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IN THE SUPREME COURT OF FLORIDA

SARASOTA CLASSIFIED/TEACHERS ASSOCIATION and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Petitioners,

vs. CASE NO. 81,423

SARASOTA COUNTY SCHOOL DISTRICT,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT, THE SCHOOL BOARD OF SARASOTA COUNTY, FLORIDA

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III. STATEMENT OF CASE AND FACTS.

Respondent, the School Board of Sarasota County, Florida ("School Board"), accepts the statement of the case and facts presented by Petitioner, Sarasota Classified/Teachers Association ("SC/TA"), with the following exceptions and clarifications.

At the conclusion of its statement of the case and facts, the SC/TA implies that the Second District relied upon this court's decision in State v. Florida Police Benevolent Ass'n., Inc., 613 So. 2d 415 (Fla. 1992), to hold that the concept of separation of powers required reversal below. As is discussed more appropriately in the argument section of this brief, this is not an accurate "fact" in this case.

The SC/TA also makes several statements concerning educational budgeting procedures which require correction. The SC/TA first states that "[i]n July 1991, the superintendent of the School Board, acting on behalf of the Board as the employer, submitted a proposed budget to the School Board . . ." SC/TA Initial Brief at 1. This is incorrect. In submitting a budget to the School Board, the Superintendent of Schools (not the Superintendent of the School Board) is fulfilling his own legal obligation, not acting "on behalf of" the School Board. It is the Superintendent's responsibility, not the Board's, to initially propose a budget. §230.32(12)(b), Fla. Stat.

Second, the SC/TA states that following the School Board's adoption of a tentative budget that failed to appropriate sufficient funds to fully fund the collective bargaining

agreements, "the School Board unilaterally discontinued the step increases . . ." SC/TA Initial Brief at 2. This, too, is incorrect. Following the adoption of the "underfunded" budget, the collective bargaining agreement was administered by the Superintendent on the basis of the amount appropriated by the School Board. In so administering the agreement, the Superintendent chose to withhold the payment of step increases as the manner in which he administered the bargaining agreement within budgetary constraints. See §447.309(2), Fla. Stat.

Additionally, the SC/TA has also made an incorrect factual assertion in the argument section of its brief. At page twelve, the SC/TA states, "It is undisputed that the School Board and SC/TA were actively engaged in reopener negotiations on wages. . . ." SC/TA Initial Brief at 12. This is inaccurate. While the parties were actively engaged in negotiations, the negotiations were not on a contractual reopener but rather were negotiations on an entirely new contract following the completion of the old collective bargaining agreement.

Finally, the School Board wishes to add one additional fact to those previously presented. The School Board, anticipating an expected $18.8 million dollar deficit for the upcoming school year, set two policy goals for its budgeting a number of months prior to adopting its 1991-92 budget: (1) no layoff of employees

and (2) no increase in teacher/student ratio. R.O. at 5-6.[1] The budget ultimately adopted accomplished these goals.

[1] Following the convention established by the SC/TA in its initial brief the School Board will cite to the opinion below, "Sarasota County School District v. Sarasota Classified/Teachers Ass'n, 614 So. 2d 1143 (Fla. 2d DCA 1993), as "Sarasota County," the order of the Public Employees Relations Commission as "PERC Order," and the hearing officer's recommended order as "R.O."

IV. SUMMARY OF ARGUMENT.

For the past two years the parties to this action have litigated whether Section 447.309(2), Fla. Stat., applies to "underfunding" actions taken during the hiatus period between collective bargaining agreements. The Second District Court of Appeal correctly ruled that the statute does apply during the hiatus period and, accordingly, found that the School Board committed no unfair labor practice in this case. Sarasota County School District v. Sarasota Classified/Teachers Ass'n, 614 So. 2d 1143 (Fla. 2d DCA 1993).

At this late stage of the litigation, the SC/TA has now changed the issues dramatically. Remarkably absent from its thirty-one page initial brief is any discussion of the hiatus issue on which this case was decided both by PERC and the Second District. In its place are arguments concerning separation of powers, whether Section 447.309(2) was intended to apply to local governments, and whether the statute is constitutional. Each of these arguments has been waived by the SC/TA because none was presented below. This court should not consider these arguments initially at this late date.

Moreover, none of the issues belatedly raised by the SC/TA changes the result reached by the Second District. It is clear that the Florida Legislature intended for Section 447.309(2) to apply to local governments including school boards; indeed, school boards are specifically included in the definition of "legislative body" enacted by the Legislature in Section

447.203(10), Fla. Stat. Numerous PERC and court decisions have reached the same conclusion and applied Section 447.309(2) to local governments.

The SC/TA's attempt to inject the concept of separation of powers into the discussion does not alter this analysis. The constitutional requirement of separation of powers applies to state government and mandates that the various branches of state government have distinct roles. Separation of powers, however, does not limit the authority of the Florida Legislature to grant legislative authority, like underfunding pursuant to Section 447.309(2), to local governments and does not prohibit local governments from exercising any of the powers granted to them by the Legislature. Separation of powers, therefore, is irrelevant to this case.

Finally, Section 447.309(2) is constitutional. Pursuant to Article I, Section 6 of the Florida Constitution, public employees have the right to collectively bargain. As this court has recently held in State v. Florida Police Benevolent Ass'n, Inc., 613 So. 2d 415 (Fla. 1992), the possibility of legislative underfunding of a collective bargaining agreement is not an abridgement of public employees right to bargain but, rather, is an inherent limitation on that right. Section 447.309(2), therefore, does not abridge the right to bargain enjoyed by public employees and is constitutional.

V. ARGUMENT: THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

A. Jurisdiction was improvidently granted and should be discharged.

Although it is difficult to tell from the SC/TA's initial brief, this case is about Section 447.309(2), Florida Statutes. In a blizzard of well written prose, the SC/TA seeks to obscure the issue which has been litigated by the parties for over two years--whether Section 447.309(2) applies during the hiatus period between collective bargaining agreements. Perhaps recognizing the futility of continuing to advance this rejected argument, the SC/TA has radically changed course and now principally seeks to rely on an unrelated separation of powers issue which has never been raised before any of the lower tribunals and which has no application to this case. The court should not permit this eleventh hour issue to be considered here.

The issue below was whether Section 447.309(2) applies during the hiatus period after the expiration of a collective bargaining agreement. In its administrative ruling, the Public Employees Relations Commission ("PERC") held that it did not: "We conclude that Section 447.309(2) is inapplicable to an employer's actions during this hiatus, and therefore, cannot shield the school district from liability for unilaterally terminating the step increases." PERC Order at 8. The School Board challenged PERC's interpretation of Section 447.309(2) in the Second District Court of Appeal and, in its brief to that court, the SC/TA summed up the salient question as follows:

> The issue on appeal is whether the Public Employees Relations Commission correctly interpreted Section 447.309(2) to require that a collective bargaining agreement be in effect before that section of the statute is operable to excuse the School Board's otherwise unlawful conduct.

SC/TA Answer Brief at 16. PERC, joining the SC/TA as an appellee before the Second District, agreed:

> The singular issue before the Commission was whether the failure to fund language contained in the last sentence [of Section 447.309(2)] would apply to step increases during the hiatus between contracts. . . . Because a collective bargaining agreement was not in effect when the unilateral termination of step increases occurred, the Commission concluded that Section 447.309(2) would not shield the School District from liability for that action.

PERC Answer Brief at 14.

The issue thus squarely presented, the Second District reversed PERC, holding that Section 447.309(2) applies not only during the expressed duration of a collective bargaining agreement but also during the hiatus period between agreements and "whenever a legislative body, such as the school board in this case, is requested to appropriate public funds to satisfy an obligation which arises out of the collective bargaining." Sarasota County School District v. Sarasota Classified/Teachers Ass'n, 614 So. 2d 1143, 1146 (Fla. 2d DCA 1993). It is that decision which has been appealed to this court.

The opinions and briefs below show clearly that both the separation of powers argument and the unconstitutionality argument briefly mentioned on the last page of the SC/TA's brief

are raised by the SC/TA for the first time in this forum. By failing to raise the issues below, the SC/TA has waived these arguments. The SC/TA should not be permitted to inject these new, very different issues into this controversy at this late date. See, e.g., Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970) ("Constitutional issues, other than those constituting fundamental error, are waived, unless they are timely raised.") Because the issues decided by PERC and the Second District have not been raised before this court, jurisdiction was improvidently granted and should be discharged.

B. Section 447.309(2) applies to the underfunding action taken by the School Board during the hiatus period between collective bargaining agreements.

In Section "A" of its argument, the SC/TA meticulously proves that which is not in dispute--that unilateral changes in the status quo during bargaining can be made only "in the manner allowed by Florida law . . . ." SC/TA Initial Brief at 15. The SC/TA goes on to detail the three circumstances in which it believes unilateral action can be taken: waiver, exigent circumstances, and impasse resolution pursuant to Section 447.403, Florida Statutes. Having tediously constructed this strawman, the SC/TA then crushes it under the weight of precedent, finally announcing that because the School Board has failed to prove that any of these circumstances exist in this case, the Board's underfunding has violated the law.

Conveniently and disingeniously ignored in the SC/TA's analysis is any mention of the statute around which this entire

case has been litigated, Section 447.309(2). Section 447.309(2) is most obviously a part of the "Florida law" the SC/TA has only partially surveyed and it expressly details yet another manner in which unilateral action is permitted. Section 447.309(2) provides:

> Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

(emphasis added).

It is Section 447.309(2), not waiver, exigent circumstances, or impasse resolution, which formed the basis of the decisions below. PERC, adopting the SC/TA's argument, held that although Section 447.309(2) allowed a public employer to unilaterally alter terms and conditions of employment during the duration of a collective bargaining agreement, it did not apply during the hiatus period between bargaining agreements. Sarasota County, 614 So. 2d at 1146. PERC's conclusion was apparently based on its belief that the parties did not have any collective bargaining agreement in effect during the hiatus period so that there was no agreement for the School Board to underfund. PERC Order at 7-8.

The Second District reversed stating, "We disagree with PERC's holding that Section 447.309(2) is not applicable in this case because the bargaining agreements had expired and the parties were negotiating new ones." Sarasota County, 614 So. 2d at 1146. Although this conclusion has not been directly challenged on appeal, because it was the sole issue before the court below, the School Board will nevertheless briefly demonstrate that the Second District's statutory construction was correct.

The operation of well-established law requires the School Board to maintain all its employees' terms and conditions of employment after expiration of their collective bargaining agreements just as they had prior to expiration. E.g., Hendry County Education Ass'n v. School Board of Hendry County, 9 FPER ¶14059 (1983). If the School Board did not meet the various obligations established in the collective bargaining agreements, it would have committed an unfair labor practice regardless of whether the parties are in the hiatus period or not.[2] PERC's conclusion that there is no collective bargaining agreement during the hiatus period ignored this reality and, in essence, permitted the SC/TA to receive all the benefits of the collective

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[2] After the June 30, 1991 expiration of the collective bargaining agreements, the School Board did, in fact, continue all benefits including payment of appropriate step increases. After the underfunding occurred the Board continued to maintain all provisions of the "expired" bargaining agreements, including, inter alia, the maintenance of health benefits, the sick leave policy, and the collection of union dues, with the exception of payment of step increases. Sarasota County, 614 So. 2d at 1144-45.

bargaining agreements but none of the concomitant legal burdens during the hiatus period.

The Second District recognized that while public employees continue to reap the benefits of their "expired" collective bargaining agreements during the hiatus period, they, too, must accept the corollary legal burdens. One of these is the legislatively authorized underfunding mechanism established in Section 447.309(2). United Faculty of Florida FEA/United v. Board of Regents, 365 So. 2d 1073, 1078 (Fla. 1st DCA 1979) (collective bargaining agreements embody the contingency of underfunding "just as surely as if it had been expressly recited therein.").

The application of the statute is triggered "[u]pon execution of the collective bargaining agreement . . . ." The necessity for this language is plain. If no collective bargaining agreement had ever been executed, there would, of course, be no collective bargaining agreement for the legislative body either to fully fund or to underfund. It does not follow, however, that during the hiatus period--a time during which, by operation of law, public employees are entitled to receive all benefits of the collective bargaining agreements--the Legislature intended for a legislative body's control over the appropriation of public monies and authorization to underfund a collective bargaining agreement to automatically vanish. To the contrary, given that the Florida Legislature has permitted legislative bodies the authority outlined in Section 447.309(2), there is no

reason that a legislative body should have less flexibility during the hiatus period than it has during the time period when the collective bargaining agreement, by its duration clause, is in effect.

If public employees are entitled, as they clearly are, to have maintenance of the status quo during the hiatus period, it is incongruous for them to assert that the statute permitting underfunding of a collective bargaining agreement does not apply during this same time. The Legislature cannot have intended for public employees to have greater rights, or for a public employer to have fewer rights, during a hiatus period than either had when the collective bargaining was, by its terms, in effect between the parties. The Second District recognized the illogic of PERC's statutory construction and its determination should be affirmed.

C. The Second District's opinion below does not improperly rely on this court's opinion in FPBA and is consistent with all opinions of this court.

Once again completely ignoring the hiatus argument it travelled on below, in Section "B" of its brief the SC/TA contends that the Second District erred because it "patently misapplied" this court's decision in State v. Florida Police Benevolent Ass'n, Inc., 613 So. 2d 415 (Fla.1992)("FPBA") and erroneously relied exclusively on a separation of powers analysis in reversing the decision of PERC. SC/TA Initial Brief at 27. Both contentions are incorrect.

At page 17 of its initial brief the SC/TA unequivocally states, "the Second District held that it would have enforced Florida's requirement that a public employer maintain the established status quo during collective bargaining but for this court's decision in FPBA." SC/TA Initial Brief at 17 (emphasis in original).[3] Unsurprisingly, no citation to the Second District's opinion is given; none exists to support this mistaken conclusion. Instead, five pages into its opinion and prior to ever citing this court's FPBA decision, the Second District succinctly summarized its holding:

> As discussed herein above we would hold it to be an unfair labor practice if the school board had unilaterally discontinued step increases at any time funded agreements were in effect. We would not, however, hold to be an unfair labor practice if the school board, before ratifying the agreements, or in adopting its annual budgets, had not fully funded the agreements. §447.309(2); United Faculty v. Board of Regents, 365 So. 2d 1073 (Fla. 1st DCA 1979). See also Holmes County Teachers' Association v. The School Board of Holmes County, 9 FPER ¶14207 (1983).

Sarasota County, 614 So. 2d at 1148 (emphasis added).

In holding that the failure to fully fund a collective bargaining agreement when adopting an annual budget is not an unfair labor practice, the Second District expressly cited Section 447.309(2) as its statutory basis. While two cases are

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[3] The SC/TA repeats this mistaken reading of the Second District's opinion at least seven additional times in its brief. SC/TA Initial Brief at 8, 10, 13, 20, 21, 22, 29. Of course, merely because the SC/TA has chosen to adopt this erroneous interpretation of the Second District's opinion as its written mantra does not make it correct.

also cited as support, reliance on FPBA is conspicuously absent. Although, as described below, the Second District did discuss FPBA and, in a broad sense reached a similar result, it is clear that the Second District relied upon the statutory authority granted to school boards in Section 447.309(2), not FPBA, as the basis of its holding.

In the entire Second District opinion, the FPBA case was cited only twice, once to state the well-settled proposition under Florida law that while public employees have a constitutional right to bargain collectively, their rights are not coextensive with private employees' rights, and once to give background information on Section 447.309(2) and the separation of powers doctrine. Sarasota County, 614 So. 2d at 1148. Thus it is clear that the Second District did not simply rely upon FPBA, either explicitly or implicitly, to render its construction of Section 447.309(2).

Furthermore, the Second District's opinion is consistent with both FPBA and this court's more recent decision in Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993) ("UFF"). In FPBA this court reversed an opinion of the First District Court of Appeal and held that the Legislature was permitted, during the appropriations process, to make a unilateral change in employees' previously bargained sick and annual leave benefits as long it did, in fact, appropriate less money than was necessary to fully fund those benefits. FPBA, 613 So. 2d at 421. Because the court found that "the legislature did not simply underfund or

refuse to fund certain benefits, but rather unilaterally changed them," however, the case was remanded to the trial court to determine whether the Legislature had appropriated sufficient monies to fund the leave provisions. Id. at 420. In remanding the case the court stated:

> Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement.

Id. at 421 citing United Faculty of Florida, 365 So. 2d 1073 (emphasis added). The court also explicitly left open the issue of whether the Legislature could subsequently unilaterally reduce an appropriation which it has previously made to fund the collective bargaining agreement. FPBA, 613 So. 2d at 421 n.12.

The court recently had the opportunity to revisit the issue left unresolved in FPBA. In UFF, the court held that "[o]nce the executive has negotiated and the legislature has accepted and funded an agreement, the state and all its organs are bound by that agreement under the principles of contract law." UFF, 615 So. 2d at 672-73 (emphasis in original). In deciding UFF the court repeatedly and expressly distinguished its earlier FPBA ruling. The opinions by both Justices Kogan and Harding recognized that in FPBA no full legislative funding had occurred whereas in UFF the Legislature had funded a three percent pay raise and then subsequently sought to take it away. Id. at 672 & 674. Indeed, the court began its UFF opinion

> by noting that the present case is factually quite different from our recent opinion in State v. Florida Police Benevolent Association, 613 So. 2d 415 (Fla. 1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature. Accordingly, we do not believe that the result reached in Police Benevolent dictates the result here.

Id. at 672. The factual difference between underfunding a contract in the first instance or fully funding a contract and then, in Justice Kogan's terms, reneging, is the distinction between FPBA and UFF. See id. at 673 ("Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason.").

The Second District's opinion below construing Section 447.309(2) to apply during the hiatus period between bargaining agreements fits very comfortably into the contours of the law established by this court in FPBA and UFF. Like this court, the Second District recognized that, in the absence of legislative underfunding, a unilateral change in salary would be an unfair labor practice. Sarasota County, 614 So. 2d at 1147. However, because the School Board had properly underfunded its collective bargaining agreements,[4] the Second District ruled, in conformity

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[4] The findings of fact made by the hearing officer, adopted by PERC, and relied upon by the Second District show that the School Board and the superintendent followed all procedural requirements of underfunding pursuant to Section 447.309(2). See Sarasota County, 614 So. 2d at 1144-45.

with FPBA, that the School Board's action was permissible and did not constitute an unfair labor practice. The Second District also foreshadowed this court's subsequent UFF opinion by stating that had the School Board accepted the Superintendent's proposed budget which fully funded the collective bargaining agreements, it would have committed an unfair labor practice if it subsequently unilaterally discontinued step increase salary payments.[5] Id. at 1148. The Second District's opinion, therefore, does not improperly rely on any opinion of this court and is in harmony with the recent FPBA and UFF decisions.

D. Section 447.309(2) applies to local governments like the school board.

Finally, at page 28 of its initial brief, the SC/TA first mentions Section 447.309(2) in its argument. The SC/TA contends that Section 447.309(2) does not apply to local governments. This argument has never been raised below and, accordingly, has been waived by the SC/TA. As is discussed more fully in sub-section "A" of this brief, this argument should not be considered by the court. See Mariani v. Schleman, 94 So. 2d 829 (Fla. 1957). If the court does consider the argument, however, it will see that the SC/TA's contention is clearly incorrect.

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[5] It is clear there was no reneging in this case as was present in UFF. Not only did the School Board never appropriate money as the Legislature had in UFF, it never even contracted to pay the step increases at issue in this case. The increases at issue here are "owed" purely through the imposition of the PERC created legal doctrine of maintenance of the status quo. The School board never entered into a contract promising to give step increases for the 1991-92 school year so clearly it has not reneged on any obligation it affirmatively incurred.

Section 447.309(2), quoted fully above at page 9, refers repeatedly to the actions of a "legislative body." "Legislative body" is specifically defined in Chapter 447, Part II, to include numerous types of local governments including school boards.

> (10) "Legislative body" means the State Legislature, the board of county commissioners, the district school board, the governing body of a municipality, or the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment and which, as the case may be, is the appropriate legislative body for the bargaining unit. For purposes of S.447.403 the board of trustees of a community college shall be deemed to be the legislative body with respect to all employees of the community college.

§447.203(10), Fla. Stat. (emphasis added).

Numerous decisions of PERC and the courts have, over the span of many years, recognized that the statutes mean what they say - that Section 447.309(2) applies to local governmental units specifically including school boards. Ten years ago in Holmes County Teachers Ass'n v. Holmes County School Board, 9 FPER ¶14207 (1983), PERC rejected the argument now belatedly advanced by the SC/TA and held that Section 447.309(2) applies to school boards. "[W]e are unable to discern from the plain language of Section 447.309(2) any legislative intent to vary the funding procedures when the public employer and the legislative body are the same entity." Id. at 401. PERC reaffirmed this construction once again just last year in Florida Public Employees Counsel 79, AFCSME vs. Martin County, 18 FPER ¶23167 (1992), where it stated

it could not "ignore the plain meaning of [§447.309(2)] under the guise of statutory construction" and held that the statute applied to permit the underfunding of a collective bargaining agreement by a local county commission.[6] Id. at 291.

Courts have agreed with PERC's conclusion that Section 447.309(2) applies to local governments. In Pinellas County Police Benevolent Ass'n v. Hillsborough County Aviation Authority, 347 So. 2d 801 (Fla. 2d DCA 1977), the Second District was required to render a statutory construction of Section 447.309(3) relating to the necessity of the Hillsborough County Civil Service Board amending its rules to conform with a collective bargaining agreement. Id. at 802. In the course of its opinion interpreting the statutory rights of the local government body, the Second District stated:

> A public employee's constitutional right to bargain collectively is not and cannot be coextensive with an employee's right to so bargain in the private sector. Certain limitations on the former's right are necessarily involved. For instance, 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.

Id. at 803. In concluding that wage agreements are subject to the necessary funding by public officials, the Second District

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[6] Given PERC's repeated and correct interpretation that Section 447.309(2) applies to local governments, it is curious that PERC has now chosen to join in the SC/TA's argument that these cases have been wrongly decided.

specifically cited to Section 447.309(2). Id. at 803 n.3. Thus the Second District in Pinellas County applied Section 447.309(2) to the Civil Service Board without hesitation undoubtedly because of the clear applicability of that statute to local governments.[7]

This court has agreed. Indeed, in FPBA the court cited the Second District's Pinellas County opinion approvingly, going so far as to quote the exact language from the case set out above. FPBA, 613 So. 2d at 418. It is thus apparent that this court, like all those below it, has recognized that Section 447.309(2) applies to units of local government like the School Board.[8]

This judicial interpretation is compelled not only by the express language of the statute itself, but by common sense. Under the SC/TA's argument, Section 447.309(2) permits the Florida Legislature to underfund the collective bargaining agreements of state employees but local governments are not given similar authority. This argument is not, and cannot be, based on the constitutional right of public employees to bargain because the Constitution makes no distinction between the rights of state and local public employees. See Art. I, §6, Fla. Const.

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[7] In Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority, 522 So. 2d 358 (Fla. 1988), this court disagreed with the Second District's analysis of Section 447.309(3). It is clear by this court's citation of Pinellas County in FPBA, however, that the Second District's analysis of Section 447.309(2) was correct and should continue to be relied upon.

[8] Certainly, if the Legislature had intended a contrary result notwithstanding the definition of legislative body in §447.203(10), it would have amended either the definition or §447.309(2) itself at some time in the intervening years from the Pinellas County and Holmes County decisions.

Instead, the SC/TA grounds its argument on the concept of separation of powers which it correctly says applies only to state government. Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992). Separation of powers, however, is a false issue in this case. While the constitutional requirement of separation of powers embodied in Article II, Section 3 of the Florida Constitution requires the various branches of state government to have distinct roles, it does not place limits on the Legislature's ability to grant authority to local governments. In Section 447.309(2) the Legislature has granted local governments the authority to underfund their collective bargaining agreements. Had the Governor tried to give local governments this authority, then the separation of powers provision would be implicated. There is nothing in Article II, Section 3 which prohibits the Legislature from granting local governments, as legislative bodies, the authority to underfund, however. Consequently, the separation of powers provision in the Florida Constitution is inapplicable to this case. The only issues are whether the Legislature intended Section 447.309(2) to apply to local governments (which, as discussed above, it clearly did) and, as discussed further in Section "E" below, whether there is any constitutional provision which prohibits the Legislature from permitting any level of government from underfunding a collective bargaining agreement. The distinction drawn by the SC/TA between

state and local governments should, therefore, be rejected as irrelevant to this case.[9]

E. Section 447.309(2) is constitutional.

In the final paragraph of the argument section of its brief, the SC/TA questions the constitutionality of Section 447.309(2) stating that "if the statute did purport to grant such an absolute right to local governmental bodies such as this, it would represent a constitutionally impermissible abridgement of the employees' right to 'effective collective bargaining.'" SC/TA Initial Brief at 29. The focus, therefore, is directed to the constitutional rights of public employees and the determination to be made is whether the Legislature has illegally restricted those rights in Section 447.309(2). As is discussed above in Section "D", there is no reason for the SC/TA to limit its argument to "local governmental bodies." Local public employees have no greater right to "effective collective bargaining" than do state public employees. See Art. I, §6, Fla. Const. The statute either violates Article I, Section 6 or it does not. The relegation of this argument to the last paragraph of its brief and the SC/TA's "soft sell" approach limiting its unconstitutionality assertion to local governments underscores

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[9] Permitting the state government to underfund a collective bargaining agreement but not allowing a school board the same authority would be particularly difficult to justify given that the Legislature at least has the ability to control the amount of its revenue. School boards, by contrast, have no practical control over the amount of revenue they receive and, instead, are held hostage to the whims and caprice of the state Legislature. See Department of Education v. Glasser, 18 Fla. L. Weekly S301 (Fla. May 20, 1993).

the weakness of this argument. Section 447.309(2) is constitutional.

In both FPBA and UFF a majority of this court has explicitly recognized the validity of Section 447.309(2). In upholding the Legislature's right to underfund a collective bargaining agreement in FPBA, this court cited approvingly to both Section 447.309(2) and the Second District's opinion in Pinellas County which discussed that statute in connection with a local government's action. FPBA, 613 So. 2d at 418 & 419-20 n.7.

The FPBA court also recognized that Article I, Section 6 does not "give to public employees the same rights as private employees to require the expenditure of funds to implement the negotiated agreement." Id. at 419. Instead the court held that "any agreements entered into by public employees" are subject to the legislative appropriation process. Id. (emphasis added). Indeed the court held that legislative underfunding does not implicate Article I, Section 6 at all "because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation." Id. at n.6.

The court reached a similar conclusion on the state's motion for clarification in UFF. There, the court was asked, inter alia, to clarify the duration of the employees' pay raises. UFF, 615 So. 2d at 677. The court, in a per curiam opinion joined by Justices Barkett, Grimes and Harding, found that the Legislature had appropriated funds to pay for the pay raises for the fiscal year ending June 30, 1992 only. Id. at 678. Having found that

the appropriations ended on June 30, 1992, the court, citing Section 447.309(2), then concluded that "there was nothing to require the state to extend the three-percent increase beyond that date." Id. at 678 & n.2. Justice McDonald, joined by Justice Overton, specially concurred and explicitly agreed. Id. at 678 ("There was no legal requirement to continue the pay raise [after June 30, 1992]."). Justice Shaw, joined by Justice Kogan, concurring in part and dissenting in part, likewise agreed with that portion of the majority opinion. Id. at 678-79.

This court has thus recognized the validity of Section 447.309(2) on two occasions in the past nine months. In fact, the very argument the SC/TA now raises - that underfunding impermissibly abridges employees' right to collectively bargain - was specifically rejected in FPBA where this court recognized that the exercise of legislative power over appropriations does not abridge the right to bargain but, rather, is an inherent limitation on that right. FPBA, 613 So. 2d at 419 n.6. Accordingly, the underfunding authority granted in Section 447.309(2) can constitutionally be used by state and local legislative bodies.

F. PERC's award of interest is inappropriate.

Because PERC concluded that Section 447.309(2) does not apply during the hiatus period between collective bargaining agreements, it found that the School Board committed an unfair labor practice by withholding payment of step increases. As a remedy, PERC ordered the School Board to retroactively pay its

employees the withheld step increases "and related interest." PERC Order at 10. The Second District had no occasion to reach the issue of interest because it found Section 447.309(2) authorized the School Board's action and, hence, no unfair labor practice was committed. For the reasons previously detailed, the Second District's decision should be affirmed and this issue need not be addressed; if this court disagrees, however, no interest should be awarded.

In UFF, this court recognized that an award of interest against a governmental body "depends heavily upon equitable considerations." UFF, 615 So. 2d at 678 citing Broward County v. Finlayson, 555 So. 2d 1211, 1213 (Fla. 1990). The UFF court, distinguishing Finlayson, concluded that because UFF involved "a question of base pay to unionized employees," an award of interest was not appropriate. UFF, 615 So. 2d at 678.

Equitable factors similarly weigh against an award of interest here. Like UFF, the issue in this case is one of base pay - whether step increases will be added to the base pay of several thousand unionized employees. Moreover, the School Board and Superintendent relied on a presumptively valid state statute, Section 447.309(2), in underfunding the collective bargaining agreements and withholding the step increases. Finally, the School Board took this underfunding action in the face of serious and continuing budgetary shortfalls and as an alternative to laying off teachers and further increasing already high student to teacher ratios. Because the School Board's action was taken

in good faith for good reason, equity does not require payment of interest should this court conclude the Second District's opinion must be reversed.

VI. CONCLUSION.

The SC/TA's attempt to raise new issues for the first time in this court should not be permitted. Even if those issues are considered, however, it is clear based on the foregoing argument and authorities that the Second District's analysis of Section 447.309(2) is correct and should be affirmed.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 27th day of August, 1993 to:

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