IN THE SUPREME COURT
STATE OF FLORIDA

LAWTON CHILES AND STATE OF FLORIDA, ET AL.,
Appellants/Petitioners,

v.

UNITED FACULTY OF FLORIDA, FTP-NEA, ET AL.,
Appellees/Respondent,
_____/

LAWTON CHILES AND STATE OF FLORIDA,
Appellants/Petitioners,

vs.

Case Number: 81,252

FLORIDA PUBLIC EMPLOYEES COUNCIL 79, AFSCME, JEANNETTE WYNN, JOHN POWELL, TED PYE, AND ALL EMPLOYEES OF THE STATE OF FLORIDA SIMILARLY SITUATED,
Appellees/Respondents,

and

FLORIDA POLICE BENEVOLENT ASSOCIATION,
Appellee/Respondent.
_____/

LAWTON CHILES AND STATE OF FLORIDA,
Appellants/Petitioners,

vs.

FEDERATION OF PHYSICIANS AND DENTISTS, NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES,
Appellee/Respondent.
_____/

APPELLEES' ANSWER BRIEF

On Certified Appeal from the Florida First District Court of Appeal of an Order from the Second Judicial Circuit in and for Leon County, Florida

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I.
STATEMENT OF THE CASE AND FACTS

The Appellees/Respondents (hereinafter referred to as the "Employees") accept the statement of the case and facts contained in the Appellant's/Petitioner's[1] Initial Brief. However, by agreeing that there existed a shortfall in projected revenues, the Employees do not concede that the method selected by the State to deal with this shortfall constitutes a compelling state interest. In fact, the trial court made a specific finding to the contrary that "[n]o compelling state interest has been demonstrated to justify the action which would support such an impairment of contract."[2] (R.p. 164).

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[1] *The Appellants/Petitioners will be referred to as the "State."*

[2] *The trial court was correct that the State demonstrated "no compelling state interest" justifying its impairment of the collective bargaining agreements. The State, in responding to the motions for summary judgment, failed to raise any factual predicate to support any other finding by the trial court.*

"[W]here a motion for summary judgment is supported by evidence which reveals no genuine issues of material fact, it is not sufficient for the opposing party merely to assert that an issue does exist." NOAK v. B.L. Watters, Inc., *410 So.2d 1375, 1376 (Fla. 5th DCA 1972).*

II.
SUMMARY OF THE ARGUMENT

The trial court correctly determined that Article I, Sections 6 and 10 of the Florida Constitution limit the power of the legislature to cancel through a subsequent legislative act pay raises provided in a duly ratified and funded collective bargaining agreement. Once the legislature exercises its exclusive appropriations power by funding a collective bargaining agreement, a binding contract arises which is subject to the explicit limitations on legislative power set forth in Article I, Sections 6 and 10 of the Florida Constitution as interpreted and applied through the decisions of this Court.

The legislative act challenged in this case effectively repealed the wage provision of the Employees' collective bargaining agreements. A drastic impairment of this nature of a contract to which the State is itself a party must be reasonable and necessary to serve an important public purpose. The legislation challenged in this case is neither the most reasonable nor a necessary means of accomplishing the State's apparent purpose of balancing the budget. The State had available numerous other alternatives to accomplish that purpose, including shifting of funds from other programs and raising taxes, which would not have impaired the Employees' contracts. Having failed to prove that its action was both reasonable and necessary, the challenged legislation must be declared invalid under Article I, Section 10.

The legislature's exclusive power over appropriations is likewise limited by the rights guaranteed to public employees under Article I, Section 6 of the Florida Constitution. Unlike the situation presented in this Court's recent decision in State of Florida v. Florida Police Benevolent Association, Inc., 18 F.L.W. S1 (Fla. 1992), there was a valid exercise of the

appropriations power in this case which created a binding contract on the subject of wages. Under this Court's decision in City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487 (Fla. 1982), the elimination of such a fundamental aspect of collective bargaining as an agreement on wages constitutes a clear abridgement of the constitutional right to collectively bargain. Because the State has failed to establish that such drastic action was justified by a compelling state interest, the challenged legislative acts are also invalid under Article I, Section 6.

The savings clauses in the Employees' collective bargaining agreements do not assist the Court in the resolution of this case because they are procedural, not substantive, in nature. The purpose of these provisions is not to establish or explain rights, but merely to preserve the remaining provisions of the agreements should any provisions be rendered invalid. Because the issue of invalidity is the very matter before this Court for decision, the savings clauses themselves provide no assistance to the Court in resolving that issue. Moreover, as this Court held in Florida PBA, such clauses cannot constitute a waiver of the right to collectively bargain.

The requirements of the doctrine of separation of powers noted by this Court in Florida PBA were satisfied in this case by the initial legislative appropriation funding the collective bargaining agreements. Any reasonable construction of the Constitution giving appropriate weight to each of its provisions requires that further legislative enactments purporting to alter the original appropriation are subject to the limitations on legislative power imposed by Article I, Sections 6 and 10. Because the trial court correctly found that the State

failed to prove that its subsequent legislation was supported by a compelling state interest, its judgment should be affirmed.

III.
ARGUMENT

A.

ARTICLE I, SECTIONS 6 AND 10 OF THE FLORIDA CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, LIMIT THE ABILITY OF THE LEGISLATURE TO SUBSEQUENTLY REDUCE AN APPROPRIATION WHICH IT HAD PREVIOUSLY ENACTED TO FUND A COLLECTIVE BARGAINING AGREEMENT.

This is the case this Court anticipated in its decision in State of Florida v. Florida Police Benevolent Association. Inc., — So.2d —, 18 F.L.W. S1 (Fla. 1992). There, the Court held:

> Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced.
>
> * * * * *
>
> Footnote 12: We do not pass on whether the legislature could subsequently reduce an appropriation which it had previously enacted to fund a collective bargaining agreement.

Id. at S3.

This case concerns legislative action clearly prohibited by Article I, Section 6 and Article I, Section 10 of the Florida Constitution as interpreted and applied by the decisions of this Court. The facts of the instant case are not in dispute and fit squarely within the circumstances anticipated by this Court in the Florida PBA decision. That is, in May, 1991, the Florida legislature exercised its exclusive appropriation prerogative and appropriated monies sufficient to fund the three percent pay raises which resulted from collective bargaining. [See Chapter 91-272, Section 5, Laws of Florida (1991-92 Appropriations Act)

(R.pp. 108-110)]. The collective bargaining agreements became effective July 1, 1991, although the wage increase appropriated by the legislature in May, 1991, was not scheduled to take effect until January 1, 1992, mid-way through the contractual year. With the funding having been thus appropriated, all requisite steps to the establishment of binding contractual understandings were completed.

Seven months later the Florida legislature passed a new law canceling the employee pay raises provided in the collective bargaining agreements. (See Chapter 92-5, Section 1, Laws of Florida). This action was undertaken without notice to, negotiation with or the consent of the unions which are the duly authorized representatives of the Employees whose wages, hours and terms and conditions of employment were established by the collective bargaining contracts.

Such action constitutes an impairment of contract in violation of Article I, Section 10 of the Constitution of the State of Florida and the United States Constitution[3] as well as a denial of the right to collectively bargain guaranteed by Article I, Section 6 of the Florida Constitution.

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[3] *Article I, Section 10 of the Constitution of the State of Florida provides:*

> *Prohibited LAWS. - No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.*

Article I, Section 10 of the United States Constitution provides in pertinent part:

> *No state shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Although the trial court decided the impairment issue solely on the basis of the Florida Constitution, for purposes of this case the analysis under the United States Constitution is the same and provides an additional basis for this Court to uphold the judgment of the trial court.

1.

IMPAIRMENT OF OBLIGATION OF CONTRACT

The gravamen of the State's argument is the legislature retains continuing and unlimited power to alter the appropriations subtending collective bargaining agreements. The State's sole basis for this argument is the concept of separation of powers embodied within Article II, Section 3 of the Constitution of Florida, as recognized in this Court's recent decision in Florida PBA, supra. However, the adoption of the State's argument would require this Court to read out of the Constitution Article I, Section 10 and to ignore its federal constitutional counterpart.

This Court has long recognized Article I, Section 10 as creating a "wall of absolute prohibition" and "has generally prohibited all forms of contract impairment." State, Department of Transportation v. Chadbourne, 382 So.2d 293,297 (Fla. 1980); Pomponio v. The Claridge of Pompano Condominium. Inc., 378 So.2d 774 (Fla. 1979).

In Pomponio, this Court analyzed state and federal decisions interpreting impairment of contract clauses and concluded that the state impairment clause should be interpreted in a similar fashion as its federal counterpart. To determine the degree of impairment permitted, this Court stated:

> This becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally intolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the party's bargain to a degree greater than is necessary to achieve that objective.

Id. at 780.

In applying this test, the courts must determine whether the State employed the least restrictive means possible in accomplishing the public policy objective at issue. Id. at 782.

Decisions interpreting the federal contract impairment clause employ a similar analysis:

> [A]n enactment cannot be considered "necessary" if the legislature "without modifying the covenant at all . . . could have adopted alternative means of achieving their . . . goals" because "a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

United States Trust Company v. New Jersey, 431 U.S. 1, 27-31, 97 S.Ct. 1505, 1520-22, 52 L.Ed.2d 92 (1977).

A further distinction exists between contracts among and between private parties and contracts to which the state itself is a party. As to the former, the test is whether there is a rational basis for the impairment. However, as to the latter, the test is more stringent:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. (Footnotes omitted). (Emphasis added)

431 U.S. at 25-26. Thus, a state may not significantly impair its own contracts where there are other alternatives available for achieving the desired public purpose.

As the trial court concluded, application of these principles to the legislature's reduction of salaries protected by collective bargaining agreements results in a finding that such action drastically impairs the obligation of the bargained contracts. Such is the holding of a number of other courts, as well, under similar circumstances.

In Sonoma County Organization of Public Employees v. County of Sonoma, 591 P.2d 1, 7 (Ca. 1979), the California Supreme Court, responding to the State's claim that the elimination of wage increases for one year was not a substantial impairment of a collective bargaining agreement, held:

> We reject this assertion. An increase in wages is frequently the very heart of an employment contract; other provisions, including those relating to fringe benefits, are inextricably interwoven with those relating to wages, since employees may surrender various employment benefits in exchange for a wage increase. And, unlike the situation in the cases cited above, in which contractual benefits were either postponed (Blaisdell) or enforcement remedies were altered (El Paso), in the present case the right of petitioners to a wage increase for the 1978-1979 fiscal year is irretrievably lost. Thus, here, as in Allied Structural Steel, there was a "severe, permanent and immediate change" in petitioner's rights under the contract...

Id. See, also, Oak-Cliff Golman Banking Company, 207 NLRB No. 1063, 85 LRRM 1035 (1973).

So, too, in Association of Surrogates and Supreme Court Reporters within the City of New York v. State of New York, 940 F.2d 766 (2d Cir. 1991), was a similar impairment finding made under the federal constitution when the State of New York passed a "lag-payroll" law which merely deferred the wages of certain court employees for a two-week period contrary to the express provisions of a collective bargaining agreement. The Court

struck down the statute stating that it violated Article I, Section 10 of the United States Constitution.

In rejecting the argument advanced by the State of New York that the lag-payroll legislation was reasonably necessary to help finance a much needed expansion of the judicial system, the court noted that there were other alternatives available to the state which would not have required the impairment of the collective bargaining agreements:

> It cannot be said that a lag-payroll for only judicial employees was essential to finance the expansion of the court system. The state could have shifted the $7,000,000.00 from another governmental program, or it could have raised taxes. We recognize that neither alternative may have been popular among politician-legislators, but that is precisely the reason the contract clause exists - as a "constitutional check on state legislation." Spannaus, 438 U.S. at 241, 98 S.Ct. at 2720. In fact, the lag-payroll scheme smacks of the political expediency that The United States Trust Co. warned of: "A governmental entity can always find a use for extra money, especially when *taxes* do not have to be raised." 431 U.S. at 26, 97 S.Ct. at 1519. Clearly the New York legislators and governor would prefer not to raise the taxes of their constituents: by placing the cost of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, they ruffle only a few feathers and fight the "exploding drug crisis" without raising taxes or cutting other governmental programs. But the only people paying for the new courts are the few employees of the judicial branch who are subjected to the lag-payroll. The contract clause bars such expedient post hoc changes in contractual obligations, for "a state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." United States Trust Co., 431 U.S. at 30-31, 97 S.Ct. at 1521-1522. (Emphasis added),

Id. at 773.

In the present case, the State, having funded the collective bargaining agreements, could not constitutionally impair the obligations of its contracts with its Employees simply

because it chose not to select another available, but perhaps more unpopular, choice of funding alternatives to deal with the revenue shortfall. Because the State has not shown that other alternatives were not available, it has not carried its burden of justifying the drastic impairment of the Employees' contracts.

Stated simply, the facts subtending the instant proceedings establish that (1) there was in existence a valid contract; (2) the legislature specifically appropriated monies for the wage rates contained therein; and, (3) there was no compelling state interest warranting any modification to the contracts, While this Court held in Florida PBA that until such time as funds are specifically appropriated for contractual agreements reached there is not an enforceable collective bargaining agreement, this case is different because there was a specific appropriation to fully fund the wage rates established by the collective bargaining agreements. Therefore, a different result obtains. In this case, there is an enforceable contract for which an appropriation has been lawfully made.[4]

The State seeks to justify its impairment by reliance upon its exclusive authority to appropriate funds. The doctrine of separation of powers is not, however, a license to ignore contractual obligations. It must be read in conjunction with Article I, Section 10 which is an explicit constitutional limitation on legislative authority no matter its source. "Any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution." Pinellas County v. Banks, 154 Fl. 582, 19 So.2d 1, 3 (Fla.

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[4] *By the same reasoning, the other cases relied upon by the State, Florida Department of Health and Rehabilitative Services v. Southern Energy Ltd., 493 So.2d 1082 (Fla. 1st DCA 1986) and United Faculty of Florida v. Board of Regents, 365 So.2d 1073 (Fla. 1st DCA 1979), are distinguishable because they involved the initial appropriations decision prior to the formation of a binding contract for the applicable fiscal year.*

1944); accord, State v. Leavins, 559 So.2d 1326, 1331 (Fla. 1st DCA 1992). Here, the action of the legislature in reducing a previously enacted appropriation that provided the three per cent pay raise to which the parties had agreed, unquestionably detracted from the value of the labor agreement and was, therefore, a constitutionally impermissible impairment of that agreement.

Reduced to its essence, the State's argument is that collective bargaining agreements are different from other contracts. However, once the legislature has exercised its appropriations authority by funding them, the doctrine of separation of powers provides no basis for treating collective bargaining agreements differently than other contracts.

2.
THE RIGHT TO BARGAIN

In Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), this Court determined that Article I, Section 6, of the Constitution of the State of Florida gives public employees the same collective bargaining rights as are enjoyed by private employees.

In 1972 in Dade County Classroom Teachers Association, Inc. v. Legislature, 269 So.2d 684 (Fla. 1972), this Court reiterated the entitlement of public employees to bargain collectively with their employer stating:

> [E]xcept for the right to strike, our State Constitution guarantees to public employees the same rights of collective bargaining as are granted to private employees.

Id. at 685.

Those in the private sector may bargain over wages, hours, terms and conditions of employment. The agreements reached on these subjects may not later be ignored. The National Labor Relations Board in Oak-Cliff Golman Baking Company, 207 NLRB 1063, 1064, 85 LRRM 1035, 1036 (1973), said:

> **[A] clear repudiation of a contract's wage provision is not a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship.** (Emphasis added).

Although this Court subjected the monetary terms of an agreement to the appropriations power of the legislature in Florida PBA, it nonetheless retained the private sector model of labor relations as the basis for defining the scope of collective bargaining rights for public employees in Florida.

In City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487 (Fla. 1981), this Court considered the legislative restriction on bargaining that was then contained in Section 447.309(5), Florida Statutes (1991). That restriction referenced retirement benefits. The Court characterized the law as "barring negotiations on retirement matters," which it said, "was to eliminate a significant facet of the collective bargaining process." Id. at 489. The Court concluded that such a restriction was an improper "abridgement of the right to collectively bargain." Id.

Of more immediate importance to affected Employees than retirement benefits is the pay to which they are entitled by virtue of their work. Retirement benefits are a "significant facet of the collective bargaining process," as this Court stated, but take-home pay is central to employment. Take-home pay is the meat and potatoes of the employment contract.

The pay entitlement of public employees cannot be repudiated based upon the unfettered exercise of the legislature's discretion without seriously eroding the constitutional right of public employees to engage in collective bargaining. If a statute that virtually prohibits bargaining over retirement is unconstitutional, surely legislative action amending a prior appropriation act which forms the very essence of the contracts between the State and its Employees is an unconstitutional abridgement of the right of public employees to engage in collective bargaining.

As this **Court** said in City of Tallahassee, "Article I, Section 6, permits [statutory] regulation of the bargaining process but not the abridgement thereof." 410 So.2d at 490. Should this **Court** sanction the legislature's cancellation of the wage increases based on the doctrine of separation of powers, collective bargaining will have been relegated to nothing more meaningful than an empty written promise.

The State concedes that public employees have a "fundamental right" to collective bargaining, but cites the Florida PBA case to support the contention that the interest in the doctrine of separation of powers permits the legislature to enact a law that reduces a previous appropriation funding collective bargaining agreements. The Employees submit that this Court did not intend that the rights of public employees under Article I, Section 6 are to be ignored and forever obeisant to any legislative action. Traditionally, the rules of construction require a harmonization of constitutional provisions so that each may be given effect. Miami Shores Village v. Cowart, 108 So.2d 468 (Fla. 1958). While the doctrine of the separation of powers may require the labor agreement to be subject to the appropriation power of the legislative body, once the legislature has acted, it has completed the agreement. Just as the

executive branch cannot renege once it has executed the agreement, neither should the legislature be permitted to reduce an appropriation funding the agreement after acting in a quasi-judicial capacity under Section 447.403, Florida Statutes (1991), to resolve a statutory impasse over the monetary entitlement of affected public employees, appropriating the funding for the agreements.[5] Such a reading gives effect to both constitutional provisions, and is consistent with the admonishment that the legislative body should take no action thereafter to impair a contract.

The State suggests that the decision of this Court in Chiles v. Children A. B. C. D, E. and F, 589 So.2d 260 (Fla. 1991), supports the contention that the legislature has the power to appropriate and that such power cannot be delegated. The Employees do not disagree. The power of appropriation, however, must be read and harmonized in conjunction with other constitutional provisions that must also be given appropriate weight.

The legislative power over appropriations is not unfettered. Just as the public employees' right to engage in collective bargaining is subject to an inherent limitation, so too must the legislative power over appropriations be subjected to the constraints of Article I, Section 10 and weighed against Article I, Section 6.

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[5] *It should be noted that had the pay increase not been made part of the Employees' collective bargaining agreements, it may arguably have been afforded greater protection than under the agreements since legislatively imposed benefits are statutorily mandated to "take effect as of the date of such legislative body's action for the remainder of the first fiscal year which was the subject of negotiations . . ." [Section 447.403(4)(e), Fla. Stat. (1991]. It is totally illogical to afford statutorily mandated benefits greater protection than those protected by contract.*

B.

THE SAVINGS CLAUSE IS NOT AN AGREEMENT TO WAIVE COLLECTIVE BARGAINING OVER THE ELIMINATION OF THE SALARY INCREASES.

The *State* argues that the savings clauses contained in the various collective bargaining agreements place the parties on notice that subsequent legislative alteration of the terms of contracts was a possibility before, during and after entry into the agreements (Appellants' **Brief p. 24)** and thus, the State can alter the financial terms of the agreements at its discretion. Such a construction of the savings clauses is clearly unreasonable. This **same** issue was raised by the State before the trial court and rejected:

> The savings clauses in the collective bargaining agreements between Plaintiffs and Defendants are remedial and not substantive in nature. None specifically references a contingency where the legislative body refuses to fund an agreement or where, as here, the legislative body, after funding the agreement, decides to rescind the raise provisions contained in the agreement. Under the circumstances, the savings clauses of the agreements neither anticipate a rescission nor form a basis to find a mutual agreement for rescission. There is no other **basis** in **fact** or law by which the savings clauses may defeat the claims of the Plaintiffs.

(R.p. 166).

The trial court's reasoning is sound. The very purpose of a savings clause is to preserve the balance of an agreement if a single portion **of** it should be deemed invalid or unenforceable because of **a** provision of the Constitution or valid statute. Thus, the savings clauses provide that the invalid provision would **be** "divisible" or "severable" from the agreement and the remainder of the agreement will continue in effect. See, Corbin on Contracts, §694.4; See. also, Local Number **234.** etc. v. Henley & Beckwith. Inc., 66 So.2d

818, 821 (Fla. 1953) (labor agreement provision must yield to a provision of the Constitution or a valid statute).

However, the facts demonstrate that the savings clauses have no application in this case. As this **Court** noted in Florida PBA, such savings clauses cannot be used as an excuse not to engage in collective bargaining. 18 F.L.W. **at** S5, n.10. The State concedes that cancellation of the pay raises was never subjected to the bargaining process. Moreover, whether the contractual provisions granting pay raises have been rendered invalid by subsequently enacted legislation is the very issue presented in this case. Because the State's argument assumes the invalidity of these provisions to begin with, its reasoning is circular and therefore invalid. Clearly, it cannot rely on these clauses to support its action.

IV.
CONCLUSION

This case presents the **Court** with a very narrow issue: how many bites at the apple does the legislature get when exercising its appropriations power in the context of funding collective bargaining agreements? The State asserts that it should have unlimited bites at the apple elevating the legislative appropriations power to a position of preeminence over other constitutional guarantees. The trial court correctly perceived that the legislature must be limited to a single bite lest the fundamental rights guaranteed by Article I, Sections 6 and 10 of the Constitution be rendered meaningless. Accordingly, this Court should affirm the judgment of the trial court.

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CERTIFICATE OF SERVIC

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by Hand Delivery on this 23rd day of February, 1993, to: Kimberly J. Tucker, Esquire, Assistant Attorney General, Department of Legal Affairs, Suite LL04, The Capitol, Tallahassee, Florida 32399-1050.

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