IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners,

vs. Case No. 81,423

SARASOTA COUNTY SCHOOL DISTRICT

Respondent.

______________________________/

PETITIONER SARASOTA CLASSIFIED/TEACHERS ASSOCIATION'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The abbreviations and designations used in SC/TA's Brief on the Merits are used in this reply brief as well. Its Brief on the Merits is referred to as "In. Br. ____." The School Board's answer brief is referred to as "Ans. Br. ____." The brief of amicus Florida Association of District School Superintendents, Inc. ("FADSS"), filed on behalf of the School Board, is referred to as "Amicus Br. ___."

All emphasis is supplied unless otherwise noted.

STATEMENT OF CASE AND FACTS

In its statement, the School Board asserts that SC/TA incorrectly stated that the Second District relied on this Court's decision in State of Florida v. Florida Police Benevolent Ass'n, 613 So.2d 415 (Fla. 1992) ("FPBA") and the separation of powers doctrine in reversing the order of the Public Employees Relation Commission in this case. (Ans. Br. 1). As the face of the Second District's decision makes plain, the School Board is flatly wrong. See Sarasota County School District v. Sarasota Classified/Teachers Association, 614 So.2d 1143, 1148-49 (Fla. 2d DCA 1993) ("Sarasota County"). Since the School Board's argument is premised on that incorrect statement, we address it more fully below. (See pages 3-5, infra).

The School Board and amicus FADSS also assert that the Superintendent of Schools was not acting on behalf of the School Board in submitting a proposed budget which funded the step increases in accordance with the status quo. (Ans. Br. 1; Amicus Br. 2). Once again, the face of the Second District's decision shows to the contrary. After first noting that the School Board is both a public employer and a legislative body, the Court specifically stated that:

> 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.

Sarasota County at 1147.

Equally incorrect is their assertion that it was the Superintendent and not the School Board which discontinued the step increases. (Ans. Br. 1-2; Amicus Br. 2). As the Second District noted, the Superintendent acted here as the CEO of the School Board. Sarasota County at 1147. In recognition of this incontestable fact, the Second District refers throughout its decision to the School Board's unilateral discontinuance of step increases. Indeed, at the very outset of its decision, the Court framed the issue as whether "the school board committed an unfair labor practice . . . by unilaterally discontinuing the payment of step pay increases to employees during the pendency of (collective bargaining) negotiations. . . ."[1] Id. at 1144.

As the School Board does correctly point out, SC/TA was not technically correct in stating that the parties were engaged in "reopener negotiations" since the negotiations were actually for a new contract. (Ans. Br. 2). While SC/TA apologizes to the Court for its error, it is immaterial to the issue on this appeal and the School Board does not suggest to the contrary. Thus, SC/TA was simply making the point, which is undisputed, that collective bargaining negotiations were on-going at the time the School Board unilaterally changed the status quo.

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[1] The Court also noted that the hearing officer had stated that the issue was "whether the school district had committed an unfair labor practice by discontinuing step pay increases to employees." Sarasota County at 1145.

ARGUMENT

POINT ONE

THE SCHOOL BOARD'S UNILATERAL CHANGE IN THE STATUS QUO WAS AN UNCONSTITUTIONAL ABRIDGMENT OF THE EMPLOYEES' RIGHT TO COLLECTIVE BARGAINING.

It is critical to read for oneself the Second District's decision. When that is done, it becomes manifest that the School Board's carefully crafted brief is nothing more than an attempt to misdirect this Court's attention from the decision under review.

Complaining that the parties had framed the issue on appeal in terms of Florida Statutes section 447.309(2), the School Board argues that this statute was the sole basis of the Second District's decision. It categorically states that the Second District did not rely upon the separation of powers doctrine and this Court's decision in FPBA in concluding that the School Board had an absolute right to discontinue the step increases. A plain reading of the Second District's decision shows that the School Board's statement is simply untrue.

The Second District could not have been clearer in explaining the basis for its holding that the School Board could unilaterally alter the status quo by discontinuing step increases during collective bargaining negotiations. The Court started its legal analysis of that issue by citing FPBA and observing that "public bargaining is not the same as private bargaining." Sarasota County at 1148. The Court then declared that, "[u]nder 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 appropriations made by law.'" Id. Accordingly, "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." Id. In the Second District's view, section 447.309(2) simply "reserved this right" and, in doing so, "made it clear that underfunding an agreement was not an unfair labor practice." Id. The Court concluded its analysis by declaring that "[a]ny 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," again citing FPBA.

Thus, although the Second District may have only cited FPAA twice, it began and ended its constitutional analysis with those citations. It specifically held that the School Board had the right "under the constitution" to underfund. Id. at 1148. And, lest there be any doubt that its decision was directly founded on the constitutional requirement of separation of powers, the Court closed its decision by reiterating that "[a]ny other construction (of section 447.309(2)) would result in allowing the executive branch of government to bargain away a legislative body's constitutional right and obligation to appropriate funds." Id. at 1149. Indeed, the Court had been quick to acknowledge from

the outset that, "[i]f we were not considering the school board as a legislative body underfunding these increases, we would find an unfair labor practice." Id. at 1147.

In sum, contrary to the assertion of the School Board and its amicus, the Second District clearly perceived that it was bound by the separation of powers doctrine and this Court's decision in FPBA, which specifically rested on that doctrine. However, by applying that doctrine and that decision to the very different circumstances of this case, which does not involve separate branches of state government and thus does not implicate the Constitution's prohibition against "fusion of the powers of any two branches into the same department,"[2] the Second District impermissibly abridged these employees' constitutional right to collective bargaining.

That abridgement is in no way authorized by Florida Statutes section 447.309(2). As the Second District quite correctly recognized, the Legislature simply sought by that statute to preserve a legislative body's constitutional right to appropriate funds by expressly providing that it could underfund an agreement negotiated by the executive branch without thereby committing an unfair labor practice. The separation of powers doctrine demands that such authority be reposed in the Legislature where two separate bodies of state government are involved in the collective bargaining process. Hence, as applied to independent

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[2] Chiles v. Children A, B, C, D, E & F, 589 So.2d 260, 263 (Fla. 1991).

state government branches, the statute simply carries to a logical extension what the Constitution requires in the first instance.

Here, however, there is no such concern about one branch of government interfering with the constitutional rights and obligations of a separate branch. Although the School Board is a legislative body for some purposes (see Florida Statutes section 447.203(10)), both its legislative and its executive powers reside in one entity. Consequently, there is no issue of one independent branch binding another branch to collective bargaining obligations and the constitutional imperative of separation of powers is not in any way implicated by the action here of a single local governmental body.[3/] As such, the Second District's reliance on that doctrine and on FPBA under the wholly different circumstances of this case was plainly misplaced.

This Court's subsequent decision in Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), which was rendered after the Second District's decision in this case, unequivocally establishes that FPBA applies only in circumstances 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. Id. at 673. By its decision there, this Court squarely held that FPBA does not apply

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[3/] The School Board concedes (Ans. Br. 21) that, under this Court's controlling decision in Locke v. Hawkes, 595 So.2d 32 (Fla. 1992), the separation of powers doctrine only applies to state government, not local governmental entities such as school boards.

in situations where the separation of powers in not implicated. In that event, which was the case in United Faculty, just as it is here, the constitutional right to collective bargaining is controlling, and it cannot be abridged by underfunding of collective bargaining obligations previously incurred by the School Board.

Nor could that constitutional right be abridged by a statutory provision purporting to authorize legislative underfunding in circumstances such as these. It is entirely proper for such a statute to effectuate this constitutional right of the separate legislative branch of state government by specifying that such underfunding shall not constitute an unfair labor practice. But, if the Legislature sought by section 447.309(2) to permit a local governmental body -- which has its executive and legislative powers "fused" as a matter of constitutional command -- to avoid collective bargaining obligations it has incurred in its executive capacity by simply refusing in its legislative capacity to fund them, that would constitute an unconstitutional abridgment of the employees' right to bargain.[4]

As this Court has explicitly held, the constitutional right to bargain is a right to "effective collective bargaining." Hillsborough Cty. GEA v. Aviation Authority, 522 So.2d 358, 363

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[4] By the same token, if the Legislature intended to grant that right to school boards by defining them in section 447.203(10) as a "legislative body," that statute would likewise be unconstitutional as applied in this case.

(Fla. 1988). Manifestly, then, the Legislature cannot by statute grant a right to local governmental bodies that allows them to make a complete sham of the collective bargaining obligations imposed on them under the Florida constitution. To the contrary, the employees' constitutional right to "effective collective bargaining" cannot be abridged by a statutory grant of power to a body to underfund in its legislative capacity the obligations that very body had incurred in its executive capacity, because there is no countervailing separation of powers imperative under these circumstances.

Ignoring the constitutional separation of powers underpinnings for this Court's decisions in FPBA and United Faculty, the School Board contends that local governmental bodies have been statutorily granted the same privilege of underfunding that the Legislature has as a matter of constitutional right because it is a separate and independent branch of state government. The Second District, however, implicitly recognized that this was not the case because it did not affirm the School Board's action by merely saying the School Board's discontinuance of step increases was authorized under section 447.309(2). Instead, it specifically rested its decision on the separation of powers doctrine and this Court's decision in FPBA, holding that "[a]ny other construction of [section 447.309(2)] would result in allowing the executive branch of government to bargain away a legislative body's constitutional right and obligation to appropriate funds." Sarasota County at 1149. Under fundamental

appellate principles, the Court would not have ever reached that constitutional issue had it believed, as the School Board urges, that the statute alone was dispositive.

As the Second District obviously understood, however, the Legislature could not constitutionally allow a governmental body to abridge collective bargaining obligations absent the paramount constitutional imperative of separation of powers. It was for this reason the Court based its construction of the statute on that doctrine. Simply put, when both those constitutional provisions are implicated, the legislative body must be afforded the right to underfund a collective bargaining agreement negotiated by an entirely separate branch of government and the statute is completely constitutional as applied in those circumstances. But, if that statutory provision were applied to a single local governmental body, where there is no concern for the constitutional requirement of separation of powers, then the constitutional right of its employees to "effective collective bargaining" would be clearly undermined. That is neither required nor allowed under this Court's prior teachings.

Indeed, as the Court's decisions in FPBA and United Faculty make clear, Article II, section 3 and Article VII, section 1(c) must be construed in pari materia with Article I, section 6 where the legislative branch of state government has the exclusive right to appropriate state funds and the executive branch cannot be allowed to bind the Legislature to the executive branch's bargain. As this Court held in United Faculty, however, it would

be a sham and an unconstitutional abridgement of the right to collective bargaining to allow the legislature to avoid its collective bargaining obligations where it had already appropriated the necessary funds. It would equally be a sham and an unconstitutional abridgement of the right to collective bargaining to allow this School Board to avoid the collective bargaining obligations it had already incurred in its executive capacity by the simple device of later refusing in its legislative capacity to fund those obligations.

In short, section 447.309(2) is only constitutional if it is construed in light of the separation of powers doctrine. The Second District recognized that this statute is intended to preserve the separation of powers of legislative and executive branches, and it framed its decision on that basis, holding that the "executive" side of the School Board could not bind its "legislative" side. Where the court went awry, however, was in its failure to recognize that the separation of powers doctrine applies only to state government (In. Br. 26; Ans. Br. 21) and is not implicated by actions of a local governmental body, such as the School Board, where executive and legislative powers rest in a single entity. By misapplying that constitutional provision and this Court's decision in FPBA under circumstances where no separate, independent governmental branches of the state are involved, the Second District has impermissibly deprived the School Board's employees of their constitutional right to bargain.

Under the Second District's decision, every local government would always have an "absolute" right to alter the status quo which public employees are entitled by law to enjoy -- absent factors (such as exigent circumstances) which were neither pled nor found here -- by simply switching hats and refusing to perform the very obligations it had incurred in the first instance. This would make illusory the constitutional right of public employees to collectively bargain with public employers which act in both the executive and legislative capacity, as all school boards and local governments in this state do. But Florida's Constitution assures those employees a right to "effective collective bargaining," Hillsborough Cty. GEA, 522 So.2d at 363, and that right cannot be statutorily abridged where there is no paramount constitutional imperative that necessitates such a result.

The School Board caustically suggests that SC/TA must lack confidence in this constitutional analysis of section 447.309(2) because it was made towards the end of SC/TA's initial brief on the merits. To the contrary, it was asserted at that point because it followed inexorably from the prior analysis of the interaction of the constitutional provisions addressed in the Second District's decision and of the decisions of this Court which must be applied to the particular circumstances presented here. Thus, it was necessary, whether tedious or not, to go through that analysis in order to reach the final understanding that, absent separation of powers concerns, section 447.309(2)

could not constitutionally empower a local governmental body to underfund the very collective bargaining obligations it had itself previously incurred, albeit in one governmental capacity rather than another.

Finally, asserting that SC/TA did not attack the constitutionality of this statute below, the School Board contends that SC/TA has waived this argument. The School Board forgets, however, that SC/TA had prevailed below, on a construction of section 447.309(2) that found it to be inapplicable to the facts of this case. As appellee, it had no need to assert a claim that the statute was unconstitutional.

Indeed, it makes no contention here that the statute is facially unconstitutional -- only that it would be unconstitutional if it were applied to the School Board to allow it to abridge collective bargaining obligations such as these. And, it was not until the Second District issued its decision on the basis of the separation of powers doctrine and this Court's decision in FPBA -- which was not even rendered until after the oral argument in this case -- that this constitutional issue even arose, thereby creating conflict with this Court's precedents, including its subsequently rendered decision in United Faculty.

Given the Second District's erroneous reliance on the separation of powers doctrine and on FPBA to reach its decision that the School Board could unilaterally alter the status quo

during collective bargaining negotiations,[5] conflict was created on the face of that opinion. This Court was entirely correct, then, in accepting jurisdiction since conflict is not created by what the parties say in their briefs but rather by what the court says in its opinion. By its decision, the Second District for the first time applied the constitutional doctrine of separation of powers to uphold the School Board's action. Hence, it is singularly appropriate to raise this issue before this Court.

POINT TWO

PERC'S AWARD OF INTEREST IS ENTIRELY APPROPRIATE

The School Board argues that PERC's award of interest on the improperly withheld step increases was "inappropriate" (Ans. Br. 24-26) and should be reversed. The School Board disinguously tells this Court that the Second District "had no occasion to reach the issue of interest" because it upheld the School Board's discontinuance of the step increases (Ans. Br. 25). In truth and fact, the Second District could not have possibly reached that issue because the School Board, which was the appellant attacking PERC's order below, never attacked this part of it. Consequently, this Court should not even consider that argument

[5] Of course, as pointed out in SC/TA's Initial Brief at pages 11-12, there are well-established circumstances, including exigent circumstances requiring immediate action, under which the School Board could have unilaterally taken such action. However, it did not either plead or establish any of those circumstances.

because it was not raised before the Second District and hence was waived.[6] See, e.g., Department of Health v. Petty-Eifert, 443 So.2d 266, 268 (Fla. 1st DCA 1983).

Conclusion

The articulated basis of the Second District's decision misapplies this Court's decision in FPBA, is directly contrary to what this Court said in United Faculty, and is in contravention of this Court's controlling precedents. Those precedents make it clear that the employees' right to "effective collective bargaining" cannot be abridged in the absence of a paramount constitutional imperative such as separation of powers or a "compelling" state interest, neither of which apply here. Accordingly, this Court should reverse the Second District's decision and remand with directions to reinstate the Commission's order.

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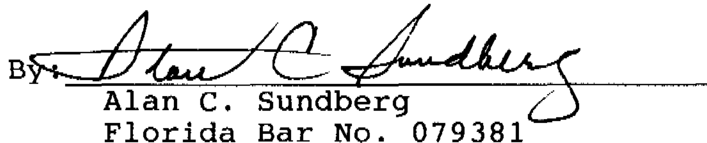
By 
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[6] In any event, PERC's award of interest was eminently appropriate for the reasons set forth in its reply brief.

Certificate of Service

I hereby certify that a copy of the foregoing was sent by U.S. Mail this 16th day of September, 1993 to:

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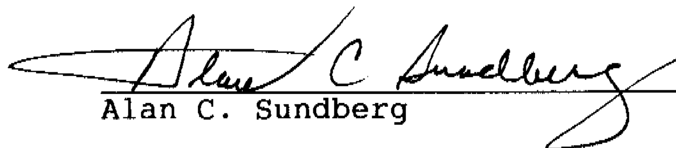

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