IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SARASOTA CLASSIFIED/TEACHERS
ASSOCIATION AND THE PUBLIC
EMPLOYEES RELATIONS COMMISSION

Petitioner,

Case No. 92-001101

vs.

SARASOTA COUNTY SCHOOL DISTRICT,

Respondent.
_____/

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

PETITIONER'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner, Sarasota Classified/Teachers Association ("CTA"), was the plaintiff/appellee below. The Public Employees Relation Commission ("PERC") was an appellee below. Respondent Sarasota County School District ("the School Board") was the defendant/appellant below. A copy of the decision sought to be reviewed ("Op.") is included in the Appendix at Tab 1.

All emphasis is supplied unless otherwise noted.

Statement of the Case and Facts

The School Board is a public employer under section 447.203(2), Florida Statutes (1989) and it is also a legislative body as defined by Section 447.203(10) [Op. 2, 8]. CTA is the certified bargaining agent for School Board employees. Id.

In 1988, the School Board and CTA negotiated two collective bargaining agreements for School Board employees. [Op. 2]. The agreements, which ran from July 1, 1988, through June 30, 1991, contained, as had past agreements, provisions for annual step pay increases. [Op. 2-3]. Although the agreements had expired and new ones had not been negotiated, those employees eligible for step increases on July 1, 1991 received the increases. [Op. 3].

In 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 acting as a legislative body; that budget included sufficient funds to allow the payment of the step increases for the 1991-1992 school year. [Op. 3, 8]. The School Board rejected this budget and instead approved a budget which appropriated less than was required to fund the step increases which had become part of the status quo as a result of established past practices. [Op. 3, 11].

On August 7, 1991, the CTA filed an unfair labor practice charge with PERC, complaining that the School Board had violated section 447.501(1)(a) and (c) by unilaterally discontinuing the payment of step increases during the collective bargaining negotiations. [Op. 3-4]. CTA asserted that the payment of

salary step increases during such negotiations had become an established past practice in Sarasota County. [Op. 4].

PERC found that the School Board had unilaterally changed an established past practice during negotiations by withholding the step increases to bargaining unit members and that this constituted an unfair labor practice under section 447.501(a) and (c). [App.2]. It further found (i) no waiver, (ii) no exigent circumstances, and (iii) no lawful legislative imposition by the School Board after a lawful impasse in the negotiation process, which are the three conditions under which public employers are authorized to take such unilateral action. See Fla. Stat. §447.403 and Florida School for the Deaf and Blind v. Florida School for the Deaf and the Blind Teachers United, 483 So.2d 58 (Fla. 1st DCA 1986). PERC specifically rejected the School Board's contention that section 447.309(2) granted it absolute authority to take this unilateral action. [Op. 4, 6-7].

The Second District reversed. [App. 1]. Although acknowledging that Florida law prohibits "unilateral changes in working conditions" during negotiations [Op. 10], it concluded that "the school board in its capacity as the legislative body has the absolute right and obligation under the constitution to fund or not fund any agreement entered into between the employees and the school board as their employer."[1/] [Op. 13]. Citing

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[1/] The Second District expressly recognized that annual step increases had become the established status quo and could not be unilaterally changed by the employer during negotiations. [Op. 10-11]. By its opinion, the Court did not differentiate (continued...)

this Court's decision in State of Florida v. Florida Police Benevolent Ass'n, 18 F.L.W. 51 (Fla. 1991) ("FPBA"), the Second District held that the separation of powers principles set forth there required reversal of PERC's decision here because "the executive branch of government [could not] bargain away a legislative body's constitutional right and obligation to appropriate funds." [Op. 13-15].

Summary of Argument

The Second District's decision allows school boards to do in their legislative capacity that which the Court conceded the school boards could not do in their capacity as a public employer: unilaterally refuse to pay salary benefits to which its employees are legally entitled, without demonstrating that exigent circumstances (or the other circumstances set forth on page 2, supra) require that action. That holding patently applies to all school boards and thus affects this entire class of constitutional officers. This Court therefore has jurisdiction.

Furthermore, the decision below misapplied the principles set forth in FPBA. As this Court has just made clear in its most recent decision on the question, FPBA applies only where

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[1]/(...continued)
between underfunding an existing agreement and discontinuing the funding of wages which had become a part of the status quo as a result of long-standing practice. Instead, the Court concluded that section 447.309(2) grants the School Board the "absolute" right to refuse to fund any "requirement that arises out of collective bargaining." [Op. 14]. For purposes of this jurisdictional brief, then, it matters not whether there is an agreement or an obligation arising out of the status quo.

Florida's separation of powers doctrine is violated. That doctrine does not apply where, as here, there is no action by state executive and legislative bodies with separate identities. The Second District's misapplication of the separation of powers principles set forth in FPBA -- as controlling a situation materially different from FPBA -- by itself creates "McBurnette conflict with this Court's decision in FPBA. McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962).

Because of the great importance of the decision the District Court has rendered in mistaken reliance on FBPA, which is expressly confined to circumstances that are not present here, this Court should exercise its jurisdiction. By allowing the School Board to evade its obligation to pay the established step increases by merely putting on its legislative hat and refusing to fund those benefits, the Second District has effectively destroyed the employees' constitutional right to bargain. Employees cannot effectively bargain with an employer which has an "absolute" right to refuse to perform the agreements it has negotiated in the first instance, merely by changing hats.

Argument

1. The decision below "expressly affects a class of constitutional or state officers" by granting school boards the absolute right to unilaterally change wages during collective bargaining negotiations.

School boards are constitutional officers under Article IX, § 4(a) of the Florida Constitution. The Second District's decision expressly holds that these officers have an "absolute" right to unilaterally alter the status quo of wages of public

employees during collective bargaining negotiations, and this decision applies across-the-board to all school boards since all of them serve as both the executive and the legislative branch for purposes of collective bargaining with their employees. See Fla. Stat. Sections 447.203(2),(10), 447.309(1), 447.403. As such, this Court has jurisdiction under Article V, § 3(b)(3) because the Second District's decision "expressly affects a class of constitutional or state officers." See Spradley v. State, 293 So.2d 697, 701 (Fla. 1974).

2. The decision below misapplies this Court's decision in FPBA as controlling in a situation materially different from that in FPBA and thereby creates "McBurnette" conflict with that decision.

McBurnett holds that a district court's decision "creates a conflict by expressly accepting an earlier decision of this Court as controlling in a situation materially at variance with the case relied on." McBurnett, 137 So.2d at 565. That is precisely what occurred here. The Second District expressly accepted this Court's decision in FPBA as controlling in this case, where both executive and legislative powers are lodged in one local government body. However, FPBA dealt with state legislative and executive bodies which are entirely separate and independent and are governed by the prohibition in Article II, § 3 against any member of one branch of "state government" exercising powers of the other branches.

This Court's recent decision in Chiles v. United Faculty of Florida, Case No. 81,252 (March 11, 1993) squarely holds that its decision in FPBA applies only in those cases where the separation

of powers doctrine would be violated by the executive branch's interference with the legislative branch's constitutional duty to make appropriations. The Second District's decision misapplies the FPBA decision to a local governmental body where separation of powers is not implicated.[2/] Thus, as the District Court's decision reflects on its face, separate governmental bodies are not involved here because, when a school board such as this engages in collective bargaining, the "employer" and the "legislative body" are one and the same entity.[3/]

Consequently, there is no separation of powers question presented here because the executive branch of state government did not "bargain away" another, separate branch's "constitutional right and obligation to appropriate funds" for an agreement negotiated by the executive branch. Unlike FPBA, where the Governor, as the public employer of state employees, sought to bind the Legislature, which is the "guardian" of state monies, here the employer is the guardian of the public monies to be used to fund the agreements the employer has previously negotiated. Since the entity that appropriates the funds is exactly the same entity that negotiated the wages in the first instance, no independent branch of the government is required to take any

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[2/] The Fourth District reached the same erroneous conclusion in School Board of Martin County v. Martin County Education Association, Case No. 92-00703 (January 20, 1993).

[3/] The court stated that "CTA and the school board, as a public employer, negotiated the agreements which contained the step increases that are the subject matter of this action," and the School Board acted "as a legislative body" to appropriate the funds to implement those agreements. [Op. 8-9].

action to implement it. Instead, when the School Board, in its capacity as a "public employer," submitted its proposed budget (through its superintendent) for funding of the agreements it had negotiated, it merely shifted the hats it wears.

In short, given the absence of separate executive and legislative branches in this case, the District Court misapplied the Court's decision in FPBA by holding that the principles set forth there establish that the School Board had an "absolute" right to refuse to fund the step increases. The separation of powers doctrine was the stated basis for the FPBA decision. This Court's March 11, 1993 decision in United Faculty of Florida unequivocally confirms that this is the doctrine upon which the FPBA decision is based, and it goes on to hold explicitly that FPBA does not control in circumstances where, as here, that principle is not implicated.

By its plain terms, the separation of powers provision only applies to the branches of state government. Art. II, Sec. 3, Fla. Const. Indeed, this Court has unequivocally held that Florida's "separation of powers provision was not intended to apply to local governmental entities and officials, such as those identified in articles VIII and IX (ie, school boards) and controlled in part by legislative acts."[4/] Locke v. Hawkes, 595 So.2d 32, 36 (Fla. 1992).

[4/] The School Board relied below on Holmes County Teachers' Association v. Holmes County School Board, 9 FPER ¶14,207 (1983) and Florida Public Employees Council 79, AFSCME v. Martin County, 18 FPER ¶23,167 (1992), which suggested that the separation of powers provision may apply to local governmental entities. The decisions of that administrative body are clearly contrary to this Court's decision in Locke, supra.

Manifestly, then, this Court's decision in FPBA -- which is expressly founded on the separation of powers doctrine -- does not authorize a local government entity to negotiate agreements under the collective bargaining process while wearing its "public employer" hat but then turn around and refuse to perform those agreements under the guise of its "legislative" hat. The District Court's improper application of the separation of powers principles set forth in FPBA creates "McBurnett" conflict jurisdiction.

3. The court should exercise jurisdiction in this case.

This Court should exercise its jurisdiction because of its great importance to employees of a public employer which also acts in a legislative capacity to appropriate funds for the very agreements it has itself negotiated through the collective bargaining process. The bargaining table is the legislatively mandated forum to determine wages and other terms of employment. School Board of Orange County v. Palowitch, 367 So.2d 730, 731 (Fla. 4th DCA 1979). Florida law is settled that the School Board was obligated to maintain the status quo -- which included these step increases -- during collective bargaining negotiations, and this obligation cannot be evaded by merely refusing to fund the step increases. Thus, while circumstances can exist which would allow the School Board to unilaterally make essential changes in the status quo during the bargaining process, those changes must be made in the manner allowed by Florida law (see page 2, supra),

not by the mere announcement that the School Board will no longer honor the status quo.

Simply put, the bargaining process can be regulated -- as it currently is -- to allow the necessary flexibility for governmental bodies to meet exigent circumstances, but the right of public employees to bargain cannot be abridged, City of Tallahassee v. Pub. Emp. Rel. Com, 410 So.2d 487 (Fla. 1981), and that is exactly what the decision below does. By saying that school boards can negotiate agreements on the one hand and refuse to fund them on the other hand, the District Court's decision makes Article I, §6 an illusory right for school board employees. That is contrary to the decisions of this Court.

In Hillsborough Cty. GEA v. Aviation Authority, 522 So.2d 358, 363 (Fla. 1988), this Court unequivocally held that:

> The Florida Constitution guarantees public employees the right of effective collective bargaining. This is not an empty or hollow right subject to unilateral denial. Rather it is one which may not be abridged except upon the showing of a compelling state interest.

No "compelling state interest" was found here, nor is there any infringement upon the separation of powers doctrine as was the case in FPBA. Hence, just as in Hillsborough Cty. G.E.A., Palowitch, and United Faculty of Florida, the fundamental right of public employees to bargain collectively cannot be abridged by the employer/legislative body's unilateral decision not to fund the step increases that the employees were lawfully entitled to receive, absent compliance with the requisite conditions for such

unilateral action. The District Court's reliance on Section 447.309(2) to permit this result was in error and contrary to the decision of this Court; indeed, if construed as the Second District did here, the statute would be unconstitutional as applied.

Conclusion

This Court has jurisdiction under Article V, § 3(b)(3) of the Florida Constitution. Because of the great public interest in this question, it is respectively submitted that this Court should exercise its jurisdiction and grant the petition for review.

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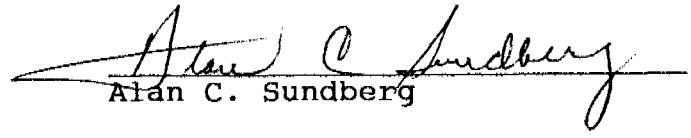

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SARASOTA COUNTY SCHOOL DISTRICT,

Appellant,

v.

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

Appellees.

CASE NO. 92-01101

Opinion filed February 12, 1993.

Appeal from the Public Employees Relation Commission.

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SCHOONOVER, Judge.

The Sarasota County School Board (school board) challenges a decision of the State of Florida Public Employees Relations Commission (PERC). The decision held that the school board committed an unfair labor practice within the meaning of section 447.501(1)(a) and (c), Florida Statutes (1989), by unilaterally discontinuing the payment of step pay increases to employees during the pendency of negotiations between the school board and Sarasota Classified/Teachers Association (CTA). We reverse.

The Sarasota County School Board is a public employer within the meaning of section 447.203(2), Florida Statutes (1989). It is also a legislative body as defined by section 447.203(10), Florida Statutes (1989). The Sarasota Classified/Teachers Association is an employee organization within the meaning of section 447.203(11), Florida Statutes (1989), and is, and has been for many years, the certified bargaining agent for the school board's classified and instructional employee's bargaining units.

In 1988, the school board and CTA negotiated two collective bargaining agreements, one dealing with instructional employees of the school board and the other dealing with classified employees. The agreements which ran from July 1,

1988, through June 30, 1991, contained, as had past agreements, provisions for step pay increases each year. Although the agreements had expired and new ones had not been negotiated, those employees eligible for step increases on July 1, 1991, received the increases. During the month of July 1991, the superintendent submitted a proposed budget for the 1991-1992 school year to the school board. The proposed budget included sufficient funds to allow the payment of step increases to all qualified employees. The school board, however, rejected this budget and instead approved a tentative budget which appropriated approximately seven million dollars less than was required to fully fund salaries and benefits. The tentative budget was finally adopted after CTA filed its unfair labor charge when the step increases were discontinued based upon the tentative budget.

The superintendent notified everyone concerned that because the school board had underfunded the budget, the 1990-1991 salary schedule would remain in effect. This action resulted in the loss of step increases to all employees entitled to them by agreement. The superintendent offered to bargain the impact of the underfunding as it related to his plans for administering the agreements but he did not agree to bargain the amount of money the school board had appropriated.

On August 7, 1991, the CTA filed an unfair labor practice charge with PERC. According to the charge, the school board committed an unfair labor practice within the meaning of section 447.501(1)(a) and (c), Florida Statutes (1989), by

unilaterally discontinuing the payment of step increases during the pendency of negotiations between the parties. CTA contended that the payment of salary step increases during the pendency of negotiations had become an established past practice in Sarasota County.

In response to the charge, the school board admitted that it tentatively approved a budget for the 1991-1992 school year which did not appropriate a sufficient amount of money to fully fund its two collective bargaining agreements and that the superintendent had discontinued payment of step increases to all school board employees. The school board also admitted that the parties were involved in negotiating new collective bargaining agreements.

As affirmative defenses to the charge the school board claimed section 447.309(2), Florida Statutes (1989), gave the school board authority to fail to appropriate funds sufficient to fund the agreements and that the statute provides that such an action shall not constitute, or be evidence of, an unfair labor practice. The school board then explained that the superintendent proposed a budget which fully funded the agreements. The school board, facing a fifteen million dollar deficit for the school year, did not adopt the superintendent's proposed budget but instead amended it and, in doing so, tentatively adopted a budget which failed to fully fund the agreements. The superintendent gave the union ample opportunity to engage in meaningful negotiations over the effect of the school board's decision.

During the course of the hearing on the charge, the parties stipulated that the school board was in a difficult financial position at the time the budget was being considered. Evidence presented at the hearing established that although new contracts had not been negotiated, union dues were still being collected, and that sick leave, health benefits, vacations, and other benefits were being paid pursuant to the expired contract.

At the conclusion of the hearing, the hearing officer entered a detailed recommended order concerning the issue of whether the school district had committed an unfair labor practice by discontinuing step pay increases to employees.

The hearing officer found that every year for at least the preceding twelve years employees who attained a higher step during the year had their salaries increased on July 1. The step increases have been a part of every collective bargaining agreement ratified by these parties. Each of these contracts expired and in every instance a new contract was not ratified until after the summer. In each instance, the district paid the step increases effective on July 1 notwithstanding the lack of a ratified successor contract. Based on those findings, the hearing officer found that because of the long-standing practice of continuing to pay the step increments, the employees had a reasonable expectation that they would receive the step increase on July 1, 1991.

The hearing officer found that the school board had not established the defense of waiver or shown that it had properly

underfunded the budget pursuant to section 447.309(2) and then held that exigent circumstances, although not pled, required immediate action. He stated that a school board as a district's elected legislative body was not free to disregard the district's bargaining obligations. However, in adopting a budget, the school board must make a good faith effort to balance its books. There was no proof or allegation that the school board's action here was a ruse for unlawful activity. Accordingly, the school board's budgetary decision was presumed to be based on a good reason, i.e. an imminent decrease in state support. The school board made a unilateral change because of an urgent need to control costs that were beyond anticipated revenues. The hearing officer found that this decision could and should be addressed in the ongoing bargaining process. However, under the narrow circumstances of this case, it was not an unfair labor practice. The hearing officer's order, accordingly, determined that the school board did not commit an unfair practice.

PERC adopted the hearing officer's findings of fact and agreed that the school board had not established a waiver, but disagreed with his holding that the board had pled and proved exigent circumstances.

PERC also rejected the school board's contention that it had acted properly pursuant to section 447.309(2). In discussing the school board's contention, PERC stated that section 447.309(2) allows a public employer to unilaterally alter terms and conditions of employment, thereby avoiding its section

447.309(1) bargaining obligation. Because section 447.309(2) impairs the right of employees to bargain collectively, guaranteed by Article I, section 6, Florida Constitution, the statute must be accorded a strict construction. A literal reading of the section reveals that it is applicable when a collective bargaining agreement has been underfunded by the legislative body. Since the provision refers specifically and repeatedly to the administration of a collective bargaining agreement, a strict and literal construction of the provision holds that it is applicable only when there is a bargaining agreement in effect. The commission concluded that the section is inapplicable to an employer's action during a hiatus and, therefore, cannot shield the school board from liability for unilaterally terminating the step increases.

Based upon its interpretation of section 447.309(2), PERC entered an order finding that the school board violated section 447.501(a) and (c) by unilaterally discontinuing salary step increments during the hiatus between collective bargaining agreements. This timely appeal followed.

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. We recognize that it is well established that an interpretation of a statute by an agency charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous, State ex rel. Biscayne Kennel Club v. Board of

Business Regulation, 276 So. 2d 823 (Fla. 1973). In this case, however, we find that PERC's interpretation of the statute is erroneous. We conclude that the statute applies 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 collective bargaining. If we were to accept the agency's interpretation of section 447.309(2), a public employee would have a right he did not bargain for, i.e. an unconditional right to receive funding, and this right would be in violation of the Florida Constitution which prohibits expenditures except in pursuance of appropriations made by law. Art. VII, § 1(c), Fla. Const.

It is well established that public employees have the right to collectively bargain. Art. I, § 6, Fla. Const. See Dade County Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969). Chapter 447, Part II, Florida Statutes (1989), implements this right and sets forth the procedures to be followed in bargaining.

As mentioned above, the school board is a public employer pursuant to section 447.203(2) and it is also a legislative body under section 447.203(10). CTA is an employee organization within the meaning of section 447.203(11) and is the certified bargaining agent for the school board's classified and instructional employees' bargaining units. After CTA and the school board, as a public employer, negotiated the agreements which contained the step increases that are the subject matter of

this action, the superintendent, as chief executive officer of the school board, requested the board, as a legislative body, to appropriate sufficient funds to fully implement the agreements. This request which was made pursuant to section 447.309(2) was approved and the agreements were fully funded for the initial year. In preparing and submitting his annual budget requests for the next two years of the agreement, the superintendent, also pursuant to section 447.309(2), requested sufficient funds to maintain the agreements. The school board approved those budget requests.

Since the agreements were fully funded during the three year period, barring any exceptional circumstances such as exigent circumstances or waiver, an unfair labor practice would have been committed if the school board had unilaterally discontinued step increases. It would also have been an unfair labor practice if the step increases had been discontinued during any reopener of the agreements for the purpose of renegotiating wages or salaries. Escambia Education Ass'n, FTP-NEA v. School Board of Escambia County, 10 FPER 15160 (1984); Nassau Teachers Ass'n, FTP-NEA v. School Board of Nassau County, 8 FPER 13206 (1982).

The contracts between the parties in this case had expired, however, before step increase were discontinued. It is, therefore, necessary for us to determine if the unilateral act of discontinuing the increases after the agreements expired and during negotiations was an unfair labor practice. If we were not

considering the school board as a legislative body underfunding these increases, we would find an unfair labor practice.

Generally, under contract law, parties to an agreement are relieved of their mutual obligations upon termination of an agreement. N.L.R.B. v. Cone Mills Corp., 373 F. 2d 595 (4th Cir. 1967). Where, however, an employee continues to work after a contract expires, a rebuttable presumption arises that the employment is continued under the terms of the original contract. Zimmer v. Pony Express Courier Corp., 408 So. 2d 595 (Fla. 2d DCA 1981), rev. denied, 418 So. 2d 595 (Fla. 1982). A collective bargaining agreement is not, of course, an ordinary contract. Parties to a collective bargaining agreement normally contemplate a subsisting relationship of indefinite duration with frequent renewals. Since the relationship generally continues beyond expiration of an agreement, some rights survive the termination, and there is more reason to apply a presumption that the employment is continued under the terms of the last contract. Zimmer.

It is of course necessary to determine if the right to step increases survived the expiration of the agreements in this case. It is well established that unilateral changes in working conditions are prohibited during negotiations. Palowitch v. Orange County School Board, 3 FPER 280 (1977), aff'd, 367 So. 2d 730 (Fla. 4th DCA 1979). A public employer cannot unilaterally alter the wages, hours, and other terms and conditions of employment of employees covered under a collective bargaining

agreement until impasse is reached and the employer as the legislative body takes action as provided under section 447.403(4)(d), Florida Statutes (1989). Palowitch. Upon the expiration of an agreement and until the legislative body takes action pursuant to section 447.403(4)(d) or a new agreement is ratified, the public employer has a duty to maintain the status quo with regard to the expired agreement. See Hinson v. N.L.R.B., 428 F. 2d 133 (8th Cir. 1970). This status quo requires the employer to maintain the terms and conditions of the expired agreement in the same state the terms existed on the expiration date of the agreement. To the extent of this straight line maintenance, the agreement remains alive in spite of its expiration date. Pinellas County Police Benevolent Ass'n v. City of St. Petersburg, 3 FPER 205 (1977). Furthermore, where a long practice of paying incremental or step wage increases has been continued in bargaining agreements, and during past periods of negotiations after contracts have expired, employees may reasonably expect that they will continue and they become part of the status quo. See Nassau Teachers Ass'n, FTP-NEA v. School Board of Nassau County, 8 FPER 13206 (1982); Hendry County Education Ass'n v. School Board of Hendry County, 9 FPER 14059 (1982).

Accordingly, if the school board, as the legislative body of the employer, had accepted the superintendent's proposed budget submitted for the 1991-1992 school year, it would also have been, absent exceptional circumstances, an unfair labor practice to have unilaterally discontinued the step increases

after the agreements had expired by their own terms and while the parties were negotiating new agreements. City of Ocala v. Marion County Police Benevolent Ass'n, 392 So. 2d 26 (Fla. 1st DCA 1980). See also Pasco CTA v. School Board of Pasco County, 3 FPER 9 (1976), aff'd, 353 So. 2d 108 (Fla. 1st DCA 1977); Escambia Education Ass'n v. School Board of Escambia County, 10 FPER 15160 (1984); Nassau Teachers Ass'n, FTP-NEA v. School Board of Nassau County, 8 FPER 13206 (1982).

Unfortunately for the employees who deserve (and if they were in the private sector would be entitled to) step increases, the school board as a legislative body also had and retained the right and obligation to properly appropriate funds for the operation of the school district.

A public employee's constitutional right to bargain collectively is not and cannot be coextensive with a private employee's right to bargain collectively. Certain limitations on the former's right are necessarily involved. For instance, a wage agreement with a public employer is obviously subject to necessary public funding. This necessarily involves the powers, duties, and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government. Pinellas County Police Benevolent Ass'n v. Hillsborough County Aviation Authority, 347 So. 2d 801 (Fla. 2d DCA 1977).

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 it 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 Ass'n v. The School Board of Holmes County, 9 FPER 14207 (1983).

Although public employees have the right to collectively bargain under the Florida Constitution, and the courts have been vigilant in upholding this right, it must be recognized that public bargaining is not the same as private bargaining. State of Florida v. Florida Police Benevolent Ass'n, 18 Fla. L. Weekly S1 (Fla. Dec. 24, 1992). Under the separation of powers doctrine, the right to bargain must be considered along with Article VII, section 1(c) of the Florida Constitution, which provides that "no money shall be drawn from the treasury except in pursuance of appropriation made by law." Accordingly, even though school board employees have the right to bargain with their employer, the school board in its capacity as the legislative body has the absolute right and obligation under the constitution to fund or not fund any agreement entered into between the employees and the school board as their employer. The legislature clearly reserved this right when it enacted section 447.309(2) and made it clear that underfunding an agreement was not an unfair labor practice. Any other rule would permit the executive branch of government, by entering into

collective bargaining agreements calling for additional appropriations, to invade the legislative branch's exclusive right to appropriate funds. Florida Police Benevolent Ass'n.

PERC applied a strict interpretation to section 447.309(2) because it concluded that it impairs the right of employees to bargain collectively as guaranteed by Article I, section 6 of the Florida Constitution. In doing so, PERC concluded that the section only applied when an agreement was in existence. We disagree with both conclusions. Section 447.309(2) does not impair the right to bargain. The agreements between the parties were negotiated within the existing legal framework which included the section under consideration. That statute makes all collective bargaining agreements subject to the approval, through appropriations, of the legislative body. The agreements by law embodied the contingency of underfunding and could not have divested the school board of its constitutional power to appropriate public moneys. United Faculty. We, accordingly, disagree with PERC's conclusion that the statute must be strictly construed because it impairs the right to bargain collectively. As mentioned above, we also disagree with PERC's conclusion that section 447.309(2) only applies when there is an agreement in existence. We conclude it applies whenever it is necessary to appropriate funds to implement a requirement that arises out of collective bargaining. The appropriation of funds is the absolute right of the legislative body. The school board had this right before it entered into any agreements. Section 447.309(2) reserved this right after the agreements were

executed, and it must be construed to reserve the right to underfund any obligation that arises from collective bargaining. Any other construction would result in allowing the executive branch of government to bargain away a legislative body's constitutional right and obligation to appropriate funds.

We, accordingly, hold that the school board did not commit an unfair labor practice in this case. It had the right to underfund the agreements and the superintendent properly offered to negotiate the impact of this underfunding. We, therefore, reverse and remand for proceedings consistent herewith.

Reversed and remanded.

LEHAN, C.J., and FRANK, J., Concur.

STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

SARASOTA CLASSIFIED - TEACHERS ASSOCIATION,	:	
Charging Party,	:	Case No. CA-91-057
v.	:	FINAL ORDER
SARASOTA COUNTY SCHOOL DISTRICT,	:	
Respondent.	:	

Thomas Young, III, Tallahassee, attorney for charging party.

A. Lamar Matthews, Arthur Hardy, and Jeanne Medawar, Sarasota, attorneys for respondent.

MUNROE, Commissioner.

On August 7, 1991, the Sarasota Classified - Teachers Association (Association) filed an unfair labor practice charge alleging that the Sarasota County School District violated Section 447.501(1)(a) and (c), Florida Statutes (1989),[1] when it unilaterally discontinued the past practice of paying step wage increases to bargaining unit members during the pendency of contract negotiations. Following an evidentiary hearing, a Commission hearing officer issued a recommended order concluding that the School District[2] did not commit an unfair labor practice. On November 21, the Association filed two exceptions to

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[1]All statutory references are to the 1989 edition of Florida Statutes.

[2]Due to a scrivener's error, the recommended order concludes that "[t]he School District of Osceola County did not violate Section 447.501, Florida Statutes,...." This conclusion is corrected to reflect the proper respondent, the School District of Sarasota County. With this correction we grant the School District's fifth exception.

the hearing officer's recommended order. The School District filed five exceptions and a supporting brief on November 25 and responded to the Association's exceptions on December 6. Both parties requested that the Commission hear oral argument; however, these requests were denied on December 17.

Neither party excepts to the hearing officer's factual findings. Our review of the record, including the transcript, discloses that the hearing officer's findings of fact are supported by competent, substantial evidence. Moreover, the proceedings upon which those findings are based comply with the essential requirements of law. Accordingly, we adopt the hearing officers's factual findings. § 120.57(1)(b)10., Fla. Stat. (1989).

We also agree, as the parties apparently do, with the hearing officer's discussion of the obligation to bargain and the prohibition against unilateral changes in the status quo during the hiatus between contracts. See HORO at 12-14. As the Commission adopts this portion of the hearing officer's analysis, we perceive no need to repeat it here. See also Florida School for the Deaf and the Blind v. Florida School for the Deaf and the Blind United, 483 So.2d 58 (Fla. 1st DCA 1986); Hendry County Education Association v. School Board of Hendry County, 9 FPER ¶ 14059 (1982).

In determining whether the School District violated Section 447.501(1), when it admittedly discontinued its past practice of

paying step pay increases during the hiatus between the expiration of one collective bargaining agreement and the execution of a successor agreement, the hearing officer considered the defenses of waiver, legislative action resulting from impasse, and exigent circumstances. The hearing officer rejected the first two defenses but found that the last, exigent circumstances, exonerated the School District. The Association's two exceptions contend that the hearing officer erred in considering this issue and in concluding that the School District proved the existence of exigent circumstances. We agree and grant both exceptions.

The affirmative defense of exigent circumstances must be properly raised in conformance with the Commission's rules. Florida Administrative Code Rule 38D-21.005(3) provides:

> The answer shall include a specific detailed statement of any affirmative defense. Failure to plead an affirmative defense shall constitute a waiver of that defense.

As the hearing officer recognized, the School District did not raise the affirmative defense of exigent circumstances in its answer to the Association's charge. Elements of this defense were vaguely alluded to in prehearing documents. Over Association objections, at the evidentiary hearing the School District presented facts concerning its financial situation with the caveat that this was only background information. Nonetheless, the hearing officer considered the issue of exigent circumstances because he deemed the School District to have amended its

pleadings to conform to the evidence in reliance on Florida Administrative Code Rule 38D-21.004. This rule, however, provides for amendment of charges or answers at the Commission's discretion upon a motion filed pursuant to Florida Administrative Code Rule 38D-13.006. The School District did not file a motion to amend its answer, nor did it enter an oral motion to this effect before the hearing officer.

The Commission's rules place the responsibility for specifically pleading affirmative defenses with the respondent. It is inappropriate for a hearing officer to compensate for a party's failure to timely plead these defenses. The School District did not specifically plead the defense of exigent circumstances in a "specific detailed statement" in its answer pursuant to Rule 38D-21.005(3). Nor did the School District enter an oral or written motion to amend its answer to plead this defense. Because this issue was first addressed in the recommended order, the Association did not have appropriate notice to be prepared to rebut this defense at hearing and was precluded from requesting a continuance to present rebuttal evidence. Under these circumstances, we conclude that the School District waived its right to rely on the affirmative defense of exigent circumstances. ATU, Local 1596 v. Orange-Seminole-Osceola Transit Authority, 11 FPER ¶ 16241 at 663 (1985); cf. Fraternal Order of Police, Ft. Lauderdale Lodge 31 v. City of Ft. Lauderdale, 14 FPER ¶ 19150 at 386 (1988) (affirmative defense which was not pled in

answer but which was raised at hearing without objection and fully litigated was not waived).

Even had the School District raised the exigent circumstances defense in a timely and specific manner, we conclude that the School District failed to support this defense by a preponderance of record evidence. The Commission described the exigent circumstances defense in Florida School for the Deaf and the Blind Teachers United v. Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 at 263 (1985), aff'd, 483 So.2d 58 (Fla. 1st DCA 1985):

> The affirmative defense of exigent circumstances is available in limited situations. It exists to provide relief to an employer who is forced by an emergency to quickly and immediately modify the wages, hours, or terms and conditions of employment of its employees. See School Board of Indian River County v. Indian River County Education Association, 373 So.2d 412, 414 (Fla. 4th DCA 1979) (exigent circumstances defense requires existence of circumstances requiring immediate action); Florida Classified Employees Association v. Taylor County School Board, 7 FPER ¶ 12100 at 236 (1981) (exigent circumstances defense requires a showing of no viable alternative to taking immediate action). For example, weather conditions such as a hurricane or "the worst freeze since the beginning of the frozen concentrate industry," may necessitate prompt changes to working conditions. See Pasco County School Board v. Public Employees Relations Commission, 353 So.2d 108, 125 (1977) (citing NLRB v. Minute Maid Corp., 283 F.2d 705 (5th Cir. 1960)). In such a situation an employer can act immediately to meet the emergency without prior consultation with or agreement by the certified union.

(footnote omitted).

There is no record evidence that this defense to a unilateral change applies here. The School District insists that a

financial emergency existed which permitted it to refuse to grant step pay increases. However, while the record reveals that the School District was faced with a shortfall in funding for the 1991-1992 school year, the record is lacking in evidence demonstrating that this shortfall precluded the School District from meeting its immediate obligation to pay the step increases. We find that the School District failed to prove that a crisis which would prevent it from meeting its legal obligation was imminent at the time it unilaterally discontinued the steps. While events occurring after that time may lend credence to the School District's asserted financial distress, such later events are irrelevant. To successfully maintain this defense, the School District was required to prove that its unilateral action was driven by imminent exigent circumstances, and proof that the School District's action could later be justified by the development of exigent circumstances is not sufficient. Accordingly, we conclude that the School District has failed to prove the defense of exigent circumstances.

We turn now to the defense raised in the School District's answer and exceptions and which was litigated at hearing: that this unilateral change was the result of underfunding and, therefore, the School District is insulated from liability pursuant to Section 447.309(2). This statutory provision states:

> 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.

Application of Section 447.309(2) allows a public employer to unilaterally alter terms and conditions of its workers' employment, thereby avoiding its Section 447.309(1) bargaining obligation. Because Section 447.309(2) impairs the right of employees to bargain collectively, guaranteed by Article I, Section 6, Florida Constitution, it must be accorded a strict construction. See Martin County Education Association v. School Board of Martin County, Case No. CA-91-048, slip op. at 3-4 (Fla. PERC Jan. 17, 1992).

A literal reading of Section 447.309(2) reveals that it is applicable when a collective bargaining agreement has been underfunded by the legislative body. When underfunding occurs, Section 447.309(2) allows the employer to administer the collective bargaining agreement on the basis of the amounts appropriated, making necessary unilateral changes without liability for the commission of an unfair labor practice. Since this provision refers specifically and repeatedly to the administration of a collective bargaining agreement, a strict and literal construction of the provision holds that it is applicable only when there is a collective bargaining agreement in effect.

Martin County, slip op. at 5; Escambia Education Association v. School Board of Escambia County, 10 FPER ¶ 15160 at 318 (1984). In the case before us, the unilateral change of discontinuing step increases occurred during the hiatus after expiration of a prior collective bargaining agreement but before ratification of a successor agreement. 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. Accordingly, School District exceptions two and three are denied.

Next, we address the waiver defense argued in School District exception one. The School District contends that the hearing officer erred in determining that the Association had not waived its right to bargain over discontinuance of the step raises. The School District points out that the Association failed to take advantage of the School District's offer to bargain over the impact of the loss of the steps. However, the School District's argument is predicated on the assumption that the decision to underfund teacher salaries and eliminate step increases is a management right pursuant to Section 447.309(2). As we have explained above, Section 447.309(2) is not applicable to the status quo period between contracts. In the absence of a management right to unilaterally alter salaries, the Association has a right to bargain the change itself, not merely the impact of that change. See § 447.309(1). Under the circumstances

presented, we find that the Association was not afforded notice and an opportunity to bargain prior to discontinuation of the step raises and, therefore, we agree with the hearing officer's conclusion that the Association did not waive its right to bargain over this change. Accordingly, we deny School District exception one.

This case presents a situation which has required us to apply interrelated statutes only recently construed by the Commission in Martin County. Accordingly, we do not believe that the School District knew or should have known that it was violating the law. An award of attorney's fees and costs is not appropriate. § 447.503(6)(c); Anderson v. IBPAT, Local 1010, 6 FPER ¶ 11114 (1982), aff'd, 401 So.2d 824 (Fla. 5th DCA 1981), cert. den., 411 So.2d 382 (Fla. 1981). Because the School District has not prevailed in this proceeding, it is not entitled to attorney's fees or costs and School District exception four to the hearing officer's denial of this remedy is denied as moot.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this unfair labor practice charge. § 447.503.

2. The Sarasota County School District violated Section 447.501(1)(a) and (c), Florida Statutes, by unilaterally discontinuing salary step increments on August 1, 1991, during the hiatus between collective bargaining agreements.

2. An award of attorney's fees and costs is inappropriate. § 447.503(6).

Pursuant to Section 447.503(6)(a), the Commission ORDERS:

1. The School District shall cease and desist from unilaterally altering wages of employees represented by the Association without bargaining.

2. The School District shall take the following affirmative action:

(a) Make a retroactive payment to qualified employees for the step increments and related interest to which they were entitled.[3]

(b) Post immediately in conspicuous locations where notices to employees are customarily posted copies of the attached Notice to Employees.[4] The School District shall take reasonable steps to ensure that the copies remain posted for 30 days and are not altered, defaced, or covered by other material.

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission

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[3]As the Commission noted in Martin County, should the School District, due to intervening acts which arose during the processing of this case, be able to demonstrate that it is faced with a financial crisis sufficient to manifest exigent circumstances requiring immediate action, it may decline to pay the step increases and related interest on that basis. Martin County, slip op. at 13.

[4]In the event the Commission's order is appealed and is affirmed by the District Court of Appeal, the words in the notice "Posted by Order of the Public Employees Relations Commission" shall be immediately followed by the words "affirmed by the District Court of Appeal."

and the district court of appeal within 30 days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 447.504, Florida Statutes (1989), and 120.68, Florida Statutes (Supp. 1990), and the Florida Rules of Appellate Procedure.

Alternatively, a motion for reconsideration may be filed. The motion must be received by the Commission within 15 days from the date of this order. The motion shall state the particular points of fact or law allegedly overlooked or misapprehended by the Commission, and shall not reargue the merits of the order. For further explanation, refer to Florida Administrative Code Rule 38D-15.005.

It is so ordered.
COHEE, Chairman, and SLOAN, Commissioner, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on January 29, 1992.

BY: June M. Farrell
Clerk

/mad

NOTICE TO EMPLOYEES

POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION

AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT interfere with, restrain or coerce public employees in the exercise of rights protected by Chapter 447, Part II, Florida Statutes, in any manner including unilaterally altering step salary increases for employees.

WE WILL NOT in any like or related manner refuse to bargain collectively or fail to bargain collectively in good faith over wages, hours, or terms and conditions of employment.

WE WILL take the following affirmative action:

Pay to all eligible employees step increases retroactive to August 1, 1991, together with interest computed at a rate of twelve percent per annum.

Sarasota County School District

DATE _____ BY _____ TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

SARASOTA CLASSIFIED/TEACHERS ASSOCIATION, Charging Party, v. SARASOTA COUNTY SCHOOL DISTRICT, Respondent.	Case No. CA-91-057 ORDER CLARIFYING FINAL ORDER AND DENYING MOTION FOR RECONSIDERATION Order No. 92U-080 Issued: March 16, 1992

Thomas Young, III, Tallahassee, attorney for charging party.

A. Lamar Matthews, Arthur Hardy, and Jeanne Medawar, Sarasota, attorneys for respondent.

The final order in this case issued on January 29, 1992. On February 11, the Sarasota Classified/Teachers Association (Association) filed a motion for reconsideration of the final order pursuant to Florida Administrative Code Rule 38D-15.005. On February 19, the Sarasota County School District filed a reply to the Association's motion for reconsideration.

The Association's motion first disputes the Commission's ruling that attorney's fees are not properly awarded in this case. This argument does not raise any points of fact or law that the Commission has overlooked or misapprehended in its resolution of this issue. Rather, it is a mere reargument of the Commission's decision. As such, it is not a proper ground for reconsideration. Fla. Admin. Code Rule 38D-15.005(2).

The second point raised by the Association disputes the following statement in footnote 3, page 10, of the final order:

> As the Commission noted in Martin County, should the School District, due to intervening acts which arose during the processing of this case, be able to demonstrate that it is faced with a financial crisis sufficient to manifest exigent circumstances requiring immediate action, it may decline to pay the step increases and related interest on that basis. Martin County [Education Association v. School Board of Martin County, Case No. CA-91-048], slip op. at 13 [(Fla. PERC Jan. 17, 1992)].

This issue was raised and resolved upon reconsideration of our final order in Martin County. See Martin County Education Association v. School Board of Martin County, Case No. CA-91-048, slip op. at 6-7 (Fla. PERC Feb. 27, 1992). For the reasons articulated in that order, we will clarify the final order in this case to state that the School District's exigent circumstances argument was rejected in the final order, and the School District was ordered to make retroactive payment to eligible employees for step increases and related interest. Any alleged error in the final order should be advanced to the appropriate district court of appeal via the procedure set forth in the next paragraph of this order. If no timely appeal is taken or after all appeals have been exhausted, then enforcement of the order may be pursued in the circuit court pursuant to Section 447.5035, Florida Statutes (1991). If during this process the case is remanded or referred to the Commission for assessment of the amount of the wage increase, then contentions of a financial inability to pay may be advanced in that proceeding, if authorized by the court.

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within 30 days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 447.504 and 120.68, Florida Statutes (1991), and the Florida Rules of Appellate Procedure.

It is so ordered.
COHEE, Chairman, SLOAN and MUNROE, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on March 16, 1992.

BY: Jane M. Farrell
Clerk

/bjk