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.

APPELLANTS' REPLY BRIEF

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

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SUMMARY OF THE ARGUMENT IN REBUTTAL

The question posed in his case bar is wh ther 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 Legislature expressly reserved the right to underfund collective bargaining agreements when it enacted Section 447.309(2), Florida Statutes. Section 447.309(2) is triggered by the execution of a collective bargaining agreement. Section 447.309(2) applies whenever it is necessary to appropriate funds to implement a requirement that arises out of collective bargaining.

No case law, statute, nor constitutional provision exists in Florida to support Appellees' suggestion that the Legislature is divested of its exclusive power to appropriate funds and prioritize the fiscal expenditures of the State, once an appropriation is initially made. The Legislature is not made a party to a collective bargaining agreement by virtue of its appropriation of funds and the power to reduce an appropriation, like any other lawmaking, remains within the Legislature's prerogative.

In enacting Chapter 447, the Legislature did not relinquish the power to reduce an appropriation of funds necessary to implement a collective bargaining agreement. In the absence of

such an express waiver, an initial appropriation cannot divest the Legislature of the right to reduce an appropriation when the State faces a severe fiscal crisis due to an undisputed revenue shortfall. Nothing in the statutes or constitution imbues collective bargaining agreements with a special status immunizing them from reevaluation during times of fiscal crisis.

The plain meaning of the savings clauses contained in each of the collective bargaining agreements at issue, as well as the existing legal framework, demonstrate that the possibility of underfunding the collective bargaining agreements was a contingency well known to the parties before, during, and after execution and ratification of the agreements.

ARGUMENT

I. IN THE ABSENCE OF *AN* EXPRESS LEGISLATIVE WAIVER, THE LEGISLATURE RETAINS THE POWER TO REDUCE APPROPRIATIONS RELATIVE TO A COLLECTIVE BARGAINING AGREEMENT

Contrary to the assertions of Appellees, a collective bargaining agreement does not "arise" "once the legislature exercises its exclusive appropriations power." Answer Brief, p. 2. Rather, a collective bargaining agreement exists from the time that it is ratified by the parties and is binding, on the parties, from the time of execution forward. ***See generally,*** *Sarasota County School District u. Sarasota Classified Teachers Association,* 1993 WL 33802 (Fla. 2d DCA February 12, 1993); *School Board of Martin County v. Martin County Education Association,* 18 FLW D337 (Fla. 4th DCA January 20, 1993).

The Florida Legislature is not a party to collective bargaining agreements between the State of Florida and its public employees. Further, the instant agreements were executed within the legal framework of existing law.

Under existing law the Legislature expressly reserved the right to underfund collective bargaining agreements when it enacted Section 447.309(2), Florida Statutes. *State of **Florida** v. Florida Police Benevolent Association,* 18 FLW S1, S2 (Fla. December 24, 1992); *Pinellas County **Police** Benevolent Association v. Hillsborough County Aviation Authority,* 347 So.2d 801, 803 (Fla. 2d DCA 1977) ("[A] wage agreement with a public employer is obviously subject to the necessary public funding which, in turn, necessarily involves the

powers, duties and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government."); *United Faculty of Florida v. Board of Regents,* 365 So.2d 1073 (Fla. 1st DCA 1979); *Sarasota County School District v. Sarasota Classified Teachers Association,* 1993 WL *33802,* p. 6 (Fla. 2d DCA February 12, 1993). Under the express terms of Section 447.309(2), failure of the Legislature to fully fund an executed collective bargaining agreement "shall not constitute, nor be evidence of, any unfair labor practice."

The "benefit" to the public employer of section 447.309(2) is triggered by the execution of a collective bargaining agreement. *School Board of Martin County u. Martin County Education Association,* 18 FLW, at D338 (Fla. 4th DCA January 20, 1993). Section 447.309(2) applies whenever it is necessary to appropriate funds to implement a requirement that arises out of collective bargaining. *Sarasota County School District v. Sarasota Classified Teachers Association,* 1993 WL *33802,* at p. 6.

Appellees identify the act of appropriation as a "requisite step to establishment of" a binding contract, necessary to complete the contract itself. Answer Brief, p. 6. Appellees erroneously suggest that the existence of a binding contract divests the Legislature of the power to underfund fiscally impacting terms of a collective bargaining agreement through reduction of an appropriation. In fact, a binding agreement is a prerequisite to the ability of the Legislature to underfund a contract pursuant to Section 447.309(2).[1]

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[1] Under Chapter 447, a unilateral underfunding of wages by a

No case law, statute, nor constitutional provision exists in Florida to support Appellees' suggestion that the Legislature is divested of its exclusive power to appropriate funds and prioritize the fiscal expenditures of the State, once an appropriation is made. The Legislature is not made a party to a collective bargaining agreement by virtue of its appropriation of funds and the power to reduce an appropriation, like any other lawmaking, remains within the Legislature's prerogative. *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260, 265 (Fla. 1991).

In enacting Chapter 447, the Legislature did not relinquish the power to reduce an appropriation of funds necessary to implement the fiscally impacting terms of a collective bargaining agreement. In the absence an express waiver of such power, an initial appropriation cannot be inferred as divesting the Legislature of the right to reduce an appropriation when faced with a severe fiscal crisis due to an undisputed revenue shortfall. Nothing in the statutes or constitution imbues collective bargaining agreements with a special status immunizing them from reevaluation during times of fiscal crisis.

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legislative body, in the absence of a binding, executed collective bargaining agreement is a per se unfair labor practice under Sections 447.501(1)(a) and (c). *School Board of Martin County v. Martin County Education Association*, 18 FLW, at D338 (Elimination of wage increase by school board, acting in its legislative capacity, due to anticipated budget shortfall was permissible because a binding contract existed at the time of the action. A reopen provision, contained in an existing collective bargaining agreement, and negotiations begun pursuant thereto, do not remove the section 447.309(2) protection for the school board with respect to the salary provisions of the agreement),

II. REDUCTION OF THE APPROPRIATION FOR STATE EMPLOYEES' SALARIES, ELIMINATING THE THREE PERCENT PAY RAISE, DOES NOT CONSTITUTE AN IMPAIRMENT OF CONTRACT

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, *See, State of Florida v. Florida Police Benevolent Association, supra; United Faculty of Florida v. Board of Regents,* 365 So.2d 1073, 1078 (Fla. 1st DCA 1979).

Appellees erroneously suggest that this clearly established precedent does not apply to a reduction of an appropriation by the Legislature. Likewise, the trial court erred when it based its ruling on the conclusion that "[t]o permit the Legislature such unfettered, unilateral power over the fundamental terms of the collective bargaining agreement would render the contract illusory far lack of mutuality." A: 14, p. 6. Appellees base their assertion on the premise that, "[o]nce 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 . . . " Answer Brief, p. 2.

The trial court cited no case law or statutory provision in support of its holding. In the absence of favorable Florida precedent, Appellees rely on decisions from other jurisdictions. However, none of the cases cited by Appellees is applicable to

the case at bar due to the substantial differences in controlling law and the facts of the cases cited.

First, Appellees cite *Association of* ***Surrogates*** *v.* ***State*** *of N.Y.,* **940** F.2d 766 (2d Cir. 1991), to support their contention that the reduction of the appropriation for raises constituted an impairment of contract under the federal constitution. However, in light of the substantial distinctions in New York law, as outlined below, this case is inapposite to the case at bar.

In *Association of* ***Surrogates*** *v.* ***State*** *of N.Y., supra,* labor organizations representing non-judicial employees of the New York court system brought a declaratory judgment action, in federal court, seeking a determination that a state statute implementing a "lag payroll" system was unconstitutional and requesting an order enjoining implementation of the law. The New York law at issue deferred wages of certain court employees, contrary to the terms of their collective bargaining agreements, in order to finance an expansion of the court system in New York.

The unions' challenge was based, in part, on the ground that the law violated the federal impairment of contract clause, Article I, section 10 of the United States Constitution. However, the United States District Court for the Southern District of New York held that, under New York law, collective bargaining agreements were subject to legislative approval under statute and Compensation provisions of such agreements did not become effective until payroll legislation was enacted and an appropriation passed. *Ass'n of* ***Surrogates*** *v.* ***State*** *of* ***New York,*** 749 F.Supp. 97, **101 (S.D.N.Y. 1990).**

The district court's conclusion on the proper interpretation of N.Y.Civ.Serv.Law Section 204-a(1) (McKinney 1983), conflicted with the decision of the New York Supreme Court, Albany County, in *Matter of Quirk v. Regan*, 148 Misc.2d 300, 565 N.Y.S.2d 422 (N.Y.Sup.Ct., Albany Cty. 1991). Due to this conflict regarding New York state law, the United States Second Circuit Court of Appeals certified the following question to the New York Court of Appeals:

> Does N.Y.Civ.Serv.Law Section 204-a(1) make the compensation sections of collective bargaining agreements to which it applies conditional upon or subject to annual legislative appropriations?

Association of Surrogates v. State, 577 N.E.2d 10, 11 (N.Y. 1991); *Ass'n of Surrogates v. State of N.Y.*, 940 F.2d, at 770 (2nd Cir. 1991).

In stark contrast to the law in Florida, the New York Court of Appeals answered the question in the negative. In addition, the New York Court held that such employee contracts became valid when ratified. See, *Association of Surrogates v. State*, 577 N.E.2d 10, 16 (N.Y. 1991); *Ass'n of Surrogates v. State of N.Y.*, 940 F.2d, at 770-771 (2nd Cir. 1991). Due to this determination by the New York Court of Appeals, the Second Circuit reversed the district court, holding that its decision that there was no contractual impairment was erroneous as a matter of New York law.

In Florida, "the 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, Inc.*, 18 FLW, at S2. Accordingly, Appellees' reliance on Ass'n *of Surrogates v. New York*, 940 F.2d 766 (2nd Cir. 1991), is

misplaced, as under New York law, the legislature may not underfund a collective bargaining agreement, even in the context of an initial appropriation. Thus, this case is clearly distinguishable from the law in Florida and fails to support a finding of an impairment of contract, as asserted by Appellees, as a consequence of a reduction in an appropriation. *See also, Texaco, Inc. v. Short,* 454 U.S. 516, 531, 102 S.Ct. 781, 793, **70 L.Ed.2d 738 (1982)** (statute cannot unconstitutionally impair a contractual obligation that does not exist at the time of the statutory enactment).

Second, Appellees cite the decision of the Supreme Court of California in *Sonoma* ***County, etc.*** *v. County of Sonoma,* 152 Cal.Rptr. 903, 591 P.2d 1 (Cal. 1979), in support of their impairment of contract claims. In *Sonoma,* after adoption of Proposition 13, the California Legislature passed a statute prohibiting the distribution of state surplus or loan funds to any local public agency granting its employees a cost-of-living wage or salary increase for the 1978-79 fiscal year, which exceeded the cost-of-living increase provided for state employees. The statute declared "null and void" raises negotiated between local governmental agencies and their public employees which exceeded the increase provided for state employees.

The *Sonoma* court found that the California statute impaired the obligations of contract and was impermissible because there was no compelling reason necessitating the nullification of raises from local entities.

Sonoma is distinguishable from the case at bar, in that the California Legislature nullified the raises of non-state employees, whose salaries were obviously not subject to the appropriation of funds by the state legislature as a matter of law. Further, the statute nullifying raises was not enacted in the appropriations process, whereas the reduction of appropriation in the case at bar was. Accordingly, *Sonoma* is not on point.

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

As noted in Appellants' Initial Brief, 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 force and effect for the term of this Agreement.

(A: 5)(emphasis added).

Appellees assert that these clauses "do not assist the Court in the resolution of this case because they are procedural, not substantive, in nature." Further, Appellees assert that "[t]he 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. . . "

Answer Brief, p. 3.

Appellees' contention is not supported by the plain meaning of the savings clauses and is merely a feeble attempt to avoid the Legislature's power to underfund the collective bargaining agreement through the appropriations process.

In an analogous case, the Supreme Court of South Dakota held that a collective bargaining agreement, containing language similar to that of the instant savings clauses, allowed the State to make midstream unilateral changes and that such changes did not unconstitutionally impair the agreement. *AFSCME Local 1922 v. State*, 444 N.W.2d 10 (S.D. 1989).

In *AFSCME Local 1922*, the South Dakota Career Service Commission (hereinafter CSC), over the objections of the union and the South Dakota Department of Transportation, promulgated new personnel rules to bring the State of South Dakota into compliance with the Fair Labor Standards Act. 29 U.S.C.A. 201 et seq. These changes were partially in response to the decision of the United States Supreme Court's in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). These new CSC rules applied to all employees, including members of the union. Certain provisions of the new rules were in conflict with terms of the collective bargaining agreement executed prior to adoption of these changes.

The Union sought a declaratory judgment that the State had violated the collective bargaining agreement by imposing unilateral mid-stream changes on certain Department of Transportation employees. Of significance to the case at bar,

the court in *AFSCME Local 1922* held that clauses within the collective bargaining agreement, similar to the savings clauses in the case at bar, clearly indicate "the contemplation of changes in the governing law or regulations." *AFSCME Local 1922 v. State*, 444 N.W.2d, at 13.[2]

The *AFSCME Local 1922* court held that:

> The language of the agreement indicates that any statutory or regulatory change will

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[2] The pertinent contract language from the South Dakota contracts is found at Clauses 3.04, 23.01 and 23.02. Clause 3.04 reads:

> In the administration of all matters covered by this agreement, the officials and employees are governed by existing or future laws and regulations of appropriate authorities, including the policies set forth in the Bureau of Personnel Manual; by published department policies and regulations in existence at the time this agreement was approved; and by subsequently published department policies and regulations required by law or by regulations of appropriate authorities.

Clause 23.01 reads:

> If any provision of this agreement is in contravention of the laws or regulations of the United States or the State of South Dakota, such provisions shall be superseded by the appropriate provisions of law or regulation, so long as the same is in force and effect, but all other provisions of this agreement shall continue in full force and effect.

Clause 23.02 reads:

> If any provision of this agreement is so superseded or the enforcement of any provision is enjoined by a court of competent jurisdiction, the parties will meet for the purpose of good faith negotiations concerning a substitute provision.

> become effective immediately. Any argument to the contrary wauld result in a usurpation of legislative authority. In other words, a contrary reading of the statute would give both sides the authority to accept or reject legislative enactment. . Under the contract [the] union cannot argue that the agreement is not subject to preemption when they have agreed that they "are governed" by the laws and regulations of South Dakota and the United States, and that contravening provisions of the contract "shall be superseded" by appropriate provisions of law or regulations.
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> * * *
>
> When [the] union agreed to be governed by the **future** laws and regulations, those future laws and regulations cannot be an impairment. [The] Union, therefore, has not met its burden.

AFSCME Local ***1922*** *v. State,* **444** N.W.2d, at 12-14.

The ***AFSCME*** *Local 1922* decision demonstrates that clauses similar to the savings clauses'containedin the collective bargaining agreements at issue here, have been interpreted by other courts **as** substantive, not merely "procedural" **as** Appellees contend. Appellants do not suggest that the savings clauses contemplate a waiver of the right to collectively bargain; however, under the plain meaning of these **clauses,** the agreements expressly contemplate the possibility of "subsequently enacted legislation" nullifying a provision contained in the agreement. Further, the savings clauses recognize the validity of such subsequently enacted legislation.

Indeed, this Court recently held that these same savings clauses constituted a recognition that collective bargaining agreements entered into by some of these same parties "were subject to the appropriations power of the legislature." ***State*** *of*

*Florida v. **Florida Police Benevolent** Association, **Inc.**, **18 FLW, at** S2, S5, f.n. 5.*

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

The question posed by the case at bar is whether the reduction of an appropriation by the Legislature, when faced with an undisputed 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 1, section 10, Fla. Const.

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 26th day of February, 1993.

Kimberly J. Tucker