087 O.A. 3-2-93

IN THE SUPREME COURT OF FLORIDA

LAWTON CHILES and STATE OF FLORIDA, et al.

Appellants/Petitioners,

vs. Case No. 81,252

UNITED FACULTY OF FLORIDA, FTP-NEA, et al.

Appellees/Respondents.

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APPELLANTS' INITIAL BRIEF

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

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STATEMENT OF THE CASE AND OF THE FACTS

This case was filed in the trial court by several unions representing various public employee collective bargaining units. (R: 1-5. A: 1; 2). The unions challenge the constitutionality of legislative enactments, made during the appropriations process, which delayed and, subsequently, rescinded a three percent pay raise for state career service employees. (R: 1-5. A: 1; 2).

Initially, career service employees had been awarded the raise by the Legislature through inclusion of a three percent pay raise in the 1991-92 Appropriations Act. The raise was awarded as a consequence of impasse resolution by the Legislature, in accordance with Chapter 447, Florida Statutes. The raise was delayed and, ultimately, eliminated by the Legislature during reconsideration of the 1991-92 Appropriations Act, as a consequence of a severe revenue shortfall.

The unions contend that the Florida Legislature violated their right to collectively bargain, under Article I, section 6 of the Florida Constitution (R: 67-74. A: 1, pp. 6-7; 2, p. 3-4; 8, pp. 11-18) and impaired their right to contract under the federal constitution and Article I, section 10 of the Florida Constitution (R: 58-65. A: 1, pp. 4-6; 2, P. 3; 8, pp. 2-9). They also assert that their Executive Branch employers breached the contracts by failing to pay the three percent raise, despite the absence of a lawful appropriation. The employees brought suit against their respective public employers, rather than the Florida Legislature. (R: 1-5. A:1; 2).

The trial court entered an order "granting summary judgment" to the unions (R: 160-169. A: 14). The trial court held that, although the Legislature was not obligated initially to fully fund the collective bargaining agreements between the public employees and their respective Executive Branch employers, once the Legislature resolved the bargaining impasse over wages by awarding a raise in the Appropriations Act, the Legislature could not rescind that raise without going back to the bargaining table (R: 164, 166. A: **14, pp. 5,** 7).

The trial court determined that the subsequent legislative enactments which delayed and, later, eliminated the 3% pay raise violated the right to collectively bargain under Article I, section 6 (R: 164, **167-168.** A: **14, pp.** 5, 8-9) and constituted an impairment of contract under Article I, section 10 of the Florida Constitution (R: 164, 165, **168.** A: **5, 6, 9).** The trial court did not rule on any of the unions' theories of violation of federal constitutional rights or breach of contract. (R: **167.** A: **14,** p. 8).

The parties concur that there is no dispute of material fact in this case, only a dispute of law. (R: **57, 80, 137.** A: **8, p.** 1**; 11, p. 1; 12, p.** 2).

SPECIFIC FACTUAL BACKGROUND

The Plaintiffs/Appellees in these consolidated (R: 55-56. A: 6; 7) cases are unions representing public employees of various bargaining units employed by the State of Florida.[1] Each of the unions entered collective bargaining agreements with the Defendants/Appellants.[2] (R: 137. A: 12, p. 2). Plaintiffs had collective bargaining agreements with their respective public employers, which were in effect at all times relevant to this cause. (R: 163. A: 14, p. 3).

In 1991, the collective bargaining agreements between AFSCME, FPBA, UFF, and FPD contained a reopener clause on the issue of wages. (R: 80-81; 163. A: 11, pp. 1-2; 14, p. 3) The unions and public employers were unable to reach an agreement at the bargaining table on the issue of wage increases for the FY 1991-92 budget year. Accordingly, the issue was presented to the

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[1] Florida Public Employees Council 79, AFSCME (AFSCME) is a labor organization that represents career service employees of the State of Florida. United Faculty of Florida, FTP-NEA (UFF) is an employee organization whose membership consists of faculty, graduate assistants, administrative and other professional employees employed by the university system of the State of Florida. Federation of Physicians and Dentists, National Union of Hospital and Healthcare Employees (the Federation) is an employee organization representing the Selected Exempt Service Physicians unit. The Police Benevolent Association (PBA) is an employee organization representing the State law enforcement officers and security services bargaining (correctional officers) units.

[2] The collective bargaining agreements entered by AFSCME, PBA, and the Federation were with the State of Florida, Defendant Lawton Chiles, as Governor of the State of Florida, is deemed the public employer of these unit employees pursuant to Section 447.203(2). The collective bargaining agreements entered by UFF were with the Florida Board of Regents, which is deemed to be the public employer of public employees with the State university system. (A: 1, pp. 9-21; 2, pp. 6-30; 5, pp. 3-8).

Legislature for impasse resolution, pursuant to Section 447.403(4)(d), Fla.Stat.[3] (R: 81, 163. A: 11, p. 2; 12, p. 3; 14, p. 3).

In May, 1991, the Legislature, acting as the legislative body for the designated public employers, BOR and the Governor, resolved the impasse on the wage issue by appropriating wage increases sufficient to fund the three percent pay raise recommended by the Governor and BOR at impasse. See Chapter 91-272, Section 5, Laws of Florida (1991-92 Appropriations Act)(R: 139, 164. A: 12, p. 4; 14, p. 3-4).

The money to fund these wage increases was appropriated by the Legislature in the 1991-92 Appropriations Act, Chapter 91-272, Section 5, Laws of Florida. The raise was to become effective on January 1, 1992, for all Career Service employees, including those represented by Appellees. (R: 139. A: 12, p. 4). As required by Section 447.403(4)(e), the collective bargaining agreements between the parties were amended to include three percent pay raises for unit employees commencing on January 1, 1992. (R: 164. A: 14, p. 4).

As a consequence of the recession, sales tax collections fell far short of projected levels in the summer and fall of 1991, creating a fiscal crisis in state government. An estimated $621.7 million general revenue shortfall was determined to exist

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[3] Pursuant to Section 447.403, F.S., unresolved issues shall be submitted to the legislative body for resolution. Section 447.403(4)(d), F.S., states that " . . . the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues . . ."

in the fiscal 1991-92 state budget. *Chiles v. Children* **A, B, C, D, E,** *and* ***F***, 589 So.2d 260, 262 (Fla. 1991).

In September 1991, the Governor directed all "state agencies," to prepare revised financial plans that would reduce their current operating budgets. On October 22, 1991, pursuant to Section 216.221(2), Florida Statutes (1989),[4] the Administration Commission[5] adopted the Governor's recommendations reducing the budgets established by the 1991 Appropriations Act. ***Chiles v. Children*** **A, B, C, D, E, and F, 589** So.2d, at 262.

However, on October 29, 1991, the Florida Supreme Court declared that Section 216.221(2), Fla. Stat. (1989), was unconstitutional, as an impermissible delegation of legislative authority to the Executive Branch in violation of the doctrine of Separation of Powers. As a consequence, all of the reductions to the Appropriations Act made by the Administration Commission were nullified.

The Legislature was required to reconvene in special session to address the fiscal crisis facing the state. During a special session of the Legislature, in December 1991, the

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[4] Section 216.221(2) provides in relevant part that:

> If, in the opinion of the Governor, after consultation with the Revenue Estimating Conference, a deficit will occur in the General Revenue Fund, he shall so certify to the commission, The commission may, by affirmative action, reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund. . .

[5] The Administration Commission is created pursuant to section 14.202, Florida Statutes, as part of the Executive Office of the Governor and is composed of the Governor and Cabinet.

Legislature passed Chapter 91-428, Section 10, Laws of Florida, delaying the effective date of the raise until February 15, 1992.[6] (R: 139, 164. A: 12, p. 4; 14, p. 4).

Prior to the effective date of the raises, however, the Legislature met in regular session to again address the fiscal crisis in Florida as the magnitude of the revenue shortfall became more apparent. (R: 139, 164. A: 12, p. 4; 14, p. 4). Chapter 92-5, Section 1, Laws of Florida, was passed, which totally eliminated the wage increases.[7] (R: 139. A: 12, p. 4).

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[6] Specifically, Chapter 91-428, Section 10, Laws of Florida, provides that:

> Notwithstanding the provisions of any other law, the state employee pay raises authorized in chapter 91-272, Laws of Florida, excluding pay raises for employees in the Professional health care unit, shall be reduced by $8,000,000.00 in general revenue and become effective February 15, 1992. Pay raises for employees in the professional health care unit were authorized by the 1991 Legislature to become effective December 1, 1991.

[7] SECTION 1. The moneys contained herein include amendments to 1991-92 appropriations, and other appropriations in prior fiscal years, and appropriates moneys from the named funds for the 1991-92 fiscal year to the state agency indicated.

ADMINISTERED FUNDS

3 LUMP SUM
SALARY INCREASES
FROM GENERAL REVENUE FUND . . . . . -27,987,767
FROM TRUST FUNDS . . . . . -16,076,640

The State employee 3% pay raises, effective February 15, 1992, as authorized in Chapter 91-272, Laws of Florida, and amended in Chapter 91-428, Laws of Florida, are hereby eliminated.

Through the reductions contained in Chapters 91-428 and 92-5, the Legislature reduced 1991-92 appropriations by $705.7 million in General Revenue. Of that sum, $35.4 million was attributable to General Revenue reductions in the appropriation for state employee raises,

The legislative action taken to enact Chapters 91-428 and 92-5, Laws of Florida, delaying and then eliminating state employee pay raises, was taken without submitting the question of wage increases to the unions and Executive Branch employers for further collective bargaining and was done without the consent of the unions. (R: 164. A: 14, p. 4). Consequently, the unions representing some of the affected public employees filed suit against their respective public employers challenging the constitutionality of Chapters 91-428 and 92-5, Laws of Florida, as each relates to State employee pay raises, and seeking declaratory and injunctive relief. Two such actions were consolidated into the instant cause. (R: 55-56).

The unions asked that the trial court declare the reduction of the appropriation necessary to fund the pay raises unconstitutional. (R: 1-5, 57-79. A: 1; 2; 8; 11). Further, the unions sought an order compelling the Executive Branch public employers to pay such raises, despite the absence of a lawful appropriation.

The unions asserted in the trial court that underfunding the collective bargaining agreement, by the Legislature, constitutes an impairment of contract, prohibited by the U.S. Constitution and Article I, section 10 of the Florida Constitution; and that elimination of the pay raises abridges public employees' right to collectively bargain, guaranteed by

Article I, section 6 of the Florida Constitution. Further, The unions asserted that the failure of Executive Branch public employers to pay the raises in accordance with the terms of their respective collective bargaining agreements, despite the absence of a lawful appropriation, constitutes a breach of contract and a denial of the right to collectively bargain. (R: 4-5. A: 1, pp. 6-7; 2, pp. 4-5).

Appellants submitted to the trial court that the Legislature's failure to appropriate funds necessary to provide bargaining unit employees a three percent (3%) pay raise does not constitute an unconstitutional impairment of contract, as the contract entered by the parties was negotiated within the existing legal framework.[8] (A: 3, pp. 8-9; 4). Further, the underfunding was within the contemplation of the parties, as indicated by the Savings Clause contained in each of the collective bargaining agreements; thus, no breach has occurred. (R: 21. A: 3, p. 9; 4, p. 11). Additionally, the public employers have no power to pay the raises in the absence of a lawful appropriation by the Legislature. (R: 22. A: 3, p. 10; 4, p. 11). Finally, neither the failure to fund by the Legislature nor the failure to pay by the public employers constitutes a violation of Article I, section 6, of the Florida Constitution. (R: 146-152, 156. A: 12, p. 10-15, 21).

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[8] The Legislature explicitly reserved the right to appropriate "less than the amount requested" to fund a collective bargaining agreement, when Section 447.309(2), F.S., was enacted. AFSCME challenged the constitutionality of Section 447.309(2), Fla. Stat., in the trial court. (AFSCME Memorandum in support of Plaintiff's Summary Judgment motion, pp. 2, 3, 7, 8, 12).

A hearing was held on September 29, 1992, on the unions' motions for summary judgment. After argument was heard, the trial court ruled in favor of the unions, specifically finding that the Legislature's actions in taking a "second bite at the apple" on the question of pay raises, without submitting the question for renegotiation, was not permissible and violated Article I, sections 6 and 10 of the Florida Constitution, (R: 165, A: 14, p. 6).

On October 8, 1992, the trial court entered an "Order Granting Plaintiffs' Motion for Summary Judgment" and held that the deferral and rescission of the pay raises was a substantial impairment of the bargaining contracts between the parties. (R: 164, 165-166, 168. A: 14, pp. 5, 6-7, 9). Further, the trial court stated that "No compelling state interest has been demonstrated to justify the action taken which would support such an impairment of contract." (R: 164. A: 14, p. 5). Accordingly, the trial court declared that Chapter 91-428, Section 10 and 92-5, Section 1, Laws of Florida, violate Article I, sections 6 and 10, of the Florida Constitution and held that judgment should be entered for the unions on these claims. (R: 164, 168-169).

A notice of appeal of this order was timely filed on November 6, 1992. Jurisdiction over this appeal was accepted by the district court, on December 23, 1992, pursuant to Fla.R.App.P. 9.130(a)(3)(C)(iv).

On January 19, 1993, Appellees filed a suggestion for certification of the final judgment of the trial court for review

by the Florida Supreme Court. On February 9, 1993, the First District Court of Appeal certified this case for resolution the Florida Supreme Court, pursuant to Fla.R.App.P. 9.125, stating that "the issues presented in this appeal are of great public importance and will have a great effect on the proper administration of justice in this state." On February 16, 1993, this Court accepted jurisdiction over this appeal and scheduled it for expedited resolution.

SUMMARY OF THE ARGUMENT

The question posed by the case at bar is whether the *reduction* of an appropriation by the Legislature, to address a fiscal crisis created by a revenue shortfall, violates the right to collectively bargain under Article I, section 6, Fla. Const., or constitutes an impairment of contract under Article I, section 10, Fla. Const.

The doctrine of Separation of Powers vests the Florida Legislature with exclusive authority over appropriations. The right of public employees to collectively bargain does not abrogate or supersede the Legislature's exclusive power over appropriations decisions.

The enforcement of the monetary terms of a collective bargaining agreement are subject to the appropriations power of the Legislature. The power to appropriate state funds is legislative **and** is to be exercised only through duly enacted statutes. Likewise, at all times relevant to the instant cause, the power to *reduce* appropriations, like any other lawmaking, **was** exclusively a legislative function.[9] **The** exercise of legislative power over appropriations is not an abridgement of the right to bargain, but an inherent limitation on that right.

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[9] The amendment of the Florida Constitution to include Article IV, section 13, in November, 1992, permitting the Governor and Cabinet to establish all necessary reductions in the state budget, in the event of revenue shortfalls, has constitutionally altered the Legislature's function with respect to determining reductions in the Appropriations Act in order to comply with the provisions of Article VII, Section 1(d), Fla. Const. In such circumstances, in the future, the Governor and Cabinet are empowered to make these traditionally legislative choices.

The trial court's order is in error in three significant respects: it fails to properly apply the doctrine of Separation of Powers; it imposes a requirement to renegotiate the terms of the collective bargaining agreement on the Legislature; and it fails to acknowledge the plain meaning of the Savings Clause contained in each of the collective bargaining agreements.

First, the trial court erred in holding that the Legislature was required to demonstrate a compelling state interest in order to reduce the appropriation of funds for a raise contemplated by the collective bargaining agreements. Just as the appropriation of funds necessary to provide a three percent pay raise was within the exclusive authority of the Legislature, *reduction* of the appropriation for state employees' salaries, eliminating the three percent pay raise, **was** within the Legislature's exclusive authority over appropriations,

Elimination of the appropriation far a pay raise, due to an undisputed fiscal crisis created by a revenue shortfall, does not constitute an unconstitutional impairment of contract, under Article I, section 10, Fla. Const,, and **does** not violate the right to collectively bargain, under Article I, sectian 6, Fla. Const. The initial appropriation of funds for a raise does not divest the Legislature of the authority to reevaluate that appropriation decision, prior to the effective date of the raise, in the event of a revenue shortfall requiring the reassessment of the priority of all expenditures by the state.

Second, the trial court erred in holding that the Legislature was required to submit the wage question to the

unions and the public employers for renegotiation, prior to reduction of the appropriation for raises by the Legislature. The trial court is without authority to impose such a requirement on its own prerogative and Such a solution is without precedent in Florida law.

Finally, the trial court erred in holding that the Savings Clause contained in each of the agreements neither anticipated the possibility of a rescission of funding by the Legislature nor formed a basis to find a mutual agreement for such rescission. The Savings Clauses recognize the inherent limitation upon public employee collective bargaining agreements, which are always subject to the appropriations power of the Legislature.

ARGUMENT

1. REDUCTION OF THE APPROPRIATION FOR STATE EMPLOYEES' SALARIES, ELIMINATING THE THREE PERCENT PAY RAISE, WAS WITHIN THE LEGISLATURE'S EXCLUSIVE AUTHORITY OVER APPROPRIATIONS

The doctrine of Separation of Powers underlies the issues presented by this cause. This doctrine is expressly embodied in Article II, section 3 of the Florida Constitution, which states that:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

See, e.g., Chiles v. Children **A,** *B,* ***C,*** *D,* ***E, and F,*** 589 So.2d at 263. "The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty." ***Chiles v. Children A,*** *B,* ***C, D, E, and F,*** **589** So.2d at 263 (citations omitted).

In Florida, the constitution provides that "[n]o money shall be drawn from the treasury **except** in pursuance of appropriation **made** by law," art. VII, **§** 1(c), Fla. Const. In interpreting this provision, the Supreme Court of Florida has long held that the Legislature has exclusive authority over appropriations. ***Chiles v. Children*** **A,** ***B, C,*** *D,* ***E, and F,*** ***supra; Florida House of Representatives v. Martinez,*** **555** So.2d **839** (Fla. 1990); ***State ex rel. Dauis v. Green,*** **95** Fla. 117, **127, 116** So. 66, 69 (Fla. 1928).

> The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state

> treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. Such a provision secures to the Legislature (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, for what purpose the public funds shall be applied in carrying on the government.

State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (Fla. 1935).

In addition, the Florida Constitution guarantees employees the right to collectively bargain over the terms and conditions of employment, including wages. Article I, section 6, Florida Constitution, provides in pertinent part that:

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

The right to collectively bargain is a fundamental right in Florida, *Dade County Classroom Teachers' Association v. Ryan*, 225 So.2d 903 (Fla. 1969); *Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority*, 522 So.2d 358 (Fla. 1988). However, "[t]he constitutional right to bargain must be construed in accordance with all provisions of the constitution. . . . [I]t was not intended to alter fundamental constitutional principles, such as the separation of powers doctrine." *State of Florida v. Florida Police Benevolent Association*, 18 FLW S1, 2 (Fla. January 1, 1993).

While the courts in Florida have zealously upheld the right of public employees to collectively bargain, the courts have recognized that public employee bargaining is not the same as

private bargaining. *State of Florida v. Florida Police Benevolent Association,* 18 FLW, at 1; *United Teachers of Dade v. Dade County School Bd.,* 500 So.2d *508,* 512 (Fla. 1986).

A public employer, deemed by Florida statute to be from the Executive Branch, cannot bind the Legislature to fund the terms of a collective bargaining agreement. Enforcement of the monetary terms of a collective bargaining agreement is subject to the appropriations power of the Legislature. *State of Florida v. Florida Police Benevolent Association* , 18 FLW, at 2.

"[T]he exercise of legislative power over appropriations is not an abridgement of the right to collectively bargain, but an inherent limitation." *State of Florida v. Florida Police Benevolent Association,* 18 FLW, at 2, f.n. 6.

Part II of Chapter 447, F.S., codifies the rights and responsibilities of public employees and employers in the collective bargaining process referenced in Article I, section 6. As defined by statute:

> "Collective bargaining" means the performance of mutual obligations of the public employes and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.

Section 447.203(14), Fla. Stat.

Section 447.309(2), Fla. Stat., explicitly reserves the right of the Legislature to appropriate less than the amount requested to fund collective bargaining agreements. "That

statute operates to make all collective bargaining agreements subject to the approval, through the medium of appropriations, of the legislative body." *United Faculty of Florida v. Board of Regents,* 365 So.2d 1073, 1078 (Fla. 1st DCA 1979).

Indeed, it is well settled in Florida that the Legislature's failure to fully fund a collective bargaining agreement, through the appropriations process, does not constitute an unconstitutional impairment of contract under Article I, section 10 of the Florida Constitution.[10] *See,* United *Faculty of Florida v. Board of Regents,* 365 So.2d 1073, 1078 (Fla. 1st DCA 1979).

The question posed by the case at bar is whether the *reduction* of an appropriation by the Legislature, when faced with a fiscal crisis created by a severe revenue shortfall, violates the right to collectively bargain under Article I, section 6, Fla. Const., or constitutes an impairment of contract under Article I, section 10, Fla, Const.

In *Chiles v. Children A, B, C, D, E, and F,* 589 So.2d, at 265, this Court held that "the power to *reduce* appropriations, like any other lawmaking, is a legislative function. *See Florida House of Representatives v. Martinez,* 555 So.2d 839, 845 (Fla. 1990)." Although passage of Article IV, section 13, Fla. Const., in November, 1992, has constitutionally modified the traditional

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[10] Article I, section 10, Florida Constitution provides in pertinent part that:

> No bill of attainder, ex past facto law or law impairing the obligation of contract shall be passed.

functions of the Executive and Legislative Branches in the event of a revenue shortfall, at all times relevant to this cause, the power to reduce appropriations was within the ambit of the Legislature's exclusive authority.

The trial court erred in applying a different standard of review to reductions in appropriations by the Legislature, to address an undisputed fiscal crisis created by a severe revenue shortfall, than is applicable to judicial review of the constitutionality of initial appropriations decisions to underfund a collective bargaining agreement.

Resolution of impasse through appropriation of funds necessary to provide a three percent pay raise did not bind the Legislature, or future Legislatures, to fully fund the contract, nor did it divest the Legislature of the ability to reevaluate the award of a raise in the event of a revenue shortfall.

At all times relevant to this cause, the Legislature had both the responsibility and *exclusive authority* over reductions in appropriations. The reduction of the appropriation for public employees' salaries, eliminating the three percent pay raise, was an appropriate exercise of that authority.

No case authority exists to support the application of a compelling state interest test to such reductions, even where the reduction affects a contractual obligation including a collective bargaining agreement. The trial court erred in imposing a compelling state interest standard in its review of the instant appropriations reduction.

Indeed, in *Florida Dept. of Health and Rehabilitative Services v. Southern Energy, Ltd.*, 493 So.2d 1082, 1084, *reh. denied,* 501 So.2d 1283 (Fla. 1st DCA 1986), the trial court applied a similar standard when it found that "'the letter of the law favors . . . the Florida Department of Health and Rehabilitative Services,' but equity should be invoked because neither HRS *nor the legislature* had demonstrated exigent financial conditions to justify the under-appropriation." *Florida Dept. of Health and Rehabilitative Services v. Southern Energy, Ltd.,* 493 So.2d, at 1083 (emphasis in original).

In *Southern Energy,* providers of wood fuel pellets sued the Florida Department of Health and Rehabilitative Services, with which it had a multi-year contract to provide wood pellets as a heating fuel, alleging breach of contract through nonpayment. The Legislature fully funded the purchase of 50,000 tons of wood pellets in 1982-83 and 1983-84. However, in **1984-85** the Legislature reduced the appropriation by **$855,360**, from the **$3,168,000** annual amount contemplated in the **1982** contract as **amended.** This reduction in the appropriation was the basis of Southern Energy's breach of contract action.

Citing *United Faculty v. Board of Regents, supra,* and the doctrine of Separation of Powers, the First District Court of Appeal reversed and remanded the trial court's decision.

In *Southern Energy,* the Legislature was not required to demonstrate any compelling state interest for its reduction in the authorized price for wood pellets. The district court rejected the trial court's assertion that equity required the Legislature to demonstrate the existence of "exigent financial conditions to justify the under-appropriation."

The precedent in ***Southern Energy*** demonstrates that the trial court erred in imposing such a requirement in the case at bar.

Further, even assuming, ***arguendo,*** that such a standard applies, the trial court erred in determining that no compelling state interest existed for a reduction in this cause. (R: 164. A: 14, p. 5). The existence of an undisputed, severe revenue shortfall is compelling state interest enough to justify a reduction of appropriations contained in the Appropriations Act.

Such a reassessment of the priority of state expenditures is the essence of the Legislature's exclusive prerogative over appropriations. The trial court is without constitutional authority to judge the wisdom of any particular appropriation reduction. Indeed, for the trial court to do so, constitutes an impermissible encroachment by the judiciary on the Legislature's exclusive authority over appropriations.

> The constitution specifically provides for the legislature alone to have the power to appropriate funds. More importantly, only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. The legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has **provided.**

Chiles v. Children A, *B,* ***C,*** *D,* ***E,*** *and* ***F,*** 589 So.2d at 267 (emphasis added).

Accordingly, the trial court's order granting the unions' motions for summary judgment should be reversed.

II. THE LEGISLATURE CANNOT BE REQUIRED TO SUBMIT THE ISSUE OF REDUCTION OF THE APPROPRIATION FOR RAISES TO THE UNIONS AND THE EXECUTIVE BRANCH PUBLIC EMPLOYERS, FOR RENEGOTIATION, PRIOR TO THE LEGISLATURE'S CONSIDERATION OF WHETHER TO REDUCE THE APPROPRIATION

Subsequent to the trial court's decision in the instant cause, the Florida Supreme Court issued its opinion in *State of Florida v. **Florida** Police **Benevolent Association, supra.*** This Court held that public employee collective bargaining agreements are subject to the Legislature's exclusive authority over appropriations.[11] Of particular significance to the **case** at bar, this Court rejected the unions' contention that the legislature should have provided for the governor and the unions to return to the bargaining table to negotiate possible changes, rather than unilaterally imposing changes through the appropriations process.

This Court stated that:

> While such a solution would certainly be preferable to unilateral changes, we refuse to impose renegotiation on our own prerogative. . . [S]uch a solution would be completely without precedent as a judicially-imposed remedy, in addition to being administratively untenable. We are unwilling to eliminate the certainty of appropriatians by requiring renegotiation and then a subsequent reconvening of the legislature to pass a **new** appropriation every time the legislature attaches conditions to appropriations that happen to touch upon a collective bargaining term.

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11 In footnote 12 of the majority decision, the Court stated that "We do not pass an whether the legislature could subsequently reduce an appropriation which it had previously enacted to fund a collective bargaining agreement. ***State** of Florida v. **Florida Police Benevolent** Association,* 18 FLW, at 3**, f.n. 12.**

State of Florida v. Florida Police Benevolent Association, 18 FLW, at 3, f.n. 8.

Here, the trial court held that:

> Once the Legislature appropriated funds for a wage increase and the collective bargaining agreements containing provision for that wage increase were ratified by the public employers and employee bargaining units, the Legislature was not permitted to readdress the wage issue without resubmitting the question of wages to the [unions] and [the Executive Branch public employers] for collective bargaining.

(R: 166. A: 14, p. 7).

Clearly, the trial court's ruling is based upon a misapprehension of, and contrary to, current case law as revealed by the *Police Benevolent Association* decision. The collective bargaining agreements at issue in *Police Benevolent Association* case had all been ratified; however, this Court held that the Legislature had the authority to modify terms and conditions of employment expressly contained in the agreements concerning the use, accrual, and retention of annual and sick leave by career service employees, to the extent such terms and conditions had a fiscal impact.

Similarly, in *Florida Dept. of Health and Rehabilitative Services v. Southern Energy, Ltd., supra*, the First District Court of Appeal held that the Legislature had the power, through its appropriations authority, to modify the terms of a binding contract, by underfunding the fiscal aspects of the agreement.

In the *Southern Energy* case no breach of contract was found; the Legislature's reduction in the authorized price per ton of wood pellets was within the Legislature's exclusive authority

over appropriations and did not constitute an unconstitutional impairment or breach of the contract between the State and Southern Energy. The district court noted that the Legislature's failure to completely fund the contract was a contingency well known to the parties "before, during, and after negotiations," *Florida Dept. of Health and Rehabilitative Services v. Southern Energy, Ltcl.*, 493 So.2d, at 1084. The Legislature was not required to resubmit the issue of price per ton of wood pellets to the parties to the contract for further negotiations, prior to reducing the authorized price.

Likewise, in the case at bar, the fact that a contract existed between the Executive employers and bargaining unit employees did not divest the Legislature of the power to reduce the authorized amount to be paid in wages to career service employees, by eliminating the three percent pay raise. The trial court erred in stating that further negotiations were required before the Legislature was permitted to underfund the contract.

Accordingly, in light of the subsequent clarification of the law by the Florida Supreme Court, and under existing case authority regarding the Legislature's power to underfund final contracts through reductions in appropriations, the court should reverse the trial court's order in this cause.

111. THE SAVINGS CLAUSE CONTEMPLATED A SUBSEQUENT LEGISLATIVE REDUCTION OF FUNDING FOR THE COLLECTIVE BARGAINING AGREEMENT

Each of the collective bargaining agreements at issue in this cause contain a "Savings Clause" which provides as follows:

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

(A: 5)(emphasis added).

It is unclear what force, if any, Appellees give the savings clauses contained in their Agreements. However, these clauses placed the parties on notice that subsequent legislative alteration of the terms of the contracts was a possibility before, during, and after entry into the agreement.

The First District Court of Appeal has previously held that similar clauses do not render the contracts "illusory for lack of mutuality". See, *Florida* ***Dept.*** *of* ***Health and Rehabilitative Services*** *v.* ***Southern Energy,*** *Ltd.,* ***supra*** , (Contractual provision making state's obligations subject to appropriations does not render contract illusory for lack of mutuality because HRS was obligated by its terms to diligently seek appropriation from the Legislature).

The unions which executed the collective bargaining agreements on behalf of various public employee bargaining units should not be permitted to nullify these clauses through a retroactive challenge to a contemplated condition subsequent (i.e. Legislative enactments contrary to a term of the contract).

The savings clauses do not waive the public employees' right to collectively bargain. However, the savings clauses make clear that the parties contemplated the possibility that subsequent legislative action could alter terms of the contract. Clearly, to the extent that subsequent legislative action concerns appropriations decisions, the enactments do not constitute an impairment or breach of contract.

In *United Faculty of Florida v. Board of Regents*, 365 So.2d, at 1078, the First District Court found that "[t]he [collective bargaining] agreement embodied the contingency of underfunding just as surely as if it had been expressly recited therein," In the case at bar, the contingency of subsequent legislative action altering or nullifying terms of the collective bargaining agreements is expressly recited in the Savings Clauses.

The trial court erred in holding that:

> None [of the savings clauses] 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 agreement neither anticipate a rescission nor form a basis to find mutual agreement for rescission.

(R: 166. A: 14, p. 7).

In *State v. Florida Police Benevolent Association, supra,* this Court referenced these same Savings Clauses as evidence that the agreements recognized that "the collective bargaining agreements entered into by the unions were subject to the appropriations power of the legislature." *State v. Florida Police Benevolent Association,* 18 FLW, at 2, f.n. 5.

The Legislature must retain the power to respond to a budget crisis caused by unexpected events between legislative sessions. *See, e.g., Chiles v. Children A, B, C, D, E, and F*, 589 So.2d, at 268. Neither the Constitution of the State of Florida, Chapter 447, nor the collective bargaining agreements at issue in this cause, divest the Legislature of its "constitutional duty to establish fiscal priorities in light of the financial resources it has provided." *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d, at 267.

"[T]he power to *reduce* appropriations, like any other lawmaking, is a legislative function." *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d, at 265 (emphasis in original). The reduction of the appropriation for raises, by the Legislature, in this cause, was constitutionally permissible as a valid exercise of the Legislature's exclusive authority over appropriations.

This reduction was within the plain meaning of the phrase "subsequently enacted legislation" referenced in the savings clauses. Further, the Legislature's ability to make such reductions, when faced with a fiscal crisis, such as that which beset this state in 1991, is essential to maintaining the fiscal integrity of the state and is an integral aspect of Separation of Powers and the appropriations process.

Accordingly, the trial court order should be reversed, as the reduction in appropriation for employee raises was a condition subsequent expressly contemplated by the parties.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court and declare Chapter 91-428, section 10, and 92-5, section 1, Laws of Florida, constitutional,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by HAND DELIVERY on Thomas W. Brooks, Esquire, counsel for Plaintiff UFF, and Ronald Meyer, counsel for Intervenors "the Federation", at Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302; Benjamin R. Patterson, 111, Esquire, Post Office Box 4289, Tallahassee, Florida 32315; and Gene "Hal" Johnson, Esquire, Florida Police Benevolent Association, 300 East Brevard Street, Tallahassee, Florida 32301, this 17th day of February, 1993.

Kimberly J. Tucker