IN THE SUPREME COURT OF FLORIDA

State ex. rel. LAWTON CHILES,
as Governor of Florida, and
ROBERT A. BUTTERWORTH, Attorney
General, and MELANIE ANN HINES,
Statewide Prosecutor,

Petitioners,

v. CASE NO.: 81,835

FLORIDA PUBLIC EMPLOYEES
RELATIONS COMMISSION and
STATE EMPLOYEES ATTORNEY
GUILD (FPD, NUHHCE/AFSCME)

Respondents.
_____/

AMICUS CURIAE BRIEF ON BEHALF OF STATE EMPLOYEES ATTORNEY GUILD (FPD,NUHHCE/AFSCME)

Respectfully submitted,

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PRELIMINARY STATEMENT

On September 3, 1993, Counsel submitted his Motion Seeking Leave To File An Amicus Brief In Support of Respondent State Employees Attorney Guild and Motion Seeking Enlargement of Time To Submit An Amicus Brief And Supporting Memorandum of Law. By Order dated October 18, 1993, this Honorable Court granted Counsel's Motions.

STATEMENT OF THE CASE AND FACTS

Counsel accepts the statement of the case and facts as set forth by the Petitioners and Respondents in their respective briefs.

SUMMARY OF THE ARGUMENT

This Honorable Court should reject Petitioners' request for Writ of Prohibition. This Court should not preclude state employed attorneys the right to collectively bargain simply because they are attorneys. In this regard, the experience of Federal executive agencies over the past 30 years in collectively bargaining with units of Federal sector attorneys has not produced the conflicts or ethical violations that Petitioners contend would occur. Secondly, collective bargaining history in the private and Federal sector indicates that Petitioners are truly out of step with the realities of the workplace. Thus, labor-management relations have been enhanced through the collective bargaining process. Accordingly, state employed attorneys should not be deprived of this right on the basis of mere speculation. Accordingly, this Court should lift its stay and allow the Public Employees Relations Commission to process SEAG's

petition.

Experience demonstrates that many of the ethical rules Petitioners' claim will be diluted or violated by attorney collective bargaining are already restricted because of Federal or state constitutional and statutory protections when applied to state employment decisions. Of equal importance is the fact that the Comments to the Rules Regulating the Florida Bar strongly suggest that collective bargaining by attorneys with their government employers is not inappropriate.

Lastly, Congress granted Federal employees, including Federal attorneys, the right to collectively bargain with their Federal employers over terms and conditions of employment. A decision from this Honorable Court which concludes that collective bargaining by Florida Bar attorneys is violative of the Professional Rules of Conduct will conflict with Federal law and place Florida Bar Federal sector attorneys who have, are or will collectively bargain in the undesirable position of committing an ethical violation.

ARGUMENT

POINT I

Whether Labor-Management Relations Would be Enhanced Through the Recognition of a Statewide Unit of Attorneys Employed Within the Executive Branch of State Government

In their petition seeking Prohibition from this Court, Petitioners in substance claim that a statewide unit of state employed attorneys within the Executive Branch would reek havoc on its ability to conduct business and in its dealings with its attorneys. This warning has no foundation in rationality or in practice. Since the issues

raised by Petitioners appear to be of first impression in Florida, the experience of agencies and employee organizations in the Federal sector will be helpful to this Honorable Court's resolution of this dispute.

A.

Labor-Management Relations in the Federal Sector Has Been Enhanced Through the Recognition of Employee Organizations in the Executive Branch

Presidential policies governing relationships between employee organizations and agency management in the Executive Branch of the Federal government were established by Executive Order 10988 in January 1962. The Order recognized that efficient administration of Government and the well-being of employees require orderly and constructive relationships between employee organizations and management officials. It noted that employee-management relations in the Federal Service could be improved by providing employees an opportunity for greater participation in developing policies and procedures affecting conditions of their employment while preserving the public interest as the paramount consideration.[1]

Seven years later, a review of the experience under Executive Order 10988 undertaken by the 1967-68 Presidential Review Committee on Employee-Management Relations in the Federal Service found that the Executive Order had produced excellent

[1] Fed. Lab. Rel. Coun., Report and Recommendations on the Amendment of Executive Order 11491 , (1975).

results. The Committee concluded that through labor-management consultation and negotiation, improved personnel and working conditions had been realized in a number of areas. Those areas included the scheduling of work, overtime, rest periods and leave, safety and industrial health practices, training and promotion policies and grievance handling among other. These gains were achieved by employee organizations while maintaining a labor-management atmosphere of reasonable harmony.[2]

From the period of 1962-69, the extent of employee representation grew dramatically. From the 29 exclusive units in the Tennessee Valley Authority and the Department of the Interior, covering 19,000 employees, which existed prior to Executive Order 10988, exclusive representation grew to 2,305 exclusive units in 35 agencies covering 1,416,073 employees or 52 percent of the total federal workforce subject to the Order. By 1971, exclusive recognition of employee organizations by the Federal government covered 87 percent of all postal employees, 67 percent of wage (blue collar) employees and 28 percent of all salaried (white collar) employees.[3] Thus, 1971 saw Federal agencies dealing with 130 separate employee organizations holding exclusive or formal recognition in addition to the existence of 1,181 local agreements covering over 1.1 million employees.

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[2] Id. at 63.

[3] Id.

In 1969, President Nixon signed Executive Order 11491.[4] The Order provided for protections for employees and employee organizations and continued on a path of refining labor-management relations in the Federal sector. Specifically, the Order provided for exclusive recognition of employee organizations, negotiations of agreements, a forum for the resolution of unfair labor practice charges and the resolution of negotiation disputes and impasses through arbitration and mediation. The Order further created the Federal Labor Relations Council, as the adjudicator of certain disputes arising under the Order.

In its 1975 report to the President, the Federal Labor Relations Council addressed the issue of attorney membership in an employee organization at the Federal level.[5] The Council concluded that no special policy should be established concerning the status of attorneys under Executive Order 11491. The Council then addressed two basic arguments on this issue.

First, it was contended that a conflict of interest existed between the attorney's role as an advisor to agency management and her role as a member, participant or representative of a labor organization which admits to membership and represents nonattorneys. Second, it was contended that the ethical standards of the American Bar Association required that labor organizations which attorneys join be composed solely

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[4] Exec. Order 11491, 3 C.F.R. 861(1966-1970). Executive Order 11491 was amended by Exec. Order 11616, 3 C.F.R. 605 (1971-1975) and Exec. Order 11636, 3 C.F.R. 634 (1971-1975). Exec. Order 11838, 3 C.F.R. 957 (1971-1975), further refined the prior Executive Orders.

[5] Fed. Lab. Rel. Coun., Labor-Management Relations in the Federal Service, (1975).

of attorneys.

In its response to the first argument, the Council wrote:

With respect to the ethical standards of the American Bar Association, we have not been referred to a single instance where an attorney employed by a Federal agency has been disciplined for joining, participating in or being represented by a labor organization which admits to membership or which represents nonattorneys. Thus, a conflict with ethical standards is of theoretical concern only. Actual experience has not established that a real problem exists. In any event, there is no requirement that proscriptions of the American Bar Association be determinative under the Order.

As to the second argument the Council opined that:

The concern that the Order requires amendment to avoid conflicts of interest between an attorney's obligations to management and those to a labor organization are almost more theoretical than real. The Order in its present form and the manner in which it has been interpreted contains ample provision for avoiding conflicts of interest. Thus, for example, section 1(b) prohibits participation in the management of or acting as representative of a labor organization when the participation or activity would result in a conflict or apparent conflict of interest; section 10(b)(1) excludes management officials and supervisors from units of exclusive recognition. Moreover, confidential employees are, through the adjudicatory processes under the Order, excluded from bargaining units. Thus, we have concluded that the current framework is adequate for dealing with any conflict of interest problems, and no amendments to the order are recommended. [6]

In 1978, the Congress enacted the Federal-Service Labor Management Relations Statute.[7] This statute codified and refined many of the provisions and procedures which existed under the earlier Executive Orders. The statute also

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[6] Id. at 31.

[7] 5 U.S.C. §7101 (1990).

established the Federal Labor Relations Authority.[8] In enacting this statute, the Congress found that:

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargaining collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progress work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.[9]

When Congress made this pronouncement in 1978, 58 percent of nonpostal Federal employees were in units of exclusive recognition and collective bargaining agreements had been negotiated covering 89 percent of those employees involved. As the Federal sector program evolved and grew, so did the number of units which included attorneys. Today, in 1993, the National Treasury Employees Union, one of

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[8] The Authority consists of three members appointed by the President with the advice and consent of the Senate. Its duties are similar in function and structure with that of the Florida Public Employees Relations Commission.

[9] 5 U.S.C. § 7101 (1990).

the largest Federal employee organizations, represents the largest number of attorney/employee units in the Federal sector.[10] Similarly, attorney bargaining units

[10] In part, NTEU Chapters represent attorney/employee units in the following agencies:

Chapter 101 United States Customs Office.
Chapter 224 Social Security Administration Office of Hearings and Appeals
Chapter 245 U.S. Patent and Trademark Office Attorneys
Chapter 251 U.S. Internal Revenue Service Office of the Chief Counsel
Chapter 210 Dep't of Health and Hum. Services, Atlanta
Chapter 212 Dep't of Health and Hum. Services, San Francisco
Chapter 215 Dep't of Health and Hum. Services, Seattle
Chapter 217 Dep't of Health and Hum. Services, Kansas City
Chapter 218 Dep't of Health and Hum. Services, New York
Chapter 219 Dep't of Health and Hum. Services, Dallas
Chapter 229 Dep't of Health and Hum. Services Headquarters, Washington DC
Chapter 230 Dep't Health and Hum. Services, Chicago
Chapter 235 Dep't of Health and Hum. Services, Philadelphia
Chapter 236 Dep't of Health and Hum. Services, Denver
Chapter 237 Dep't of Health and Hum. Services, Boston
Chapter 204 Fed. Elections Comm., Washington, DC
Chapter 211 Pension Benefit Guaranty Corp.
Chapter 207 Fed. Deposit Ins. Corp., Washington, DC
Chapter 241 Fed. Deposit Ins. Corp., Boston, Ma.
Chapter 242 Fed. Deposit Ins. Corp., Chicago, Il.
Chapter 244 Fed. Deposit Ins. Corp., New York, NY
Chapter 256 Fed. Deposit Ins. Corp., Midwest Region
Chapter 257 Fed. Deposit Ins. Corp., Midwest Region
Chapter 258 Fed. Deposit Ins. Corp., Northeast Region
Chapter 259 Fed. Deposit Ins. Corp., Western Region
Chapter 260 Fed. Deposit Ins. Corp., Southern Region
Chapter 261 Fed. Deposit Ins. Corp., Chicago Region
Chapter 262 Fed. Deposit Ins. Corp., Atlanta and Orlando Region
Chapter 263 Fed. Deposit Ins. Corp., New England
Chapter 266 Fed. Deposit Ins. Corp., Atlanta, Ga.
Chapter 252 U.S. Internal Revenue Service Long Island Appeals Office
Chapter 253 U.S. Internal Revenue Service Boston Appeals Office
Chapter 208 U.S. Nuclear Reg. Comm.
Chapter 209 Fed. Comm. Comm.
Chapter 213 U.S. Dep't of Energy, Washington, DC

exist in virtually all Federal agencies either as an separate attorney units or as part of a mixed professional attorney/nonattorney unit.[11] Notably, attorneys of the National

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NTEU represents approximately 100 mixed attorney/nonattorney units throughout the United States.

[11] While many units exist solely by locale, nationwide units of attorney/professionals exist within the following Federal agencies:

Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.
Dep't of the Treasury, U.S. Customs Service
Dep't of the Treasury, Internal Revenue Service
Dep't of Agriculture and subordinate components
Dep't of Commerce, Patent and Trademark Office
Nat'l Labor Rel. Brd.
U.S. Information Agency
Nat'l Science Foundation
U.S. Comm. on Civil Rights
Nuclear Regulatory Comm.
Fed.l Election Comm.
Pension Benefit Guaranty Corp.
Fed. Energy Regulatory Comm.
Fed. Trade Comm.
General Services Admin.
Interstate Commerce Comm.
Occupational Health and Safety Review Comm.
Office of Personnel Management
Securities and Exchange Comm.
Commodity Futures Trading Comm.
Consumer Product Safety Comm.
Defense Logistics Agency
U.S. Dep't of Housing and Urban Development
U.S. Dep't of Educ.
U.S. Environmental Protection Agency, Washington, D.C.
U.S. Small Business Admin.
U.S. Dep't of Commerce, National Oceanic and Atmospheric Administration
U.S. Dep't of Commerce, Patent and Trademark Office, Attorney Patent Examiners
U.S. Dep't of Transportation
U.S. Equal Employment Opportunity Comm.

Labor Relations Board and the Federal Labor Relations Authority have organized into bargaining units for the purpose of collective bargaining.[12] In the same vein, the U.S. Department of Justice, recognizes several attorney bargaining units throughout the country. For example, immigration judges have been organized and recognized as a nationwide unit since 1979.[13] The U.S. Department of Labor also recognizes several attorney bargaining units nationwide.[14] In sum, collective bargaining for attorneys has had a positive effect on labor-management relations and the Federal government has not experienced the ethical problems or conflicts that Petitioners argue would occur at the state level. Simply stated, there is no logical reason to believe that collective bargaining for attorneys would not be as equally successful at the state level as it is at

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U.S. Small Business Administration
U.S. Commission on Civil Rights.

Source: U.S. Office of Personnel Management, Union Recognition in the Federal Government, 1991.

[12] 5 U.S.C. § 7103(a)(3)(F), specifically excludes employees of the Federal Labor Relations Authority from its coverage since the Agency enforces the provisions of the Statute. However, the Authority voluntarily recognizes the Union of Authority Employees as the exclusive representatives of its professional employees under the same statutory guidelines applied to other Federal executive branch agencies.

[13] The Nationwide unit of all U.S. Immigration judges is represented by the National Association of Immigration Judges. In the same agency, the American Federation of Government Employees, Local 3525, AFL-CIO represents attorneys in the Executive Office for Immigration Review, Washington D.C.

[14] Attorneys in these units are represented by the American Federation of Government Employees, AFL-CIO.

the Federal level.[15]

II.

No Violation of the Professional Rules of Conduct Would Occur As a Result of Collective Bargaining By Attorneys

In their petition, Petitioners forcefully avow that the Rules of Professional Conduct would be violated if state employed attorneys collectively bargain. Hence, Petitioners claim that state employed attorneys could not be loyal, that state employed attorneys interest in collectively bargaining with Petitioners would be adverse to the State's interests and that conflicts of interests would occur in perpetuity. Petitioners

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[15] The success and cooperative nature of labor management relations throughout the Federal sector was evidenced on October 1, 1993, when the President signed Exec. Order 12871, 58 F.R. 52201 (1993), entitled Labor Management Partnerships. In keeping with the President's promise to streamline government, the Order stated:

> **The involvement of federal government employees and their union representatives is essential to achieving the National Performance Review's Government reform objectives. Only by changing the nature of labor-management relations so that managers, employees and employees' elected union representatives serves as partners will it be possible to design and implement comprehensive changes necessary to reform government. Labor-management partnerships will champion change in Federal government agencies to transform them into organizations capable of delivering the highest quality of services to the American people.**

The Order then established the National Partnership Council comprised of the Director of the Office of Personnel Management; Deputy Secretary of Labor; Deputy Director for Management, Office of Management and Budget; Chair, Federal Labor Relations Authority, Federal Mediation and Conciliation Director; President, American Federation of Government Employees, AFL-CIO; President, National Federation of Federal Employees; President National Treasury Employees Union; Secretary/Treasurer, Public Employees Department, AFL-CIO; and deputy Secretary or other official with department or agency-wide authority from two executive departments or agencies.

further assert that the "at will" relationship between they and their attorney employees would be destroyed if state employed attorneys collectively bargain. Petitioners' warnings are an exaggeration of law, logic and past experience.

At the outset, it should be noted that state governmental employment decisions, unlike employment decisions between a private attorney and a client, constitute state action. Thus, a panoply of safeguards and protections not available to private counsel in her dealings with a private client attach to government attorneys by the nature of their employment. Accordingly, many of the ethical rules that Petitioners claim would be impinged upon as a result of collective bargaining are already restricted or curtailed because of Federal or state constitutional and statutory protections. For example, as to the issue of "at-will" employment, Petitioners cannot merely discharge a state employee for good cause or no cause at all, as is the law in Florida in the private sector. See e.g. De Marco v. Publix Super Markets, Inc., 384 So.2d 1253 (Fla. 1980). Petitioners must accord state employed attorneys due process of law if they wish to discharge them. These steps include a pre-termination notice of charges on which the discipline is based, an opportunity to review the evidence, and a chance to respond to the charges coupled with post-termination procedures which provide for a full due process review. Cleveland Brd. of Educ.v. Loudermill , 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). (nonprobationary police officer may not be terminated or otherwise disciplined, so as to lose significant pay or reputation, without certain procedural steps). In the same vein, Petitioners could not discharge a state employed attorney for the exercise of her First Amendment rights in commenting on a matter of

public concern. Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Similarly, Petitioners could not lawfully discharge a state employed attorney because the employee filed a complaint alleging discrimination based upon sex, race, national origin or color or age.[16] Nor could Petitioners discharge a state employed attorney because she served on a jury, did or did not vote[17] or dismiss an attorney for Whistleblower activities.[18] To be sure, the ability of Petitioners to discharge a state employee under the same circumstances as in a true "at-will" employment relationship in the private sector is significantly curtailed. Under Petitioners' theory, these constitutional protections would be violative of the Rules of Professional Conduct because they interfere with their ability to discharge under Rule 4-1.16.

Petitioners next assert that collective bargaining by its attorneys will result in a conflict of interest. Again, Petitioners' argument falls short of the mark. First, the Comments to Rule 4-1.7 advise that simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, would not be deemed a conflict. It is only when a lawyer cannot consider,

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[16] Title VII of the Civil Rights Act of 1964, §703(a), 42 U.S.C. § 2000-e-2a (1990); Age Discrimination Act of 1967, §4(a), 29 U.S.C. § 623(a) (1991). See also §110.105(2) Fla. Stat. (1993) (prohibiting discrimination in state employment based upon sex, age, race, religion, national origin, political affiliation, marital status or handicap).

[17] §40.271 Fla. Stat. (1993) (prohibiting discharge because of service on a jury); Fla. Stat. §104.081 (1993) (prohibiting discharge for voting or not voting in any election).

[18] §112.3187 Fla. Stat. (1993).

recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest would a conflict occur. Therefore, where a state employed attorney is merely performing agency business and not involved in the formulation of labor-management relations policy, no conflict would occur. More importantly, the Comments to Rule 4-1.7 recognize that there are circumstances in which an attorney may act as an advocate against a client and not violate the Rules. In this regard, the Comments of the Rule are significant:

> **By the same token, government lawyers in some circumstances may represent government employees in some proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.**
>
> **A lawyer may represent parties having antagonistic positions on legal questions that has arisen in different cases, unless representation of either client would be adversely affected.**

Hence, the Comments to Rule 4-1.7 explicitly recognize the right of a government attorney not only to represent another employee before an agency but implicitly recognizes the attorney's right to collectively bargain with the state. Bargaining over subjects such wages, dispute resolution, health and safety, hours of work, case loads or even enforcement of an agreement would not create an impermissible conflict since it does not entail how the Agency accomplishes its statutory mission. [19]

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[19] Conflict would occur where the attorney attempted to represent a client regulated or prosecuted by the employing agency. Or where an attorney was

The American Bar Association's Informal Opinion on the same issue is instructive.[20] Notably, the Committee recognized that on one hand a lawyer who is a member of a union or bargaining organization will not violate any disciplinary rule as a result of his membership. On the other hand, the Committee further recognized that in some circumstances, such as participating in a strike, a lawyer might neglect a legal matter entrusted to him, although it is not necessarily true.[21] Indeed, the Committee noted that:

> **It would be idle speculation, for union membership and participation in union activities will not necessarily result in any violation of Disciplinary Rules. Proper guidelines, therefore, for lawyers considering union membership or participating in union activities, are simply these: Lawyers who are union members are required, the same as all other lawyers, to comply with the Disciplinary Rules at all times; and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer from outside influences.**

More recently, the New York Bar addressed two issues concerning attorney

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negotiating for employment with an interest regulated by the employing agency.

[20] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1325 (1975).

[21] §447.505 Fla. Stat. (1993) provides:

> No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike.

Therefore, a public employee or employee organization can be enjoined from striking, decertified from exclusive representative status and fined. This statute effectively eliminates the potential for a strike.

membership in an employee organization.[22] The first issue concerned whether an attorney may join a labor union composed of both lawyers and non-lawyers. The second issue pertained to whether an attorney employed by a state department or agency who is covered by a collective bargaining agreement could represent the state in disciplinary proceedings brought against other state employees under a collective bargaining agreement.

The facts revealed that certain lawyers employed by the State of New York are covered by a collective bargaining agreement and joined a union which also includes non-lawyers as members. As part of their duties, the lawyers may be required to represent the State in disciplinary proceedings brought against other State employees under a collective bargaining agreement. These employees may be either full or agency shop members of the same union or they may be members of another union which represents state employees. The Committee reached the same conclusion as was reached by the ABA in Informal Op. 1325. They wrote:

> **While lawyers are not prohibited from union membership, they remain first and foremost lawyers. Consequently, lawyers who are union members are required, the same as other lawyers, to comply with all Disciplinary Rules at all times, and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations.**

The Committee found that unless union membership impinged upon the attorney's professional judgment, no ethical violation would occur. The Committee cautioned, however, that if a conflict did occur the lawyer might have to withdraw from

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[22] N.Y. State Bar Assn. Committee on Prof. Ethics, Op. 578 (1986).

representation. The Committee's answer to the second question concluded that a lawyer union member may not represent the State in disciplinary proceedings against other state employees brought under a collective bargaining agreement to which the lawyer is also subject. In such a situation, the Committee held that there is a real danger that the union may attempt to prescribe, direct or suggest the course of the lawyer's conduct. If, however, the lawyer is simply an agency shop member or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, the Committee found that such a lawyer is not specifically prohibited from representing the State in a disciplinary proceedings brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment.

In the instant dispute, there are adequate existing safeguards to insure that Petitioners can accomplish an agency's mission. First, as to the use of attorneys in representing the State in matters involving employees not covered by an attorneys' agreement, there would be no conflict. As to lawyers within the same bargaining unit, Petitioners need only designate a lawyer as a confidential employee.[23] Thus, Petitioners can designate lawyers to deal exclusively with labor-management matters. These attorneys would not be members of a bargaining unit. The Federal sector subscribes to this approach.

In U.S. Department of Labor, Office of the Solicitor, Arlington Field Office and

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[23] §447.203(5) Fla. Stat. (1993).

American Federation of Government Employees, Local 12, 37 FLRA 1371 (1990), the Federal Labor Relations Authority reviewed the Regional Director's Decision and Order on a petition for clarification of unit.[24] The issue presented before the Authority concerned whether certain attorneys within the Office of the Solicitor should be excluded from the bargaining unit because of their confidential status. Upon review, the Authority excluded the attorneys on the basis that they were confidential employees within the meaning of the Federal Service Labor-Management Relations Statute. Id. at 1376. The Authority concluded from the evidence that the attorneys performed internal labor relations matters and obtained advance information of management's position with regard to contract negotiations, the disposition of grievances and other labor relations matters. Id. at 1382. However, the Authority opined:

> **...[W]e agree with the union that Congress intended attorneys, like other professionals, to have the same right to be represented by a union that Congress conveyed to other Federal employees. Membership in a labor organization is in itself not incompatible with the obligations of fidelity owed to an employer by its employees...**

Id. at 1381.[25]

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[24] Clarification of Unit is the procedural device utilized in the both the Federal, state and private sectors to determine whether an employee should be excluded from membership within a bargain unit for purposes of collective bargaining. In general, an evidentiary hearing takes place where evidence is presented on the record so that the deciding official can determine whether the statutory criteria are satisfied. §447.203 (3) (d) Fla. Stat. (1993), excludes from the definition of public employee managerial or confidential employees pursuant to the statute's criteria and adjudicates the issue in a similar fashion as does the Federal sector.

[25] In the same vein, the Florida Legislature intended that public employees have the right to choose or not choose to collectively bargain with the State. § 447.201 Fla. Stat. (1993).

Thus, the Authority expressly recognized the right of attorneys in the federal sector to collectively bargain.[26]

As to the issue of loyalty, the collective experience of both the private and Federal sectors do not support the assertions that Petitioners' claim before this Honorable Court. In Dunn & Bradstreet, 240 NLRB 162 (1979), the National Labor Relations Board held that:

> **As we stated in Dun & Bradstreet, Inc...union membership is not incompatible with an employee's duty of loyalty to his or her employer, even when that duty involves a responsibility to maintain confidentiality.**

Id. at 163.

In Foley, Hoag & Eliot, 229 NLRB 456, 457 (1977) n.12, the Board rejected the same variety of conflict speculation asserted by Petitioners in the instant case. The Board wrote:

> **Chairman Fanning and Members Jenkins and Penello are aware, no less than Members Murphy and Walther, of the privileged and confidential relationship which exists between an attorney and his or her client but**

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[26] Throughout these voluminous pleadings, Petitioners point to several decisions where attorneys were excluded from bargaining units. While dicta in those cases spoke about an attorney's ethical obligations, the outcome of the decisions turned upon the fact that the attorneys work in the area of labor-management relations. That is the key to this Court's inquiry. No conflict of interest could ever arise through collective bargaining unless the attorney attempting to collectively bargain with the state was also performing labor-management relations advice and service. However, Petitioners would claim a conflict if an attorney is involved in any determination of state policy or by merely conducting the agency's day to day business. The most obvious display of this patently absurd reasoning appears at p. 15-16 of Petitioners' Reply Brief. There, petitioners assert that a conflict of interest would occur if Dep't of Health and Rehabilitative Services attorneys are allowed to collectively bargain since they have discretionary authority to implement a fiduciary duty to dependent children in the state.

not, based on the mere speculation that in certain unusual situations self-organization of a law firm's staff employees may in some way conflict with that relationship, treat law firm employees differently than they would treat any other group of employees under the National Labor Relations Act.

id. at 457.

As noted previously, the Federal Labor Relations Authority subscribes to the same philosophy as the National Labor Relations Board. U.S. Dept. of Labor, supra. Consequently, Petitioners mere speculation should not be used as a basis to prevent attorneys from collectively bargaining with their State employers.[27]

In Petitioners' Reply to the Responses of the Respondents, they rely heavily on the Local Labor Relations Board's determination in the Salaried Employees of N.A. (SENA) and City of Chicago, Law Dept., Case No. L-RC-87-04 (1987), as support for the proposition that state employed attorneys are confidential and managerial employees. One point requires comment. As is evident from the opinion, the Corporation Counsel's Law Department attorneys were excluded from collectively bargaining based upon the specific factors and evidence that the attorneys were confidential and managerial employees within the meaning of Illinois law. The Board did not premise its holding on the fact that the Rules of Professional Responsibility would be violated. More importantly, this Board reached this holding only after a full evidentiary hearing wherein each party had the right to present evidence and to

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[27] Thus, if one were to employ Petitioners' HRS theory, attorneys at both the NLRB and the FLRA, the agencies that develop, define and refine federal and private sector labor policy would have conflicts ad nauseam since they exercise a great deal of discretionary authority that effectively controls and implements the fiduciary duty owed by these agencies to workers throughout the country.

examine and cross examine witnesses. Yet, in the case at bar, Petitioners seek to remove even the smallest vestige of due process and would have this Honorable Court decide appropriate unit determinations in this proceeding rather than the forum that the Legislature specifically designated to develop Florida public sector labor policy. The effect of Petitioners' suggestions is to create a Supreme Court Labor Commission merely because attorneys are involved. Thus, Petitioners' desired resolution of this dispute would place this Honorable Court in the untenable position of conducting evidentiary hearings for the purpose of resolving appropriate unit determinations, clarify units of attorneys, to conduct representation elections and lastly to decide attorney unfair labor practices. At a minimum, this Court should withdraw its stay in this case and allow the Public Employees Relations Commission the opportunity to conduct a full evidentiary hearing whereby an adequate record can be created.

III.

A Determination That Collective Bargaining At the State Level by Attorneys is Violative of the Professional Rules of Conduct Will Place Florida Bar Members in the Federal Sector in Jeopardy of Running Afoul of this Court's Pronouncements and Will Conflict with Rights Guaranteed By Federal Law

Should this Honorable Court determine that collective bargaining by attorneys violates the Professional Rules of Conduct at the state level, then this Court must also conclude that collective bargaining by Florida Bar attorneys at the Federal level is also inappropriate. If this Honorable Court reaches that conclusion, the decision would be

in direct conflict with Federal statutory protections. 5 U.S.C. §7102 (1990) provides:

> **Each employee shall have the right to form, join, or assist any labor organization, or refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right---**
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> **(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and**
>
> **(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.**

5 U.S.C. §7103 (1990), in pertinent part, provides:

> **(a) For purposes of this chapter---**
>
> **(2) employee means an individual---**
>
> **(A) employed in an agency;**
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> **(3) agency means and Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service,Veterans Administration), the Library of Congress, and the Government Printing Office, but does not include--**
>
> **(A) the General Accounting Office;**
> **(B) the Federal Bureau of Investigation;**
> **(C) the Central Intelligence Agency;**
> **(D) the National Security Agency;**
> **(E) the Tennessee Valley Authority;**
> **(F) the Federal Labor Relations Authority; or**
> **(G) the Federal Service Impasses Panel**

As noted previously, Congress intended attorneys like other professionals, to have the same right to be represented by a union that Congress conveyed to other Federal employees. In the case at bar, Congress' intention to provide collective bargaining rights to all Federal employees, including federally employed attorneys, is firmly established by Statute.[28] As noted by Petitioners', the Professional Rules of Conduct apply to government attorneys. Thus, a decision prohibiting or restricting collective bargaining by attorneys at the state level will place Federal sector members of the Florida Bar in an ethical dilemma.

CONCLUSION

Petitioners have been able to demonstrate only through hyperbole, unsubstantiated conjecture and mere speculation that collective bargaining by state employed attorneys is inappropriate. Their precarious predictions portend of the ethical collapse of state government should attorneys be allowed to improve themselves through good-faith collective bargaining. Not surprisingly, Petitioners were unable to point to one disciplinary case in Florida or in any jurisdiction where an attorney committed an ethical violation because she collectively bargained.[29] Even

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[28] 5 U.S.C. §7101(b) (1990) provides:

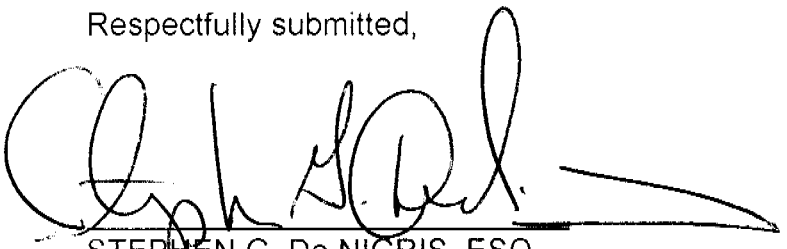
> **It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish which are designed to meet the special requirements and needs of the Government.**

[29] Without a doubt, Petitioners' inability to support its claims, leaves one with the unmistakable memory of Clara Peller shouting "'Where's the Beef?"

more compelling, the vast collective experience of both the Federal and private sectors warrants a contrary conclusion and a finding on behalf of Respondent SEAG. As noted, there are adequate statutory safeguards through the designations of confidential or managerial employees which will protect against any actual conflict.

WHEREFORE, and for the reasons stated herein, the undersigned Counsel respectfully prays that Petitioners request for Writ of Prohibition be denied, that this Honorable Court lift its stay and direct the Public Employees Relations Commission to proceed with the processing of Respondent SEAG's Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was provided to **Louis F. Hubener**, Assistant General Counsel, Department of Legal Affairs, The Capitol-PL01, Tallahassee, Florida 32399-1050; **Peter J. Hurtgen**, Special Assistant Attorney General, Morgan Lewis & Bockius, 200 South Biscayne Blvd., Suite 5300, Miami, Florida 33131; **Stephen A. Meck**, General Counsel, Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32301-5032; **Jack E. Ruby**, Assistant General Counsel, Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32301-5032 and **Thomas W. Brooks**, Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, P.O. Box 1547, Tallahassee, Florida 32302, on the 5TH day of November, 1993.

STEPHEN G. De NIGRIS, Esq.