IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

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

RESPONDENT'S BRIEF ON JURISDICTION

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III. STATEMENT OF THE 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 exception of the last sentence. There, the SC/TA states that the Second District relied on this court's decision in State of Florida v. Florida Police Benevolent Ass'n, 18 Fla. L. Weekly S1 (Fla. 1992) to hold that a separation of powers argument required reversal below. As is discussed more appropriately in the argument section of this brief, the School Board does not believe this is an accurate "fact" in this case.

IV. SUMMARY OF ARGUMENT.

There is no basis upon which this court should exercise its discretionary jurisdiction in this case. The Second District's decision below construing the scope of Section 447.309(2), Florida Statutes, is fully consistent with this court's very recent rulings and State of Florida v. Florida Police Benevolent Ass'n, 18 Fla. L. Weekly S1 (Fla. 1992) ("FPBA"), and Chiles v. United Faculty of Florida, 18 Fla. L. Weekly S143 (Fla. 1993) ("UFF"). The Second District correctly ruled that a legislative body may unilaterally alter a portion of its collective bargaining agreement as long as appropriate underfunding procedures are used. This decision, although not directly relying on FPBA, certainly is in harmony with it. Further, dicta from the Second District's opinion explicitly foreshadowed this court's UFF holding. No conflict exists between the opinion below and any pronouncement of this court.

Nor is there any other reason why the court should review this case. The holding below only indirectly affects the School Board's general budgetary powers and does not affect school boards exclusively. Moreover, the SC/TA's great importance argument is simply an artfully drafted way of claiming the Second District's opinion was wrong. This argument fails to recognize that the opinion below is consistent with both FPBA and UFF. Finally, the SC/TA should not be permitted to inject the issue of the constitutionality of Section 447.309(2) into the proceedings at this late date. This issue was not presented in any form below and should not be raised for the first time here. If this issue were truly of great importance, it certainly would have been presented below.

V. ARGUMENT.

1. The Second District's opinion below is consistent with this court's opinions in FPBA and UFF and creates no "McBurnette conflict."

The SC/TA contends in its brief on jurisdiction that the Second District erred below by relying on this court's opinion in State of Florida v. Florida Police Benevolent Ass'n, 18 Fla. L. Weekly S1 (Fla. 1992) ("FPBA"). The SC/TA argues that the Second District's reliance on FPBA creates conflict based upon McBurnette v. Playground Equipment Corp., 137 So. 2d 563 (Fla. 1962), because FPBA is factually distinct from this case and, therefore, not controlling. The SC/TA's contention is wrong for two reasons. First, the Second District did not find FPBA directly controlling nor did it rely exclusively on that case to reach its holding. Second, a close reading of the Second District's opinion and this court's opinions in FPBA and Chiles v.

United Faculty of Florida, 18 Fla. L. Weekly S143 (Fla. 1993) ("UFF"), reveals that the opinion below is in harmony with both recent decisions of this court. No conflict, "McBurnette" or otherwise, exists.

This court held in McBurnette that conflict jurisdiction arises when a district court "expressly accept[s] an earlier decision of this Court as controlling precedent in a situation materially at variance with the case relied on." McBurnette, 137 So. 2d at 565. In McBurnette the court reviewed a four paragraph opinion of the Third District Court of Appeal which cited only one case, Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961). Not only was Carter the sole case cited by the Third District, but the court of appeal explicitly stated its holding was grounded "on the authority of the recent opinion of the Supreme Court in Carter v. Hector Supply Co., Fla. 1961, 128 So. 2d 390." McBurnette v. Playground Equipment Corp., 130 So. 2d 117, 118 (Fla. 3rd DCA 1961), quashed, 137 So. 2d 563 (Fla. 1962). Because this court found both that the Third District relied exclusively on Carter and that Carter did not apply to all legal claims presented, the court exercised its conflict jurisdiction. McBurnette, 137 So. 2d at 562-63.

In stark contrast to the Third District's brief McBurnette opinion, Judge Schoonover, writing below for a unanimous panel including Judges Lehan and Frank, authored a comprehensive fifteen page opinion surveying all relevant caselaw. The narrow issue before the court was whether Section 447.309(2), Florida Statutes, applied during the hiatus period between collective bargaining agreements to

permit the School Board as legislative body to "underfund" its collective bargaining agreements with the SC/TA.[1] Relying upon numerous labor law cases interpreting the responsibilities of governmental employers during the hiatus period, the Second District correctly concluded that Section 447.309(2) did apply during that time period and, consequently, that the School Board did not commit an unfair labor practice when it underfunded the bargaining agreements.

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), Florida Statutes, and the separation of powers doctrine. Op. at 13-14. 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 entire conflict issue raised by the SC/TA is illusory because the Second District's opinion is consistent with both FPBA and 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

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[1] There was no dispute below that Section 447.309(2), Florida Statutes, allowed "underfunding" by a school board during the express term of a collective bargaining agreement. Indeed, this aspect of Section 447.309(2) was clearly recognized by the Public Employees Relations Commission, which became an appellee along with the SC/TA in the Second District, in its administrative opinion below. App. 2 to Petitioner's Brief at page 7.

employees' previously bargained sick and annual leave benefits so long as it did, in fact, appropriate less than was necessary to fully fund those benefits. FPBA, 18 Fla. L. Weekly at S3. 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 S2-3. 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 S3 citing United Faculty of Florida v. Board of Regents, 365 So. 2d 1073 (Fla. 1st DCA 1979) (emphasis added). The court also explicitly left open the issue of whether the Legislature could subsequently unilaterally reduce an appropriation which it had previously made to fund a collective bargaining agreement. FPBA, at S5 n.12

The court very 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, 18 Fla. L. Weekly at S144 (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 3%

pay raise and then subsequently sought to take it away. Id. at S143-44. 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 S144 ("Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason.").

Moreover, despite the SC/TA's repeated assertions to the contrary, nowhere does any opinion written by a member of the UFF majority state that the FPBA decision was based solely on separation of powers or that FPBA cannot control in any other factual circumstance. The clear distinction made by the authors of the UFF case between FPBA and UFF is the distinction between the legislative body underfunding, on the one hand, or funding and then reneging, on the other. The cases have made clear that the former is permitted while the latter is not. Issues relating to separation of powers, while discussed in FPBA, are in no way limited by the court's ruling in UFF.[2]

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

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[2] Although the SC/TA states several times in its jurisdictional brief that UFF recognizes a separation of powers limitation on FPBA, it tellingly cites to no language from the UFF opinion to support that bald assertion.

unilateral change in salary would be an unfair labor practice. Op. at 9-10. However, because the School Board had properly underfunded its collective bargaining agreements, the Second District ruled, in conformity 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. Op. at 11-12. The Second District's opinion does not conflict in any way with any opinion of this court and review should be denied.

2. The Court should not exercise its discretionary jurisdiction in this case.

In addition to seeking review based on the alleged conflict previously discussed, the SC/TA advances two additional arguments in an effort to persuade this court to invoke its discretionary jurisdiction. The SC/TA argues that the court should hear the case (1) because it involves school board members who are constitutional officers and (2) because the court should hear the case (i.e., it involves a matter of great importance). Neither argument presents a reason for the court to grant discretionary review in this case.

Although School Board members are constitutional officers and the School Board was a party to this unfair labor practice

charge,[3] this is not the type of case contemplated by the constitutional grant of jurisdiction to this court to review cases expressly affecting "a class of constitutional or state officers." Art. V, §3(b)(3), Fla. Const. This court has determined that to review a case expressly affecting constitutional officers the case "must directly and, in some way, exclusively affect the duties, powers [etc.] . . . of a particular class of constitutional or state officers." Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974) (emphasis in original). This case, at best, only indirectly affects the School Board's general budgetary powers and, even at that, does not exclusively affect school boards.

In any event, even if the "constitutional officer" jurisdiction were implicated, that fact, in and of itself, only makes jurisdiction in this court discretionary. Some additional reason need be shown why the court should desire to, or why it needs to, decide this case. As described above, the Second District's opinion is consistent with this court's recent FPBA and UFF rulings. The court need not revisit this subject for the third time in as many months.

The SC/TA's request for jurisdiction based upon great importance should likewise be denied. In its brief exposition on this issue, the SC/TA begins by stating that while the School Board can take certain unilateral actions to alter its contractual obligations, those changes

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[3] Although the Public Employees Relations Commission has continuously, erroneously denominated the party to this action as "Sarasota County School District" the School Board of Sarasota County, Florida recognizes it is the proper party to this action and has participated as such throughout the course of these proceedings.

must be made pursuant to Florida law. The School Board and, more importantly, the Second District agree. What the SC/TA fails to accept is that Section 447.309(2) does permit the School Board to take the action that it did in this case.

The true heart of the SC/TA's great importance argument is found on page 9 of its brief. There the SC/TA states, "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." Thus, its argument, stated very clearly, is that a school board can never underfund a bargaining agreement. In other words, Section 447.309(2), Florida Statutes, is unconstitutional. While the School Board can offer numerous responses to the merits of this argument, one response is of particular moment at this stage of the proceedings -- the SC/TA has never before raised this argument and should not be permitted to inject it into the proceedings at this late date.

The law is clear that issues not raised below, even issues involving the constitutionality of a statute, are not, in the absence of fundamental error, initially cognizable in an appellate court. 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."); see also Hillsborough County v. Bennett, 167 So. 2d 800 (Fla. 2d DCA 1964) (issue of statute's constitutionality waived where not raised below). There is absolutely no reason to depart from this well established rule in this case. Since the beginning of this proceeding the School Board has relied on

Section 447.309(2) as the legal basis for its underfunding action. The constitutionality of this statute has never been questioned; the only issue has been whether the statute applied during the hiatus period as well as during the express duration of a collective bargaining agreement. The SC/TA should not be permitted to present this untimely argument. Certainly it should not be the basis upon which this court invokes its discretionary jurisdiction. If the SC/TA truly believes this argument is of such great importance as to merit review in this court, surely it would have presented the argument below.

VI. CONCLUSION.

Based on the foregoing authorities and argument, the SC/TA's petition for review should be denied.

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 7th day of April, 1993 to:

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