that he meant that this does not make it unsound (R. 590), but only that he did not personally care for that particular way. (R. 590).

The Plaintiffs appealed to the First District Court of Appeal, which affirmed the Circuit Court's holding that the Florida Association of Counties and the Florida League of Cities had standing, and that the trial court was correct in receiving into evidence numerous copies of correspondence received by the Department of Administration as exceptions to the hearsay rule under the business records exception. The First District Court of Appeal held that the trial court was correct in holding that Ch. 88-238, Laws of Fla., was constitutionally valid.

The First District Court of Appeal held:

> There is clear record support for the trial court's decision...A consulting actuary testified that the plan was actuarially sound, appropriate, thoughtful, and sensible. He added that the plan assesses the cost to the appropriate generation of taxpayers, i.e., those who are being served by the generation of special risk members who are receiving the particular benefit. *Fla. Assoc. of Counties v. Dept. of Admin.*, supra at 645

The Plaintiffs filed a notice to invoke discretionary jurisdiction in the Supreme Court, which by order, accepted jurisdiction.

THE FACTS

The Florida Retirement System (FRS) was created in 1970 by the Florida Legislature in order to consolidate existing retirement systems. §121.021(2), Fla. Stat., §121.045, Fla. Stat. The state, all of the counties, and

some cities are members of FRS. §121.051(1)(a) and (2), Fla. Stat.. It provides for retirement benefits for employees of the member employers in various categories. These different categories of employees vary the retirement age and the percentage of earnings, which is a service credit used to calculate retirement benefits. §121.021(29), Fla. Stat., §121.091, Fla. Stat. One of the categories is the special risk category, which includes law enforcement officers, correction officers, and fire fighters. §121.0515, Fla. Stat. For the special risk members, service prior to October 1, 1974, was at 2% of average final compensation for each year. Service between October 1, 1974, and October 1, 1978, was at 3%, and service between October 1, 1978, and January 1, 1988, was at 2%. Service after January 1, 1989, increased equally between 2% and 3% for each year until January 1, 1993, at which time it is 3%. That is, the service credit for 1989 is 2.2%. The service credit for 1990 is 2.4%. The service credit for 1991 is 2.6%. The service credit for 1992 is 2.8%. The service credit for 1993 and thereafter is 3%. §121.091(1)(a), Fla. Stat., §121.091(1)(a)(1)-(8), Fla. Stat.. The service credit for general employees is 1.6% of average final compensation for each year of service. §121.091(1)(a), Fla. Stat. For the judiciary class it is 3.33% and for the elected state officers' class it is 3% (§121.052(5)(a), Fla. Stat.) and for the senior management service class, it is 2% after January 31, 1987. §121.055(4)(d), Fla. Stat.

3% of average final compensation for each year of service for special risk members is a restoration of the 3% benefit which was previously in the statute. §121.091(1)(a)(2), Fla. Stat.

In the 1987 Valuation of the Florida Retirement System (R. 238), Milliman & Robertson, the state's consulting actuaries, proposed and recommended a phased-in methodology over a five year period to fund the

unfunded liability which had built up in the system. The Division agreed with that recommendation and it was implemented. (R. 185-187).

Prior to the 1988 legislative session, the Legislature had in hand an actuarial report provided by the Division of Retirement showing that the funding for an immediate increase from a 2% to a 3% service credit for special risk members would be 7.64% of payroll over a 30-year period. (R. 134).

The question arose as to the phasing-in of the increase from 2% to 3% equally over a five-year period, which is what was actually done. For the phasing-in of the service credit over five years, Milliman and Robertson (M & R), the consulting actuaries, recommended an employer contribution of 7.04% of payroll for every year beginning with the first year, even though the full 3% benefit was not in place. (R. 153-154). On passage, the Legislature adopted a formula for the phasing-in of the increase in the service credit together with a phasing-in of the contribution rate, both over the same five-year period. Ch. 88-238, Laws of Fla.

At the time of passage, there was a point of order made as to whether the phasing-in of the increase in the contributions, together with the phasing-in of the increase of the benefits, both over a five-year period, was within the actuarial report. In the Senate, the Rules Committee reported that it was. The President accepted the report and so ruled. (R. 191).

The act provides for a phase-in of contributions and benefits over a five-year period as follows:

Period	% Increase in Contributions[3]	% Increase in Benefits[4]
1989	1.6	2.2
1990	3.2	2.4
1991	4.8	2.6
1992	6.4	2.8
1993+	8.0	3.0

Fla. Assoc. of Counties v. Dept. of Admin., 580 So. 2d 641, at 643 (Fla. 1st DCA 1991).

While the proposal was under consideration, the State Retirement Director opposed it for philosophical and political reasons, which he conveyed to the actuarial firm: (1) he was opposed to anyone receiving a 3% credit, it was too much compared to general employees and other employee groups who received less would want to ask for more; and (2) Governor Martinez was opposed to the increase because the law enforcement officers and the fire fighters had not supported his re-election campaign. (R. 187-188, 211-214, 219). After adoption, when the Legislature had not followed his advice, the State Retirement Director claimed that the increase was unconstitutional. (R. 147). However, in his testimony, he stated that it was not unusual for the Legislature to mandate programs to the executive branch of the government, and for the executive branch of the government to say that the Legislature had not given the executive enough money. (R. 229-230).

He also admitted that his opinions were colored by his belief that the Legislature should fund the accrued actuarial unfunded liability that existed before FRS was created and before the constitutional amendment was enacted in 1976, before it should grant any increase in benefits. (R. 211-214).

By the time of the hearing, the first year's payments had already been received. The projection had been 17 million dollars and it was actually 16 million dollars, but this was for a fiscal year versus a calendar year, and consequently it was acceptably close according to Mr. Gibney, the State Retirement Actuary. (R. 275). Mr. Gibney stated that this was enough money and that the contribution formula in Ch. 88-238, Laws of Fla., was

sufficient to pay the benefits. (R. 303-304). All payments have been made. (R. 50, 58).

Howard Winklevoss, an actuary, testified for the Plaintiff that in his opinion Ch. 88-238, Laws of Fla. was not funded on a sound actuarial basis. (R. 379).

Lawrence Mitchell, an actuary, testified for the Defendant, PBA, that the benefit increase in Ch. 88-238, Laws of Fla., was funded on a sound actuarial basis. (R. 432-434, 437, 438, 440-444, 445).

Richard Daskas, another actuary, testified for the Defendant, PFFF, that Ch. 88-238, Laws of Fla. was funded on a sound actuarial basis. (R. 492-493).

When the Florida Retirement System was created in 1970, it already had an actuarily accrued unfunded liability. (R. 78-80). This was largely due to the fact that the Legislature had granted increases in benefits in the past but had not provided for funding, particularly in the former teachers' retirement system. (R. 78-80, 85-86). The special risk category (law enforcement officers and fire fighters) did not exist prior to 1970. §121.0515, Fla. Stat.

In 1976, the people of Florida adopted Art. X, §14, of the Florida Constitution, which provides:

> SECTION 14. **State retirement systems benefit changes.** - A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis. [bold emphasis in title in original]

In 1978, the Florida Legislature enacted Ch. 78-170, Laws of Fla., creating Part VII, Ch. 112 of the Florida Statutes captioned "Actuarial Soundness of Retirement Systems" but which has the short title, "Florida Protection of Public Employee Retirement Benefits Act" §112.60, Fla. Stat. §112.61, Fla. Stat. contains a statement of legislative intent in regard to Part VII. This 1978 statement of legislative intent did not contain any provision in regard to funding methods.

Later in 1983, this statement of legislative intent was amended by Ch. 83-37, Laws of Fla., adopting the following language:

> Accordingly, except as hereinafter provided, it is the intent of this Act to prohibit the use of any procedure, methodology, or assumptions, the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. (emphasis added).

At the same time, Ch. 83-37, Laws of Fla., "hereinafter provided" in Part VII of Ch. 112, an amendment to §112.63, Fla. Stat., creating this language in §112.63(1)(f), Fla. Stat.:

> The actual cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved in the Employee Retirement Income Security Act of 1974 and as permitted under regulations prescribed by the Secretary of the Treasury. (emphasis added).

The Employee Retirement Income Security Act (ERISA) provides that:

> Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. 29 USC §1002; §3(31), ERISA.

It further provides:

> The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods. 29 USC §1002; §3(31), ERISA.

The Secretary of the Treasury issued Treasury Regulations 1.412(c)(3)-1 entitled "Reasonable funding methods in implementation of §3(31) of ERISA.

Treasury Regulations 1.412(c)(3)-1(b)(2) provides:

> (2) *Normal cost.* Normal cost under a reasonable funding method must be expressed as--
> (i) A level dollar amount, or a level percentage of pay, that is computed from year to year on either an individual basis or an aggregate basis; or
> (ii) An amount equal to the present value of benefits accruing under the method for a particular plan year.

Treasury Regulations §1.412(c)(3)-1(d) provides:

> (d) Prohibited considerations under a reasonable funding method--*(1) Anticipated benefit changes*--(i) In General. Except as otherwise provided by the Commissioner, a reasonable funding method does not anticipate changes in plan benefits that become effective, whether or not retroactively, in a future plan year or that become effective after the first day of, but during, a current plan year.

Revenue Rulings 77-2 provides that a change in benefits (increase or decrease) which becomes effective in a subsequent year, shall not be considered in computing funding for the current year. (R. 196). (A. 4).

The February 15, 1983, Senate Staff Analysis for the 1983 amendment to Part VII of Chapter 112, the Florida Protection of Public Employee Retirement Benefits Act, stated in regard to the amendment to the statement of legislative intent:

B. Effect of Proposed Changes:

1. The new language of the bill amplified the legislative intent section of the act to specify more clearly that any currently incurred costs for increased benefits should be funded on a current basis and not deferred to a future generation of taxpayers. (R. 180). (A. 9). (emphasis added).

The 1983 Senate Staff Analysis stated in regard to the "except as hereinafter provided" reference to ERISA methods of funding:

3. The act has been silent with respect to the actuarial cost methods which will be permitted for use by governments in funding pension systems. Section 3 of the bill specifies that only those methods approved by ERISA shall be used to fund public pensions in Florida. There are basically six actuarial cost methods: units credit, actual cost entry age normal, actuarial cost attained age, actuarial cost, aggregate actuarial cost, frozen initial actuarial cost, and individual level actuarial cost. (R. 181). (A. 10).

The Revised Senate Staff Analysis of April 6, 1983, contained the same statements. (R. 182-183). (A. 11-12).

The 1983 House of Representatives Staff Analysis stated:

B. Probable Effect of Proposed Changes:

1. The new language of the bill amplifies the legislative intent section of the act to specify more clearly that any currently incurred costs for increased benefits should be funded on a current basis and not deferred to a future generation of taxpayers. This would not impact on the use of a payroll growth assumption in paying for or retiring the past service debt liability of a public retirement system, the method utilized by the FRS. (R. 184-185). (A. 13-14).

* * * * * * * * * * * * * *

3. The act has been silent with respect to the actuarial cost methods which will be permitted for use by governments in funding pension systems. Section 3 of the bill specifies that only those

> methods approved by ERISA shall be used to fund public pensions in Florida. There are basically six actuarial cost methods: unit credit, actual cost entry age normal, actuarial cost attained age, actuarial cost, aggregate actuarial cost, frozen initial actuarial cost, and individual level actuarial cost. (R. 185). (A. 14).

The 1983 Legislative Analysis prepared by the Department of Administration stated in regard to the Part VII intent provision that following the original 1978 Act, the Department of Administration had adopted a rule which was to be incorporated into the 1983 amendment:

> Section one of the bill clarifies the intent section of Part VII of Chapter 112, Florida Statutes. This language has been taken from Chapter 22D, Florida Administrative Code, to describe more accurately the intent of the Legislature in creating Part VII of Chapter 112, Florida Statutes. (R. 175). (A. 6).

In regard to the adoption of ERISA funding methods, the 1983 Department of Administration Legislative Analysis stated:

> Section three of the bill addresses the area of actuarial cost methods. Part VII of Chapter 112, Florida Statutes, is totally silent regarding acceptable actuarial cost funding methods. As part of the overall provisions of the Employee Retirement Income Security Act of 1974 (P.L. 93-406), various acceptable actuarial cost methods are identified. For determining the annual contributions for the local retirement systems to support promised benefits, the actuaries recommended the statute provide and acceptable funding methods satisfy the provisions of ERISA. (R. 175-176). (A. 6-7).

SUMMARY OF ARGUMENT

Laws of Florida, Ch. 88-238, restored the retirement benefit for special risk members of FRS (police officers, prison guards and fire fighters) from 2% of average final compensation (salary) times the years of service to 3% of salary according to the following formula:

> 2.2% for service in annual year 1989
> 2.4% for service in annual year 1990
> 2.6% for service in annual year 1991
> 2.8% for service in annual year 1992
> 3.0% for service in annual year 1993 and thereafter.
> §121.091(1)(a), Fla. Stat. (1989);
> *Fla. Assoc. of Counties v. Dept. of Admin.*, supra, at 643

To fund this increased benefit, the Act required employers of special risk members to contribute the following:

> Beginning January 1, 1989, 1.6 % of salary
> Beginning January 1, 1990, 3.2% of salary
> Beginning January 1, 1991, 4.8% of salary
> Beginning January 1, 1992, 6.4% of salary
> Beginning January 1, 1993, 8.0% of salary, and thereafter.
> §121.071(b) and (c), Fla. Stat. (1989);
> *Fla. Assoc. of Counties v. Dept. of Admin.*, supra, at 643

Prior to the 1988 legislative session, Milliman and Robertson, the Division of Retirement's consulting actuary, had reported that an increase of 7.64% of payroll over 30 years would fund an increase in the special risk retirement benefit from 2% to 3%, if done immediately.

Milliman and Robertson recommended 7.04% of payroll over 30 years beginning with the first year for a phase in of 2% to 3% equally over 5 years, even though the full 3% would not be payable in years 1, 2, 3, and 4.

In restoring the special risk retirement credit from 2% to 3% per year, the Legislature phased-in over five years, both the change in the benefit and the change in the funding contributions by employers, by

dividing both the benefit change and the contribution change into equal fifth parts.

The State Retirement Director was opposed to the restoration in the special risk retirement benefit from 2% to 3% for philosophical and political reasons. He did not believe that any group of employees should receive a different benefit from another group. He also wanted the Legislature to fund the accrued unfunded liability which FRS had inherited from the past, before the Legislature increased or changed any benefits. Governor Martinez was opposed to the change because the police officers and fire fighters had not supported his re-election bid. When the Legislature acted contrary to the Director's wishes, he cried "unconstitutional". He was wrong. It is constitutional.

Art. X, §14 of the Florida Constitution adopted in 1976 only requires that an increase in pension benefits be funded on a sound actuarial basis.

"Sound actuarial basis" has no accepted meaning, but generally means that the payments are such that the benefits are and can be paid when due.

It is undisputed in the present case that the contributions by employers have been made and can be made, and that benefits are and can be paid when due. The Petitioners do not argue that the amounts of the contributions are incorrect. They dispute the methodology. .

The Petitioners presented that the contribution must be 7.04% for each and every one of the first five years, even though the benefits only go up .2% for each year. This is a level-line contribution for a phased-in benefit. It overpays the front end, which is actuarily unsound.

There was evidence that this phased-in method used by the Legislature of both contributions by employers and increases in benefits to

employees is adequate to fund these benefits such that they can be paid when due (testimony of witnesses Mr. Daskas and Mr. Mitchell). There was evidence that the funding in Ch. 88-238, Laws of Florida, was on a sound actuarial basis. (testimony of witnesses Mr. Daskas and Mr. Mitchell).

The testimony of the State Retirement Actuary, Mr. Gibney, although he was personally opposed to the change and to the method of funding, was that there would be enough money contributed by the employers to pay the benefits when due.

The argument of the Petitioners that the phased-in method of contributions and the phased-in change in benefits over a five-year period conflicts with the legislative intent in §112.61, Fla. Stat., is not correct. It does not conflict; it complies with ERISA. Furthermore, even a conflict between a later, specific statutory enactment with an earlier statement of legislative intent, does not render the later, specific statute unconstitutional.

The First District Court of Appeal was correct in affirming the Circuit Court's finding that Ch. 88-238, Laws of Fla. was constitutionally valid as the increase in retirement benefits contained in Ch. 88-238 was funded on a sound actuarial basis.

ARGUMENT

POINT I

THE CIRCUIT COURT WAS CORRECT THAT CH. 88-238 WAS CONSTITUTIONALLY VALID WHEN:

(A) ART. X, §14 OF THE FLORIDA CONSTITUTION REQUIRES ONLY THAT INCREASES IN PENSION BENEFITS BE FUNDED ON A SOUND ACTUARIAL BASIS;

(B) THE PETITIONERS DID NOT CONTEST THE ADEQUACY OF FUNDING, BUT ONLY THE METHOD OF FUNDING;

(C) THERE WAS EXPERT OPINION THAT THIS INCREASE WAS FUNDED ON A SOUND ACTUARIAL BASIS.

In their brief before the First District Court of Appeal, the Petitioners/Appellants/Plaintiffs stated:

> "The challenge here concerns only the manner in which the Act provided for the funding of the cost of those increased benefits, not the wisdom of making the increase itself, nor whether or not funds will eventually be generated by the funding provisions of the Act to pay the cost of those increased benefits." (their emphasis) (A. 29-30).

Only that much of what they have said is correct. Neither in their Complaint, nor in their factual presentation, nor in their argument have the Petitioners ever contended that Chapter 88-238, Laws of Florida, did not provide enough funds to pay for the benefits involved. There is no proof that any particular employer did not pay or could not pay the contributions which the Act required. In fact, they all did pay. Indeed, the Petitioners steadfastly refused to name any particular city or any particular county that was adversely affected.

Since the Petitioners do not argue that the money was not paid, or that it could not be paid, or that it is not enough, what then are the Petitioners arguing? They contend that Chapter 88-238, Laws of Florida, is unconstitutional because of the method of funding used in the Act. They say that the method of funding used by the 1988 Legislature in Chapter 88-238, Laws of Florida, conflicts with the statement of legislative intent adopted by the 1983 Legislature in §112.61, Fla. Stat. There is something missing from this legal syllogism. What is missing is the absence of any legal authority for the proposition that a conflict between a later statute and an earlier statute renders the later statute unconstitutional. What is missing is any legal authority for the proposition that any conflict between a later specific statute and an earlier statement of legislative intent renders the later specific statute unconstitutional. Plainly there is no such authority because a mere conflict between statutes does not rise to the level of a constitutional question. The Petitioners' attempt to bolster their argument by saying that the statement of legislative intent was the Legislature's own interpretation of a constitutional provision and therefore the Legislature could not vary its own interpretation. For that novel suggestion, they offer no legal authority either. Plainly there is none. Indeed, the idea that Laws of Florida, Chapter 88-238 conflicts with §112.61, Fla. Stat. at all is a rather fanciful and exaggerated statement by the Petitioners. That contention was rejected in the final order of the trial judge.

The court will note that the brief of the Petitioners is replete with statements by the trial judge which the Petitioners' counsel invoked in a dialog with him. This is interesting, but the ruling of the court is the final judgment, which is the order on appeal. The court will also note that the

brief of the Petitioners makes little or no mention of the evidence which supports the trial judge's ruling. Instead, it relates in some detail the testimony and evidence upon which the trial judge did not rely in his final order. The Petitioners do not indicate by what legal authority that constitutes reversible error, and indeed there is none.

On this basis the court is then confronted with the limited issue as phrased by the Petitioners, which is: whether the method of funding in Laws of Florida, Chapter 88-238 is unconstitutional, even though there is no contention that the funding itself was inadequate.

The argument of the Petitioners is very muddied. While they contend that the method of funding contained in Ch. 88-238, Laws of Fla., is unconstitutional, they do tell us on page 13 of their brief what they contend is constitutional, that is, a level contribution of 7.04% of payroll. Indeed, this was their presentation before the Circuit Court.

This is what the Legislature did.

> The act provides for a phase-in of contributions and benefits over a five-year period as follows:
>
> | Period | % Increase in Contributions[3] | % Increase in Benefits[4] |
> |---|---|---|
> | 1989 | 1.6 | 2.2 |
> | 1990 | 3.2 | 2.4 |
> | 1991 | 4.8 | 2.6 |
> | 1992 | 6.4 | 2.8 |
> | 1993+ | 8.0 | 3.0 |
>
> *Fla. Assoc. of Counties v. Dept. of Admin.,* 580 So. 2d 641, at 643 (Fla. 1st DCA 1991).

In the proceedings below and in this Court, the Petitioners argue that the methodology of phasing-in benefits and phasing-in contributions at the same time is constitutionally impermissible, because it is actuarially unsound and because it unreasonably transfers the responsibility for

payment to future generations of taxpayers. They offered their proofs and their argument as to what is constitutional, which is the following:

Period	% Increase in Contributions	% Increase in Benefits
1989	7.04	2.2
1990	7.04	2.4
1991	7.04	2.6
1992	7.04	2.8
1993+	7.04	3.0

First of all, the argument that there is a shortfall in the first year is incorrect. There is only a shortfall if you say (as they do) that the Legislature must provide for the funding of the entire 3% benefit in the first year even though the benefit is only 2.2%. By their argument, there is only a shortfall if they say that the Legislature must provide for the funding of the entire 3% in the second year even though the service credit is only 2.4%. There is only a shortfall if they say that the Legislature must provide for the funding of the entire 3% in the third year even though the service credit is only 2.6%, and there is only a shortfall in the fourth year if they say that the Legislature must provide for the funding of the entire 3% service credit even though the service credit is only 2.8%.

The funding is over 30 years by law. §112.64(4), Fla. Stat. The argument of the Petitioners is that the current taxpayers of years one, two, three and four, must pay the same amount as the taxpayers in year five and thereafter when the taxpayers in years five through thirty are paying for a 3% benefit and the taxpayers in years one through four are not.

The argument of the Petitioners in regard to the statement of legislative intent contained in the 1983 amendment to Part VII of Ch. 112 of the Florida Statutes was that a funding methodology should not be used which unreasonably transfers to future generations of taxpayers the

responsibility for funding that which should be borne by current taxpayers. However, the argument of the Petitioners that it should be level-line funding in the first five years, even though the benefits increase with each year, requires that current taxpayers pay more than is reasonably attributable to them. That position is untenable. It is backwards.

The District Court below pointed out that the 1978 statement of legislative intent contained in Part VII of Ch. 112 of the Florida Statutes following the adoption of Art. X, §14 of the Florida Constitution, did not contain any statement with reference to methodologies for funding on a sound actuarial basis. It was not until 1983 that that language was added. The evil to be corrected, of course, was that which had existed prior to FRS having been created in the first place, which was the granting of benefits without any plan for funding, or one which was hopelessly inadequate. However, even in regard to this later statement of legislative intent, the Petitioners are evidently travelling upon the fact that the statute prohibits transferring responsibility for payment to future generations of taxpayers in an unconstitutional manner; but, since the statute does not prohibit transferring to current taxpayers in a disproportionate manner, that that is required. This is precisely the argument of the Petitioners: that the only constitutionally permissible method is a level funding method which requires taxpayers of a current year to pay for an increase in benefits which does not exist in that current year, and which will not exist until a future year.

Even the 1983 amendment to the statement of legislative intent contained the words "except as herein provided". The "except as herein provided" language was contained in §112.63(1)(f), Fla. Stat. by which the Legislature adopted the ERISA methods of funding. The ERISA methods of

funding specifically prohibit as actuarially unsound any requirement that a current payor to the pension trust contribute an amount which is funding for an increase that will take place in a future year. (R. 174, 194-197). (A. 1-5).

Part of this is economic theory. In the private sector, the purchaser of a product or service pays a business enterprise for that product or service. Included in that purchase price is overhead. Overhead includes pension contributions just like wages and materials and energy, insurance, or any other item of overhead. The economic theory is that the purchaser of a product or a service in a given year should not pay for an increase in an item of overhead in a future year, whether known, or unknown, or certain, or uncertain. In the public sector, the theory is that a taxpayer receives services from the government during a given tax year and he pays taxes for those services. Similarly, he should not have to pay taxes in the current year for funding of a pension benefit which is funding for an increase in benefits which is not applicable to that year, but which will be applicable to future years (when he may not be a taxpayer).

There is the inherent problem of what is a future taxpayer. Since taxes are assessed on an annual basis, it seems most reasonable to suggest that it is from year to year. In Ch. 88-238, Laws of Fla., both the funding contributions and the benefit increases are from year to year.

It is true from the standpoint of economic theory the taxpayer of a given year inherits the infrastructure of government from previous years for which he paid nothing, and that after he has paid his taxes, the infrastructure will be there in future years, even though he may die or leave the state. So we may say that the sensible approach to a future taxpayer is a taxpayer of next year. This is supported by the staff analysis

reports from both the House and the Senate that accompanied the 1983 amendment to the statement of legislative intent in Part VII of Ch. 112. They stated that the future taxpayers referred to in the 1983 amendment meant "future generations of taxpayers". (R. 180, 182, 185). (A. 9, 11, 14). What this meant was that a funding methodology (except that permitted by ERISA) should not transfer to future generations of taxpayers the responsibility for payment disproportionately to current taxpayers from both the standpoint of economic theory as well as the constitutional provision. A phase-in of benefits and a concurrent phase-in of contributions over a five-year period, is not a transfer to future generations of taxpayers. Five years is far too short to be considered a generation of future taxpayers, but more importantly, this phase-in was year-by-year-by year of the contributions and year-by-year-by-year of the increase in the benefit. To put it succinctly, there was a small benefit increase and a small contribution increase in each of the five years involved: an increased benefit of .2% and an increased contribution of 1.6% for each year. What such a formula does is to fairly treat the taxpayers for each of the five years fairly.

The Petitioners do not challenge the mathematical amounts, either of the benefits or their funding or their relationship to each other. Nor do they challenge the adequacy of the funding. The evidence was that this manner of funding did generate sufficient monies to pay the benefits.

The argument made by the Petitioners that the taxpayers after the fifth year are paying five times more than the taxpayers in the first year has no legal nor practical application, since at that point the benefit is also five times. The Legislature simply divided up the increase in both of them into one-fifth parts.

The constitutional provision involved is Art. X, §14, of the Florida Constitution adopted in 1976. It is unique to Florida. It provides:

> "SECTION 14. **State retirement systems benefit changes.** - A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis." [bold emphasis in title in original]

In their brief, the Petitioners argue:

> "The key words in the critical constitutional phrases are 'basis' and 'sound.' The word 'actuarial'--as discussed in the current dispute--is more intriguing and no doubt important, but less so than the other words within the phrase, in light of the facts on which the instant case focuses." (Petitioners' brief 22)

Plainly the Petitioners contend that the verb [or more correctly the verbal phrase] in the constitutional provision is unimportant. To the contrary, it is the verb [the verbal phrase] which is most important. The active words are "has made or. . .makes provision for the funding". The modifying words are "on a sound actuarial basis". The active words "makes provision for the funding" are in plain English and easy to understand. The modifying words "on a sound actuarial basis" are not plain, simple English. They are words of art that have no generally accepted meaning.

Turlington v. Department of Administration, 462 So. 2d 65 (Fla. 1st DCA 1984) is the only case involving an interpretation of Art. X, §14 of the Florida Constitution. While the cases hinges on the proposition that the change in the statute was not an increase of the kind covered by the constitutional provision, the case does indicate that the emphasis is on the

verbal phrase, that is, on the funding. The case indicates that it is not necessary for the Legislature to have a report in hand that the funding is on a sound actuarial basis. What is required is that the Legislature fund or make provision for funding. It may be determined afterward that such funding was on a sound actuarial basis.

Lawrence J. Gibney, is an official of the Department of Administration, Division of Retirement. He is the State Retirement Actuary. (R. 244). He testified that the words "sound actuarial basis" are not acceptable. He stated that there is no definition in the actuary literature as to what that means: (R. 255).

> "Q All right. Have you been involved in any discussions as to what the concept of funding on a, quote, 'sound actuarial basis' means?
>
> A I'm probably one of the few people that don't accept that term, 'actuarially sound.' I mean there's no definition in the actuary literature, to my knowledge, as to what it means and I prefer not to use the phrase 'actuarial soundness' or 'actuarially sound.'
>
> Q Is there another phrase you do prefer to use?
>
> A Well, the one that I prefer is when you are 'in balance.' In other words, your assets are equal to your liabilities, your liabilities are equal to your assets. You are in balance. That's the phrase I prefer to use." (R. 254-255).

Charles Slavin is an official of the Department of Administration, Division of Retirement. He is the pension actuary responsible for reviewing the actuarial reports of all local government plans, but not the Florida Retirement System. (R. 280-281).

He stated that "funded on a sound actuarial basis" was a nebulous term. To him as long as the liabilities are fairly valued using a fair set of assumptions compared to the assets on hand and the assets expected to be

collected in the future, it means that the planning sponsor has the ability to pay.

> "Q Thank you. I'd like a direct answer to my question, please. What does 'actuarial soundness funded on a sound actuarial basis' mean to you?
>
> A That's a rather nebulous term that's gotten to have a lot of sexy overtones to people who use it, apparently. To me it means -- and I can give somewhat of a definition, but I don't want to cast this in concrete. As long as the liabilities are fairly valued using a fair set of assumption -- and by that I mean -- I don't mean pie-in-the-sky assumptions. And compared to the assets on hand and to the assets expected to be collected in the future, meaning the planning sponsor has got the ability to pay. That's almost a definition of actuarial soundness. Or your liabilities are covered by your assets and prospective assets.
>
> Q Okay. There's money available to pay for the benefits?
>
> A Either now or will be." (R. 300-301).

Lawrence Mitchell is an enrolled and consulting actuary called as a witness for the Interveners. (R. 414-417). He stated that "sound actuarial basis" is a term that actuaries are forced to handle. (R. 437). It means that "...you have to have a plan or program that is prepared to provide benefits security. That is, as the obligated benefits mature, there are funds available or to be available to retire or pay or fund those benefits as they accrue..."

> "[Lawrence Mitchell] In the concept of sound actuarial basis being one that appropriately funds for the plan benefits and provides that the plan benefits will be paid and that the funding is on a methodical, thoughtful, sensible, equitable basis, then, yes, the ERISA methods are generally on a sound actuarial basis." (R. 437).
>
> * * * * * * * * * * * * * * * *

> THE COURT: In short, it's almost like solvency? You have enough money on hand to pay for your current obligations.
>
> THE WITNESS: Yes. (R. 447).

Richard Daskas is a consulting and enrolled actuary and a plan actuary called as a witness for the Interveners. (R. 459-463). He stated that "funding on a sound actuarial basis" means to him funding under an actuarial cost method which could be the entry age normal cost method, or could be the aggregate cost method, or could be some of the other methods mentioned in ERISA, funding the normal cost and amortizing the past service liability over a reasonable period (20 to 40 years) and recognizing within that actuarial cost method each benefit increase as it occurs and becomes effective rather than when it was enacted. (R. 492-493).

Howard E. Winklevoss, Jr. is a consulting actuary, called as a witness for the Plaintiffs (R. 334). He stated that professionals in the field of actuarial science have not defined the phrase "actuarially sound" and have recommended that it not be defined. (R. 350-351).

The trial court found in its order:

> "The phrase 'funded on a sound actuarial basis' has application within the field of actuarial science, but is not defined with specificity within the actuarial field. A consensus definition or understanding of the phrase is that a retirement program must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature." (R. 108).

The evidence clearly supports this finding. Indeed, the Petitioners do not actually dispute it. Their argument deals with the method of funding. They do not argue that funding was inadequate.

Since the words "on a sound actuarial basis" are words of art not having clear and simple meaning but are subject to expert opinion, the

Court is confronted with an unusual situation because of this unique constitutional provision. The question is whether the Legislature performed an act in conjunction with the increase in special risk service credit contained in Ch. 88-238, Laws of Fla. The act in question is whether the Legislature made provision for funding those increases on a sound actuarial basis. As to whether that act was performed is a matter of dispute among experts. The Court should be very wary of invalidating an Act of the Legislature based upon an expert's opinion of the future It is always subject to change in the future based on experience. Here there was a conflict in the testimony of the experts as to their opinion as to whether the Legislature had performed that act or not. We are really confronted with the question whether there is competent substantial evidence to support the finding of fact by the trial court after having heard the testimony that the Legislature had performed that act, that is, had provided for the funding of the increase on a sound actuarial basis.

Andrew J. McMullian, III, the State Retirement Director, stated that in his opinion Art. X, §14 of the Florida Constitution required that the Florida Legislature fund, on a sound actuarial basis, the underlying FRS system before it made any increase in benefits. In other words, the Legislature cannot increase any benefits, even on a sound actuarial basis, without first funding the underlying system because it had a past unfunded liability. He also stated that his opinions in this case are colored by that judgment.

> "Q Mr. McMullian, you testified that you believe the Constitution requires that the Florida Retirement System be funded on a sound actuarial basis; is that correct?
>
> A Yes, ma'am. That's what it says, in my opinion.

Q Okay. The retirement system as a whole? That's your understanding.

A Yes, ma'am.

Q So the opinions you have given here today are based upon that understanding?

A Yes.

Q And you communicated that understanding to Milliman and Robertson, didn't you?

A Yes.

* * * * * * * * * * * * * * * *

Q Now, you said before that you thought that the constitutional approval, Article X, Section XIV, mandated that the Florida Retirement System be funded on a sound actuarial basis. That is your belief?

A I believe that's my opinion of what the Constitution says.

Q Okay. And your decision about actuarial -- sound actuarial funding and the Florida Retirement System are, shall be say, influenced greatly by that opinion?

A Would you mind repeating that?

THE COURT: Yes, I'm confused because you keep referring to the system as being actuarially sound when the constitutional provision that's in issue here is that any increases be actuarially sound. . .

MR. SICKING: I think you may be right, but I would like to get an answer to my question. And then I will develop that if I can. Could you read that back please?

(Requested portion read.)

MR. MOORE: Which opinion?

MR. SICKING: That the constitution, Article X, Section XIV, mandates that the FRS system as a whole be funded on a sound actuarial basis to start with.

THE WITNESS: Yes. . .

BY MR. SICKING:

Q Now, well, then, do you believe that the Legislature can provide for the funding of an increase in FRS benefits without providing for the funding of the basis system on a sound actuarial basis?

A No, no.

Q So that in order to make an increase in employee benefits, before they do that, they have to fix, as you put it, the unfunded liability of FRS to start with. That's your opinion?

MS. JOHNSON: Can you answer yes?

THE WITNESS: Yes." (R. 211-214).

This opinion of the State Retirement Director is clearly erroneous. Art. X, §14, Fla. Const., enacted in 1976 states that it applies only to increases in benefits made after 1977. It does not require that the Legislature fund the past accrued unfunded liability of the Florida Retirement System on a sound actuarial basis. It does not require anything in that regard at all. What it does require is that any increases in benefits from that point forward be funded in such a manner. It does not require that before any increases are granted that first the underlying system be so funded. It is not an ex post facto provision. We can understand the desire of the State Retirement Director to tout anyone off into believing that the Legislature could not increase any benefits until they had first given him enough money to fund the past, accrued, unfunded liability. He needs and wants the money. However, his interpretation of the Constitution in this regard is clearly erroneous. He admits that all of his testimony and

opinions about this increase and its funding are colored by that opinion. Mr. McMullian further stated that he lobbied against the increase in benefits which was ultimately passed by Ch. 88-238, Laws of Florida, based on his philosophical belief that there should not be a higher benefit for one group of employees than another group of employees, and that he communicated that belief to the Legislature and to Milliman and Robertson, the state's consulting actuaries. (R. 187-188). He also stated that he communicated to Milliman and Robertson that the governor did not want this law if he had an out. (R. 188). Indeed, he told them that for political reasons, the governor did not want this legislation because the police officers and the fire fighters had not supported him in his election bid. (R. 219).

It is particularly interesting that the Florida Retirement System does not contain a past accrued unfunded liability for special risk members. The 1989 report of the Division of Retirement's consulting actuaries, M & R, (A. 25-26) showed that the total unfunded accumulated benefit obligation of the entire Florida Retirement System was between 629 million dollars, 734 million dollars, or 2 billion, one hundred sixty seven million dollars, depending upon whether this obligation was valued at market, actual basis, or amortized cost. [It is the amortized cost basis which accounts for the statement of the 2 billion dollars unfunded liability.] However, the unfunded accumulated benefits obligation of the special risk category is less than zero, both for regular and for administration. Indeed, the special risk category is substantially overfunded, between 304 million dollars o 462 million dollars , depending upon the basis used, and between 1 million dollars and 3 million dollars for administration. Similarly, in the elected state officers' class, the judiciary is overfunded and county elected officials

are overfunded. The Legislature and cabinet category is on the cusp. There is a small unfunded accumulated benefit obligation in the senior management class of between 7 million dollars and 10 million dollaqrs, depending upon the basis. By far, the largest part of the unfunded accumulated benefit obligation is the 1 billion, one hundred twenty two million dollars, or 1 billion, two hundred fourteen million dollars, or 2 billion, four hundred seventy million dollars in the FRS regular class. (A. 25-26).

First of all, it is not disputed that it is possible to fund an increase in benefits on a sound actuarial basis, regardless of whether the basic system is so funded or not. It is considered as a separate item. Furthermore, the basic special risk category was already funded on a sound actuarial basis prior to this increase. That was not at issue either. The counties and the cities had paid appropriately for their police officers and fire fighters in the past. The state had paid for its special risk members appropriately in the past. If we were to accept the Director's position, as well as the Petitioners' argument, then the Legislature would have to require that the cities and the counties, for example, pay substantial amounts of money to reduce the past accrued unfunded liability for all of the persons who were not special risk members, including those who were employed by other employers. This is particularly true since the evidence was that the largest part of the past accrued unfunded liability was in the teachers' category. From the Director's standpoint, he wanted the Legislature to fund this increase in the special risk category by overfunding in the first four years by requiring the cities and the counties to contribute the same fixed amount for each year, even though the 3% benefit was not yet in effect. Certainly he could use that money in the aggregate to offset the past accrued unfunded liability

of other categories, which, according to Table V-3 of the Florida Retirement System 1989 report (A. 25-26), is precisely what the Department of Administration, Division of Retirement did. The total of the unfunded accumulated benefit obligation for the entire system showed an offset for the overfunding in the special risk category, just as it did for the overfunding in the judicial, elected state officers' class, and others. If we were to accept the argument of the Petitioners and the position of the Director in this regard, we would have to conclude that it is perfectly alright to require cities and counties, in paying for their police officers and firefighters, to pay more than they should in order to offset the past accrued unfunded liability for other employers and other employees.

It is at least interesting that the executive branch opposed the legislative branch for political and policy reasons in regard to the enactment of Chapter 88-238. However, it is not the court's function to be interjected into political disputes. The judicial function is limited to a consideration of the issue whether the legislation is constitutionally valid.

The question then becomes whether there was evidence that the retirement fund would be able to meet its continuing obligations as and when they mature with reference to this increase. Mr. Gibney, the State Retirement Actuary, testified that the method of funding adopted by the Legislature would eventually cover the liabilities, and that this makes it sound, and that there will be money available to pay for the benefits.

> "Q I understand. Milliman and Robertson has suggested 7.04 percent level method of funding for those same benefits. You could calculate a value for that, is that correct?
>
> A They derived the 7.04 from the liabilities --
>
> Q Right.

A -- that had to be funded.

Q Right.

A So if I had to calculate a value, I'd take it right back, assuming I follow their same procedures and everything else they did, I'd come right back to the beginning.

Q Okay. But if you had -- if you calculated values for both methods -- okay? -- both sets -- M&R's proposal and the Legislature's proposal, can you do that?

A I'm not sure I can do that. Yes.

Q Okay. If the value of the way the Legislature's 88-238 is equal to or greater than the value of the M&R's 7.04 percent level method of funding, that would be funding on a sound actuarial basis; correct?

A You are saying the 'value' meaning what? The money to be collected eventually?

Q Yes.

A Does that make it sound?

Q Yes. It covers liabilities?

A Eventually it will.

Q Okay. And wasn't that your definition.

A I want to be careful. You are tying it into this definition, and one of the things you are not including, or we already passed over, is also the equity in funding these things. Now, there's no question more money is going to be paid by this nonlevel method the Legislature adopted because they deferred --

Q Okay.

A -- some of the funding.

Q But there will be money available to pay for the benefits?

A Eventually, yes.

Q Okay, and isn't that the basis for your definition of 'funded on a sound actuarial basis'?

A It fits into that definition, yes." (R. 303-304).

Mr. Daskas discussed the recommendation of Milliman & Robertson, the state's consulting actuaries, that 7.04% of payroll be paid for every year beginning with the first year, even though the full 3% benefit would not be available until five years later. He explained that when the benefits were phased in over five years, but the contributions were a straight line over 30 years, the amount of contributions during the first four years would be excessive since it was more than was needed at that time. (R. 484). He concluded that the method used by the Legislature of phasing in the contributions with the benefits was appropriate.

"Q Now everybody has been asked it, and you are going to get it too. What does funding on a sound actuarial basis mean to you, the phrase in the Constitution? You have seen it?

A Yes. It means to me -- I mean, you know, in the context, funding under an actuarial cost method which could be the entry age normal cost method or could be the aggregate cost method or could be some of the other methods mentioned in ERISA, funding the normal cost and amortizing the past service liability over a reasonable period, 20 years, 30 years, 40 years, recognizing each benefit -- recognizing within that actuarial cost method, each benefit increase as it occurs as it becomes effective, I should say, rather than when it was enacted.

Q Now, the question to you, then, is, in your opinion, within that definition, was this funding on a sound actuarial basis? That is, the phase-in of contributions and the phase-in of benefits in the manner that was done here?

A Yes, I believe it was entirely sound." (R. 492-493).

Lawrence Mitchell was of the same view.

"BY MS. JOHNSON:

Q Would you consider the ERISA funding methods to be funding on a sound actuarial basis?

A I hesitate slightly because you use this term "sound actuarial basis" which a lot of us, I think, have already testified is a term we are forced to handle. I guess the analogy might be when I go to court people start talking about the life expectancy table did you use? and to an actuary, that's a cringe. We don't use life-expectancy tables. We use mortality tables.

In the concept of sound actuarial basis being one that appropriately funds for the plan benefits and provides that the plan benefits will be paid and that the funding is on a methodical, thoughtful, sensible, equitable basis, then, yes, the ERISA methods are generally on a sound actuarial basis. But there could be a case where a method may be permitted by ERISA but which in my opinion may not be sound for a particular plan. So just by naming it does not by itself make it, in effect, in my opinion, a sensible plan to use or a thoughtful plan.

Q But with those funding methods that are outlined in ERISA -- I'm not sure if you answered by question or not. I will try to ask it another way. Is it possible to have a variety of funding methods for the same plan, any one of which would be funded on a sound actuarial basis?

A Yes. A plan -- For any particular plan, there may be two, three, four funding methods, each of which would be sound for that plan or appropriate for that plan.

Q Do you have an opinion as to whether the contributions set forth in 88-238 are funded on a sound actuarial basis?

A Yes, I do.

Q What --

MR. MOORE: Just the same objection in terms of legal conclusions.

THE COURT: Overruled.

BY MS. JOHNSON:

Q What is your opinion?

A My opinion is that they are definitely on a sound actuarial basis as we have discussed and on an appropriate basis too.

Q Okay. I would like for you to briefly explain the basis for your opinion.

* * * * * * * * * * * * * * * *

[Mr. Mitchell]

So, if you will, it seems to me the Legislature said, 'Here is my two percent for all these years. And that effective 1-1-89 for the special risk people who are going to be servicing taxpayers in the future, we are going to give them an extra 0.2 percent forever. And we are going to charge -- ' They rounded it to 1.6. So if you don't mind, I am going to use 1.6 percent for that purpose.

And then they said, 'Gee, that looks nice. For some reason we want to, at 1-1-90 -- now I have got a different group of fire and police and other specialist people because and some new ones come in here and some old ones go out just like taxpayers. New taxpayers come in, new taxpayers come out. I am going to give these people an additional two-tenths of a percent out here. And I'm going to pay for that because under the entry age normal that's also 1.6 percent.'

And then they said, 'for 1-1-91 I am going to do the same thing there. And I'm going to pay for it at that time because this additional piece is being provided to the special risk people who are servicing that bunch of taxpayers at that time, that generation of taxpayers, if you will. And for 1-1-92, the same thing, and 1-1-93.'

So that in effect what the Legislature seems to have done is added a piece every time and said that piece is going to be paid for by, in the first instance, this block of taxpayers for whom the special risk people are providing a service. In this instance, for this block of taxpayers because that's a different block of special risk people too.

And so in effect, the appropriate generation of taxpayers is paying for the appropriate benefit for those people. And if I look at the legislative intent -- and I'd like to quote from it to explain why this thing is, in my opinion, actuarially sound and appropriate. It's a thoughtful method. It's a sensible method. It has the cost applicable to the appropriate generation of taxpayers. Those who are being served by the generation, if you will, of special risk people who are getting that particular benefit. It is actuarially sound as far as being in balance because the 1.6 increments here.

I think Milliman and Robertson said that's equivalent to a 7.04 percent payroll. And if you take 1.6 here starting at 1-1-89, 1.6 starting at '90, 1.6 in '91 and discount it to the same time as the 7.04, that value is greater than the 7.04 percent.

So that the contribution schedule is at least equal to what Milliman and Robertson said would be required, in their estimate. Further, it doesn't have this generation of taxpayers paying for a benefit that's going to be paid over here.

And if you look at the next to last paragraph of one 112.61 -- and I'd like to read it. The next to last sentence in that paragraph: 'Accordingly, except as herein provided, it is the intent of this Act to prohibit the use of any procedure, methodology, or assumptions, the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by current taxpayers.'

And the previous sentence says something to the effect of the benefits shall be fairly, orderly, and equitably funded by the current as well as future taxpayers. So my reading of it is, if you can't transfer here, then it seems to me it's inappropriate to transfer there.

And if instead of this 1.6 thing, I started out up here with a 7.04 percent level, then -- let me use a different color. Then this generation of taxpayers would be paying more here. This generation would be paying more here. This generation would be paying more here. And probably about in -- well, I guess the level becomes something like that, these people back here would that be paying, if you will, on that basis, their equitable fair share of that benefit.

So to my way of thinking, this Act and the contribution schedule definitely meets the intent of the Legislature, definitely meets the Constitution, is sound, and meets all the requirements, as I see them, of the Florida law and of sound actuarial practice however defined. Sound actuarial basis as defined by me.

* * * * * * * * * * * * * * *

Q In your opinion, does Chapter 88-238 comply with the provisions of the Florida Constitution, Article X, Section XIV, that requires that increases in benefits be funded on a sound actuarial basis?

A Absolutely." (R. 437-438, 440-444, 445).

If we turn to the common sense requirement of Art. X, §14, it is clear that this increase, or more properly this restoration of the 3% benefit, is funded on a basis whereby the benefits can be paid as they accrue. This ought to be enough and indeed it is. This is all that the Constitution requires.

The argument of the Petitioners that Ch. 88-238 conflicts with the legislative intent as stated in §112.61, Florida Statutes, is interesting but hardly rises to the level of a constitutional conflict. That statement of legislative intent was amended and now provides:

> "Accordingly, <u>except as herein provided</u>, it is the intent of this act to prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the cost **(or costs)** which may <u>reasonably</u> have been expected to be paid by the current taxpayers." (emphasis added)

At the same time §112.63(1)(f), Fla. Stat. was added. It provides:

> "The actuarial cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved in the Employee Retirement Income Security Act of 1974 and as permitted under regulations prescribed by the Secretary of the Treasury."

Lawrence Mitchell testified that Chapter 88-238, Laws of Fla. did comply with ERISA funding standards (either entry age normal or other methods). (R. 433-434).

"BY MS. JOHNSON:

Q Based on your understanding of Florida law and Chapter 112, do you have an opinion as to whether the ERISA funding methods would apply?

A It is my opinion that ERISA funding methods do apply as I read the Florida law.

Q And specifically 112.63? Is that what you are --

A The two paragraphs that I have read earlier.

Q Okay. Could you use the entry age normal cost method in calculating the phased-in contributions set forth in 88-238?

A Yes.

Q In fact, do you have an opinion as to whether that method has been used in Chapter 88-238?

A It is my opinion the attained entry age normal method was used to determine the contributions for that chapter.

Q Would use of that method be consistent with the phasing-in of the contributions?

A Yes.

Q Could you also use other methods?

A Yes.

Q Would the contributions contained in Chapter 88-238 be consistent with the ERISA funding standards?

A Absolutely, in my opinion. (R 432-434) (emphasis added)

The Petitioners referred to a shortfall in the first year.

In fact there is no shortfall. Their idea of a shortfall is based on the proposition that taxpayers in years 1, 2, 3, and 4 should pay a contribution on the entire 3% even though it does not go into effect until year 5. This is wrong. If taxpayers in years 1, 2, 3 and 4 are paying for the entire increase (as though it were in effect in years 1, 2, 3 and 4, when it is not) they are paying too much.

We can understand the desires of the Director to get more money whenever and however he can, but this is not a shortfall.

The phasing in over a five year period of contributions with an increase in benefits is by no means an unreasonable transfer from one generation of taxpayers to another. The taxpayers in year one pay for the increase in the benefits beginning in year one. The taxpayers in year two pay for the increase in benefits beginning in year two. The taxpayers in year three pay for the increase in benefits beginning in year three. And so on.

The argument of the Petitioners is entirely founded on the fallacy that taxpayers in year one should have paid for the increases in benefits in years two, three, four and five. That's how they calculated their shortfall. That is how they calculated the fallacy that the taxpayers in year five are paying, as they put it, five times more than the taxpayers in year one. [That argument completely ignores that the benefits went up one-fifth per year during that same five-year period so that the payments five years later should be five times more.] By any common sense interpretation, the argument of the Petitioners that this is somehow an unfair transfer from one generation of taxpayers to another generation of taxpayers is quite fanciful on a factual basis.

More importantly, on a legal basis it is without any meaning. The argument of the Petitioners is that somehow Chapter 88-238 conflicts with the legislative intent adopted earlier in §112.63, Fla. Stat. This clearly does not rise to the level of a constitutional impediment, i.e., that one statute conflicts with another, or even more particularly, that a specific and later statute that adopts a particular program conflicts with an earlier statement of legislative intent [assuming arguendo that there is even such a conflict].

To support their argument, the Petitioners argued to the Circuit Judge and the First District Court of Appeal that they relied on *Sharer v. Hotel Corporation of America,* 144 So. 2d 813 (Fla. 1962). Their reliance on *Sharer* is misplaced for their interpretation of it was absolutely backwards as the District Court of Appeal pointed out. *Fla. Assoc. of Counties v. Dept. of Admin.,* supra, at 645. *Sharer* was a workers' compensation case in which the Supreme Court was called upon to compare a specific enactment with a statement of legislative intent. The statement of legislative intent related to the creation of the Special Disability Fund. The Fund was designed to encourage an employer to hire the handicapped by relieving him of the financial responsibility of having hired the physically handicapped by reimbursing such employer for the excess compensation payable on account of the effect of a pre-existing condition upon a subsequent injury at work. The statement of legislative intent, however, was that the Special Disability Fund was not intended to create additional benefits for employees. The court observed that such a statement of legislative intent was impossible because the Fund only operated to reimburse employers for compensation payable over and above that which was attributable to the employer's own injury. Therefore, in order to give effect to the program enacted by the Legislature, the court had to disregard

the statement of legislative intent as being inoperable. The holding of *Sharer* is that if a statement of legislative intent conflicts with a specific enactment of the Legislature establishing a program, in resolving the conflict in statutory construction, the court will give implementation to the program enacted by the Legislature and disregard the statement of legislative intent. It is what they do that counts, not what they said they were going to do.

In summary, the Petitioners to not contend that the funding was inadequate, but rather they quarrel with the method of funding which they say was not on a sound actuarial basis. The term "sound actuarial basis" is a vague one and subject to dispute among expert witnesses as to its meaning.

In the present case, there was at best a dispute among expert witnesses as to whether the method of funding was on a sound actuarial basis. The idea advanced by the Petitioners that an act of the Legislature should be declared invalid based upon a dispute between expert witnesses as to whether the method of funding is on a sound actuarial basis hardly constitutes reversible error. The trial court resolved that conflict in the experts' opinions by finding that the funding was on a sound actuarial basis. This finding is supported by the evidence.

CONCLUSION

The finding of the Circuit Court (affirmed by the First District Court of Appeal) that Ch. 88-238, Laws of Fla., is constitutionally valid, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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