FILED
SID J. WHITE
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CLERK, SUPREME COURT
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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,

vs.

CASE NO. 81,835

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

Respondents.

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RESPONSE TO ORDER TO SHOW CAUSE

Respondent, State Employees Attorney Guild (SEAG), files this response in opposition to the Petition for Writ of Prohibition filed in this case. SEAG is an employee organization within the meaning of Section 447.203(11), Florida Statutes (1991), which seeks to represent a bargaining unit of professional employees whose positions require membership in The Florida Bar as defined by the Public Employees Relations Commission (PERC) in Florida Administrative Code Rule 38D-17.023(2)(b). For the reasons set forth herein, SEAG submits that the Court should deny the Petition and permit PERC to proceed with the processing of SEAG's petition for certification.

FACTS

SEAG agrees with Petitioners' recitation of the facts insofar as they set forth the procedural posture of this case. However, SEAG disagrees and vigorously disputes the many unsupported factual assertions made by the Petitioners regarding the alleged adverse impact upon the attorney-client relationship and this Court's jurisdiction to regulate the practice of law resulting from the certification of a bargaining unit of attorneys employed by the State. SEAG asserts, and is prepared to prove in an evidentiary hearing, that such a bargaining unit is fully compatible with the Rules of Professional Conduct and does not interfere in any way with this Court's jurisdiction under Article V, Section 15 of the Florida Constitution. As evidence SEAG offers American Bar Association Informal Opinion 1325 (1975) which provides that "union membership and participation in union activities will not necessarily result in any violation of Disciplinary Rules." SEAG is also prepared to prove that collective bargaining occurs between public employee attorneys and various public employers in at least seven other states and within the federal government.[1] If afforded the opportunity, SEAG will prove that, despite the melodramatic, doomsday predictions of the Petitioners, collective bargaining for public employee attorneys has not only had no adverse effects on the practice of law by these professionals in these jurisdictions, it has in fact enhanced their ability to practice law at a high

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[1]The states are: Connecticut, Illinois, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

level of professionalism through the establishment of better working conditions, higher morale and greater opportunities for improving their professional skills.

Despite their bluster, Petitioners have failed to provide this Court with a single incidence of a significant conflict arising in any other jurisdiction which has attorney collective bargaining. The absence of such evidence casts substantial doubt on the accuracy of the "facts" asserted by the Petitioners throughout the argument portion of the Petition. Consequently, there is no undisputed factual basis upon which this Court can properly issue a writ of prohibition. Rather, PERC should be allowed to conduct an evidentiary hearing to develop the necessary factual basis upon which the legal issues raised in this case may be decided.

SUMMARY OF THE ARGUMENT

This Court lacks subject matter jurisdiction to issue writs of prohibition to an administrative agency such as PERC. Article V, Section 3(b)(7) of the Florida Constitution specifically limits this Court's prohibition jurisdiction to courts. This limitation, created in the 1980 constitutional revision, was an intentional and material change in this Court's prior jurisdiction to issue writs of prohibition and cannot, therefore, be ignored or interpreted in any other fashion.

Even if this Court had the same jurisdiction to issue writs of prohibition that existed prior to the 1980 constitutional revision, this Court still lacks subject matter jurisdiction because it does

not have direct appellate review over PERC decisions. Only the district courts of appeal have jurisdiction to issue writs of prohibition to PERC.

Even if this Court had jurisdiction, prohibition does not lie in this case because PERC is neither completely without jurisdiction nor acting clearly in excess of its statutory jurisdiction by attempting to process SEAG's petition for certification. The Legislature has explicitly conferred jurisdiction on PERC through Section 447.207(6), Florida Statutes (1991), to resolve, in the first instance, the issues raised in this case and Petitioners therefore have an adequate remedy at law by direct appellate review of PERC's decision. SEAG cannot represent any public employee attorneys in collective bargaining unless and until all opportunities for appellate review are exhausted or waived. Consequently, none of the "evils" asserted in the Petition can even arguably occur until normal judicial review is complete.

Prohibition is also inappropriate because the writ may not be employed to restrain an act which has already taken place. In this case, PERC determined that attorneys employed by the State as a class were public employees entitled to exercise collective bargaining rights in 1987 by defining by rule a separate professional unit for these employees. Consequently, any challenge to the application of this rule in a particular case must be through direct appeal, not through an extraordinary writ. Thus,

there is no need of or justification for this Court to exercise its original jurisdiction in this case.

On the merits, this Court's jurisdiction under Article V, Section 15 of the Florida Constitution is not infringed by the proceedings before PERC. In addition to the obvious fact that this Court retains all of its authority to regulate the practice of law no matter what PERC determines, this Court has repeatedly held that the Legislature has the authority to regulate the relationship between public entities and their attorneys and such action does not infringe upon its Article V, Section 15 jurisdiction. Because the Legislature unquestionably has the constitutional authority and, as decreed by this Court, the primary responsibility to enact legislation regulating collective bargaining between public employers and public employees, the doctrine of separation of powers prohibits this Court from second-guessing legislative judgments in the area of collective bargaining which do not contravene Article I, Section 6 of the Florida Constitution.

Even if this legislation alters or impacts upon the attorney-client relationship in some manner, this Court lacks the power to intercede because the Legislature, not this Court, determines on behalf of the client - the people of the State of Florida - which aspects of the attorney-client relationship are available to governmental entities. By failing to specifically exempt attorneys from the definition of "public employee" in Section 447.203(3), Florida Statutes (1991), the Legislature has preserved collective bargaining rights for state-employed attorneys and has either

waived or consented to any conflicts with or alterations of the traditional attorney-client relationship the exercise of these rights might entail.

This Court should not exercise any jurisdiction it may have to issue an extraordinary writ in this case because to do so would have the effect of both amending the Rules of Professional Conduct and depriving public employee attorneys of their constitutional rights to collectively bargain without affording the affected individuals due process of law or following customary procedures for making such decisions.

Whether the public employee attorneys employed by the Attorney General and the Office of Statewide Prosecution are officers rather than employees and are therefore exempt from coverage under the collective bargaining law is unquestionably an issue within the jurisdiction of PERC. This issue has no impact upon this Court's Article V, Section 15 jurisdiction and Petitioners have made no argument that PERC would be acting in excess of its jurisdiction to make this determination in the exercise of its authority to define appropriate bargaining units set forth in Sections 447.207(6) and .307(3), Florida Statutes (1991). Consequently, prohibition does not lie with respect to these issues.

ARGUMENT I

THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ISSUE A WRIT OF PROHIBITION TO PERC

The jurisdiction of this Court to issue writs of prohibition is set forth in Article V, Section 3(b)(7) of the Florida Constitution as revised in 1980. This Court

> [m]ay issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

Prior to the 1980 amendment, the Constitution provided in Article V, Section 3(b)(4), that this Court

> [m]ay issue writs of prohibition to courts and commissions and causes within the jurisdiction of the Supreme Court to review, and all writs necessary to the complete exercise of its jurisdiction.

This omission was deliberate and "was presented to the public as necessary to narrow this Court's jurisdiction in order to reduce [its] case load selectively." Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984). Thus, this amendment eliminated any jurisdiction this Court might previously have had to issue a writ of prohibition to an administrative agency such as PERC. In view of this express constitutional limitation, this Court is without jurisdiction to issue the writ requested in this case. Padavano, Florida Appellate Practice, Section 22.3 (1988).

Even prior to the 1980 amendment, this Court was without jurisdiction to issue writs of prohibition to administrative agencies whose orders were not directly reviewable by this Court. Article V, Section 3(b)(4), Florida Constitution (1972). Because

this Court has never had direct review of PERC orders, it has never had jurisdiction to issue writs of prohibition to this administrative agency. Rather, such jurisdiction is vested exclusively in the district courts of appeal.

Article V, Section 4(b)(3), of the Florida Constitution does not limit the jurisdiction of district courts to issue writs of prohibition thereby empowering them to issue writs of prohibition to all lower tribunals, including administrative agencies. Padavano, Florida Appellate Practice, Section 22.3 (1988). Jurisdiction to issue extraordinary writs generally depends upon whether the tribunal from whom the writ is sought would have jurisdiction to exercise direct appellate jurisdiction over the tribunal to whom the writ is directed. Id. Therefore, jurisdiction to issue writs of prohibition rests with the district courts of appeal which have appellate jurisdiction to review administrative action which is not directly appealable to this Court or a circuit court. Article V, Section 4(b)(1), Florida Constitution (1980).

This Court being without jurisdiction, the Petition should be dismissed.

ARGUMENT II

EVEN IF THIS COURT HAD JURISDICTION, PROHIBITION DOES NOT LIE IN THIS CASE BECAUSE PERC IS NOT ACTING CLEARLY IN EXCESS OF ITS STATUTORY JURISDICTION; PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW BY DIRECT REVIEW OF ANY DECISION RENDERED BY PERC; THE EXISTENCE OF THIS COURT'S JURISDICTION DEPENDS UPON DISPUTED FACTS WHICH PERC HAS JURISDICTION TO DETERMINE; AND THE ACT SOUGHT TO BE PROHIBITED HAS ALREADY BEEN TAKEN BY PERC IN RULEMAKING PROCEEDINGS TO WHICH THE STATE WAS A PARTY

Prohibition is an extraordinary remedy, extremely narrow in its scope, which is employed to prevent an inferior tribunal from acting where it has no jurisdiction or is exceeding the scope of its proper jurisdiction. Southern Records & Tape Service v. Goldman, 502 So.2d 413 (Fla. 1986); English v. McCrary, 348 So.2d 293 (Fla. 1977). It does not lie to prevent a mere erroneous exercise of jurisdiction nor is it available after the action complained of has already taken place. Id. The writ may not issue if another adequate legal remedy is available nor does it lie if there exist disputed issues of fact which the inferior tribunal has jurisdiction to determine. Id. Applying these principles to the circumstances of this case, it is apparent that prohibition does not lie to prevent PERC from carrying out its statutorily mandated responsibility to process petitions for certification filed by employee organizations such as SEAG.

This is not a case of an administrative agency acting clearly in excess of its statutory jurisdiction. No reasonable argument can be made that PERC does not have jurisdiction to entertain a petition such as that filed in this case seeking to represent a

group of individuals claimed to be public employees for purposes of collective bargaining. On the contrary, PERC not only has primary but exclusive jurisdiction to resolve the issues raised by SEAG's petition for certification.

In enacting Chapter 447, Part II, Florida Statutes (1991), the Legislature intended to vest PERC with exclusive jurisdiction over labor activities which are arguably covered by that statute, preempting the field to prevent conflicting determinations by multiple tribunals. Maxwell v. School Board of Broward County, 330 So.2d 177 (Fla. 4th DCA 1976); PERC v. Fraternal Order of Police, Local Lodge No. 38 and City of Naples, 327 So.2d 43 (Fla. 2d DCA 1976). Section 447.207(6), Florida Statutes (1991), vests PERC with the power and duty to "resolve questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit, determine or approve units appropriate for purposes of collective bargaining, . . . and resolve such other questions and controversies as it may be authorized herein to undertake." In Section 447.307(3)(a), Florida Statutes (1991), PERC is empowered to investigate a petition for certification to determine its sufficiency and, if sufficient, conduct a hearing to:

> 1. Define the proposed bargaining unit and determine which public employees shall be qualified and entitled to vote in any election held by the commission.
>
> 2. Identify the public employer or employers for purposes of collective bargaining with the bargaining agent.
>
> 3. Order an election by secret ballot. . . .

In fulfilling these duties, PERC must interpret and apply the definitions of "public employer" and "public employee" as set forth in Sections 447.203(2) and (3), Florida Statutes (1991). The latter is defined as any person employed by a public employer except:

> (a) Those persons appointed by the Governor or elected by the people, agency heads, and members of boards and commissions.
> (b) Those persons holding positions by appointment or employment in the organized militia.
> (c) Those individuals acting as negotiating representatives for employer authorities.
> (d) Those persons who are designated by the commission as managerial or confidential employees pursuant to criteria contained herein.
> (e) Those persons holding positions of employment with the Florida Legislature.
> (f) Those persons who have been convicted of a crime and are inmates confined to institutions within the state.
> (g) Those persons appointed to inspection positions in federal/state fruit and vegetable inspection service whose conditions of appointment are affected by the following:
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> 1. Federal license requirement.
> 2. Federal autonomy regarding investigation and disciplining of appointees.
> 3. Frequent transfers due to harvesting conditions.
>
> (h) Those persons employed by the Public Employees Relations Commission.
> (i) Those persons enrolled as graduate students in the State University System who are employed as graduate assistants, graduate teaching assistants, graduate teaching associates, graduate research assistants, or graduate research associates and those persons enrolled as undergraduate students in the

State University System who perform part-time work for the State University System.[2]

PERC's resolution of these issues is subject to judicial review by the district courts of appeal but only after the conduct of a collective bargaining election and/or the issuance of a final order certifying an employee organization as the exclusive collective bargaining representative or dismissing the petition. City of Panama City v. PERC, 333 So.2d 470 (Fla. 1st DCA 1976); School Board of Sarasota County v. PERC, 333 So.2d 95 (Fla. 2d DCA 1976); City of Orlando v. PERC, 338 So.2d 259 (Fla. 4th DCA 1976).

Although they have attempted to disguise the true nature of their position in order to circumvent PERC's exclusive jurisdiction, Petitioners are simply arguing that the employees SEAG seeks to represent are not public employees within the meaning of Section 447.203(3), Florida Statutes (1991). This is a determination that PERC clearly has the jurisdiction to make. Petitioners are in reality, therefore, only challenging what they claim to be an erroneous exercise of jurisdiction by PERC, not action in excess of its proper jurisdiction.

It is clear that the basis for Petitioners' claim that attorneys employed by the State should be denied public employee status neither deprives PERC of jurisdiction to resolve a dispute

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[2]Subsection (i) was held to be an unconstitutional infringement on the right to collectively bargain guaranteed by Article I, Section 6 of the Florida Constitution in United Faculty of Florida, Local 1847 v. Board of Regents, 417 So.2d 1055 (Fla. 1st DCA 1982). It should be noted that this determination was made on direct appellate review of PERC's final order dismissing the union's petition for certification based upon the statutory exclusion.

clearly within its authority nor renders the exercise of that clear authority an attempt to usurp the jurisdiction of this Court. PERC is simply doing what it is statutorily mandated to do and if its resolution of the disputed issues is erroneous or exceeds the scope of its discretion, that action can be remedied through judicial review. Indeed, such was the case in Murphy v. Mack, 358 So.2d 822 (Fla. 1978), where this Court reversed a determination of the First District Court of Appeal affirming PERC's finding that deputy sheriffs were public employees. The issue in this case is exactly the same, except that the Petitioners have asserted a different basis for the conclusion that state-employed attorneys are not public employees within the meaning of the collective bargaining law. Because PERC unquestionably has jurisdiction to determine this issue in the first instance, prohibition does not lie.

It is also apparent from the above discussion that prohibition does not lie because the Petitioners have an adequate remedy at law through direct appeal of PERC's final order. Petitioners have made no showing whatsoever that they would be irreparably harmed or prejudiced in any way by going through the administrative process prior to resorting to the courts. Nor can any such argument be sustained. SEAG cannot represent any public employee attorneys in collective bargaining until all opportunities for appellate review are exhausted or waived. Therefore, none of the dire consequences to the attorney-client relationship alleged by Petitioners can possibly occur until the normal process of judicial review is complete.

Viewed from this perspective, it is apparent that prohibition is completely unnecessary to protect the interest which the Petitioners assert. In reality, Petitioners are not seeking to protect this Court's jurisdiction but are simply using that argument in an effort to deprive PERC of its rightful jurisdiction and circumvent the statutorily mandated process for resolving the type of issues raised in this case. It is wholly improper for this Court to exercise its discretionary jurisdiction under these circumstances.

As pointed out at the beginning of this response, there are significant issues of disputed fact regarding the impact collective bargaining by public employee attorneys would have, if any, on the attorney-client relationship and the ability of these attorneys to adhere to the Rules of Professional Conduct. PERC is entirely capable of developing a factual record with respect to these issues and rendering an initial determination.[3] Because any error in this judgment may be corrected through judicial review, prohibition does not lie.

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[3]This Court is not the only tribunal which has the authority to determine whether its Article V, Section 15 jurisdiction has been infringed. Such a determination may be made by lower tribunals as well. E.g., Howard v. State Commission on Ethics, 421 So.2d 37 (Fla. 3d DCA 1982) (district court of appeal determined that constitutional authority of Supreme Court to regulate the practice of law was not infringed by Ethics Commission's interpretation of ethics statutes which was stricter than required by the Canons of Professional Responsibility); Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969) (effect of Sunshine Law is to waive the privilege of confidentiality existing in attorney-client relationship on behalf of board or commission governed by statute except for narrow exception where statute clearly conflicts with attorney's ethical duties as required by Canons of Ethics).

Finally, the action which Petitioners seek to prohibit in this case was taken by PERC in 1987 and cannot therefore be prohibited after the fact. In response to a suggestion for rulemaking by the Florida Nurses Association to which the State was a party, PERC declined to adopt the requested rule but decided on its own to initiate rulemaking to define separate units of employees in the Selected Exempt Service. In re Petition of Florida Nurses Association, 13 FPER ¶ 18190 (1987). As a result of these proceedings, PERC adopted in October, 1987, the following amendment to its rules defining statewide collective bargaining units:

> Bargaining units of state Selected Exempt Service Employees shall be established on a statewide basis, with one unit for each of the following groups, excluding all managerial and confidential employees, as defined in Section 447.203(4) and (5), Florida Statutes:
>
> (a) Physicians:
> Unit 1: all positions which require as a prerequisite licensure as a physician pursuant to Chapter 458, as an osteopathic physician pursuant to Chapter 459 or as a chiropractic physician pursuant to Chapter 460, including those positions which are occupied by employees who are exempt from licensure pursuant to s. 409.352.
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> (b) Attorneys:
> Unit 2: all positions which require as a prerequisite membership in The Florida Bar except for any attorney who serves as a hearing officer pursuant to s. 120.65 or for hearings conducted pursuant to s. 120.57(1)(a).

Florida Administrative Code Rule 38D-17.023(2); In re Amendment to Rule 38D-17.023 (State-wide Bargaining Units), 13 FPER ¶ 18264 (1987).

Thus, PERC has already determined that attorneys employed by the State, as a class, are public employees who enjoy the right to collectively bargain and engage in concerted activities set forth in Section 447.301, Florida Statutes (1991). The only issue remaining for determination is which of those employees, if any, qualify as managerial or confidential employees as defined by Sections 447.203(4) and (5), Florida Statutes (1991). Because this is unquestionably a determination PERC has jurisdiction to make, there is no basis for invoking this Court's original jurisdiction.

The State had notice of and fully participated in this rulemaking proceeding. Although the State opposed adoption of the rule as it relates to attorneys, it did so not because of the issues raised in this case but upon the basis that the law governing the Selected Exempt Service might change before any union sought to represent attorneys. PERC stated as follows regarding collective bargaining by attorneys:

> [t]he large number of attorneys employed by the State have a high degree of community of interest because they are all required to be members of The Florida Bar and conform to the Rules of Professional Conduct in addition to their wages, hours and terms and conditions being treated uniformly under the SES.
>
> We cannot agree that defining a unit of SES attorneys is inappropriate for the reasons asserted by the State. We see no reason why we should delay defining a unit of attorneys until an employee organization seeks to represent them. The purpose behind defining bargaining units by rule is to prevent such ad hoc unit determinations in favor of a more orderly all-encompassing process of defining units. The fact that the SES may be abolished in 1990 is speculative. Finally, any difficulty in negotiating concerning the terms

> and conditions of employment for SES attorneys as a result of certain prerogatives being reserved to management under Chapter 110, Florida Statutes, would apply equally with respect to SES physicians. Therefore, because the State has no objection to negotiating with a bargaining agent for the SES physicians, we see no reason why it should have any greater difficulty negotiating with a representative of the SES attorneys, should they choose to be represented.

The State did not challenge this rule pursuant to Section 120.54(4)(a), Florida Statutes (1991), or seek judicial review. Therefore, its only avenues for relief from this rule are to challenge its application in SEAG's case before PERC or, if it alleges that the rule is unconstitutional on its face, to file an action in circuit court. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So.2d 153 (Fla. 1982). Under no circumstances is it proper to challenge this rule directly in this Court through prohibition.

For each of these reasons, prohibition does not lie and the Petition should be dismissed.

ARGUMENT III

THE EXERCISE BY PUBLIC EMPLOYEE ATTORNEYS OF THEIR CONSTITUTIONAL RIGHTS TO COLLECTIVELY BARGAIN DOES NOT INFRINGE UPON THIS COURT'S EXCLUSIVE JURISDICTION TO REGULATE THE PRACTICE OF LAW

The essential premise of Petitioners' position, and the sole basis for invocation of this Court's jurisdiction, is the theory that the exercise by public employee attorneys of the constitutional right to collectively bargain through the procedures set forth in Chapter 447, Part II, Florida Statutes (1991), will necessarily and significantly interfere with the power of this Court to regulate the practice of law. This is a bogus theory unsupported by evidence and inconsistent with the doctrine of separate of powers set forth in Article II, Section 3 of the Florida Constitution.

As previously noted, Petitioners have presented absolutely no evidence in support of their theory even though one would logically expect that there would be plenty of examples of the application of this theory in one of the many other jurisdictions in which government attorneys engage in collective bargaining. Surely if such bargaining is as inherently destructive of the attorney-client relationship and the ability of government attorneys to comply with their professional obligations as suggested by Petitioners, there would be at least one case from one of these other jurisdictions so finding. The absence of such evidence casts substantial doubt on the validity of this theory.

Moreover, the theory is illogical because it is readily apparent that nothing PERC does could possibly prevent this Court from the full exercise of its Article V, Section 15 powers. The absolute worst that could happen would be that this Court would be called upon in a particular case to strike down some pronouncement of PERC found to be in conflict with this Court's authority. That, of course, is not a sufficient reason to entirely exempt a whole class of public employees from a constitutional right. As noted by the American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1325 (1975), there is no per se ethical prohibition against lawyers joining unions or engaging in union activities nor is there any factual basis to conclude that union membership and participation in union activities will necessarily result in violation of any disciplinary rules. Consequently, it simply cannot logically be concluded that collective bargaining by government attorneys will interfere in any significant way with the ability of this Court to regulate the professional conduct of the attorneys so involved.

However, even if it is assumed for purposes of argument that requiring the State to bargain with its attorneys on certain subjects would, if agreement is reached, be in conflict with the Rules of Professional Conduct, this Court's Article V, Section 15 authority is protected in at least two ways. First, as just mentioned, the State does not have to agree to any provision which it believes intrudes upon this Court's authority or requires its attorneys to violate the Rules of Professional Conduct and a union

has no power to make it do so. Section 447.203(14), Florida Statutes (1991), defines collective bargaining but contains the proviso "except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part." Most, if not all, of the parade of horribles set forth by the Petitioners in their argument could be avoided by simply saying "no."

More significantly, the Legislature has foreseen the possibility that negotiating parties might agree to provisions which are in conflict with statutes, rules or ordinances and specifically included the following fail-safe mechanism in Section 447.309(3), Florida Statutes (1991):

> If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule, or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power a proposed amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or adopted and becomes effective, the conflicting provision of the collective bargaining agreement shall not become effective.

Thus, this Court's Article V, Section 15 jurisdiction is expressly protected from encroachment by conniving unions and employers by this provision. It was this provision upon which PERC relied when it concluded that the State had an obligation to bargain (not agree) with the certified bargaining agent for physicians and dentists over proposals to provide them something greater than "at will" employment. Florida Federation Union of American Physicians and Dentists, FEA/United, AFT, AFL-CIO, Local 4591 v. State of

Florida, 16 FPER ¶ 21115 (1990). PERC was not mandating that the State agree to a provision which was in conflict with the statute which made these employees "at will;" it was simply requiring the State to bargain about this matter which, if agreed to, could not be effective until the Legislature could be convinced to change the statute. Precisely the same process would apply to collective bargaining with attorneys. If the parties negotiated and agreed to provisions which conflict with the Rules of Professional Conduct, they would not be effective unless and until the parties came to this Court and received approval first.

This statutory procedure not only fully protects this Court's Article V, Section 15 jurisdiction, it provides a useful mechanism through which the negotiating parties can develop specific agreements on matters unique to government attorneys which were never contemplated or intended to be prohibited by the Rules of Professional Conduct. There can be no doubt that the Rules of Professional Conduct were not developed in contemplation of the special issues which might arise in the context of public employee attorney collective bargaining. Although this has allowed the Petitioners to construct several arguments which may appear to some to support their theory, it simply does not follow that there is no room for reasonable people to harmonize public employee attorneys' professional responsibilities with their desire to achieve fair and equitable terms and conditions of employment. Because this Court retains, at all times, the final say, no encroachment upon its authority can occur.

Further evidence of the invalidity of Petitioners' theory is the fact that prior to the creation of the Selected Professional Service (later renamed the Selected Exempt Service) in 1985, many government attorneys were included in the Career Service System which provided them with the very job security and potential for suit against their employer which Petitioners claim is so destructive of the attorney-client relationship and the duty of loyalty. In re Amendment to Rule 38D-17.023(3) (State-wide Bargaining Units), 13 FPER ¶ 18264 (1987). Government attorneys operated under this system from at least 1979 through 1985, without adversely affecting their ability to comply with their duty of loyalty and other professional responsibilities.

Petitioners' theory is also based upon the incorrect assumption that it is the process of collective bargaining which is the culprit when, in fact, most of the "evils" which Petitioners identify emanate from the employer/employee relationship itself and exist even in the absence of collective bargaining. Indeed, the existence of problems in the employer/employee relationship is the very thing which creates interest in forming or joining a union. Collective bargaining is simply an alternative, and perhaps more effective, means for employees to deal with their common problems and concerns. It is extremely naive to believe that these concerns would disappear if collective bargaining is prohibited. Carried to its logical extreme, then, Petitioners' theory would require all attorneys to be independent contractors rahter than employees to

avoid violating the Rules of Professional Conduct. This absurd result renders the theory logically invalid.

But Petitioners' primary concern is not really with the validity of the theory; it is simply a means to advance their personal beliefs that collective bargaining for public employee attorneys is bad public policy. By using this theory to circumvent PERC and come directly to this Court, Petitioners hope to remove the debate over this public policy to what they believe will be a more sympathetic forum. Evidence of this motivation is found in Petitioners' assertion on page 9 of the Petition that "this Court alone has the authority to implement that right through adoption of an appropriate framework" citing, as authority, Dade County Classroom Teachers Association v. Legislature, 269 So.2d 684 (Fla. 1972). In fact, this Court said nothing of the sort in that or any other case. On the contrary, this Court specifically refused to act in that case because to do so would violate the doctrine of separation of powers set forth in Article II, Section 3 of the Florida Constitution. This Court's limited power to "legislate" is confined to the relatively unique circumstance where the Legislature has refused to implement basic or fundamental rights. In this case, the opposite is true - Petitioners are asking this Court to overrule a legislative enactment implementing a fundamental constitutional right. This the Court clearly cannot do.

The Legislature has the sole responsibility for making the fundamental and primary policy decisions as the elected

representatives of the people, and this responsibility may not be delegated to another branch. Id.; Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). Where the Legislature has fulfilled this duty and delegated to an administrative agency the power to carry out the legislatively determined policy based upon adequate guidelines, the sole duty of this Court is to determine whether the administrative agency has acted consistent with the discretion delegated to it. Id. Therefore, where the Legislature has enacted a law implementing the constitutional right to collectively bargain, the sole issue before this Court is whether the Legislature has in that law vested PERC with the authority to determine whether attorneys are "public employees" within the meaning of Section 447.203(3), Florida Statutes (1991). There can be no reasonable dispute that the Legislature has done so.

Section 447.203(3), Florida Statutes (1991), provides detailed standards and guidelines for determining which persons are "public employees" who may engage in collective bargaining with public employers. The Legislature chose not to specifically exclude attorneys from the definition of "public employee" and has set forth a specific category of "professional employee" in Section 447.203(13), which, on its face, encompasses attorneys.[4] While

[4] "Professional employee" means:

> (a) Any employee engaged in work in any two or more of the following categories:
> 1. Work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;

this Court may judicially review whether PERC has acted consistently with the Legislative guidelines with respect to public employee attorneys, it is prohibited under the doctrine of separation of powers from "second-guessing" the Legislature regarding the wisdom of the policy preserving collective bargaining rights for these employees.

Petitioners' response to this argument will surely be that this case is different because of this Court's Article V, Section 15 jurisdiction. Like so many of the assertions made by Petitioners, however, this one is simply wrong.

> 2. Work involving the consistent exercise of discretion and judgment in its performance;
>
> 3. Work of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
>
> 4. Work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental or physical processes.
>
> (b) Any employee who:
>
> 1. Has completed the course of specialized intellectual instruction and study described in subparagraph 4. of paragraph (a); and
>
> 2. Is performing related work under supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Contrary to Petitioners' claims, the Legislature does have the authority to regulate the relationship between public bodies and their attorneys and this Court has specifically so held on a number of occasions. In Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985), this Court considered a claim that the requirement of the Sunshine Law, Chapter 286.011, Florida Statutes (1991), that discussions between a public body and its attorneys over pending litigation infringed on this Court's authority under Article V, Section 15 to regulate the practice of law. The basis for this claim was that the Sunshine Law was in conflict with the portions of the Florida Bar Code of Professional Responsibility and Ethical Considerations which protect the confidentiality of the attorney-client relationship, relying on the decision of the Second District Court of Appeal in Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969). In Times Publishing Company, the court held that based upon this Court's exclusive jurisdiction to regulate the practice of law, the Legislature was without authority to require through the Sunshine Law an attorney to discuss pending litigation with his client in public where, in the professional judgment of the attorney, it would be in the best interest of the public (the client) that such consultations be private and confidential. 222 So.2d at 475. This Court stated in response to this argument:

> We disagree and disapprove that portion of Times Publishing Co. which holds that the legislature is without authority to regulate the relationship of public bodies with their attorneys. . . . The legislature has plenary constitutional authority to regulate the

> activities of political subdivisions and can require, as it has done in section 286.011, that meetings be open to the public. The attorney's right to invoke the attorney/client privilege is derivative of the client's right to that privilege. Under the circumstances, it would truly be a case of the tail wagging the dog to hold that an attorney, or this Court, could require closed meetings of public bodies, contrary to statutory law, based on the Code of Professional Responsibility.

462 So.2d at 825. Likewise, the Legislature has plenary authority to regulate the employment relationship between the State and attorneys, including collective bargaining.

This Court again rejected the same argument made with respect to attorney-client communications and the Public Records Act in City of North Miami v. Miami Herald Publishing Company, 468 So.2d 218, 219 (Fla. 1985), stating:

> Essentially, we addressed and rejected many of these same arguments in Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985). The legislature has the constitutional power to regulate disclosure of public records of the state and its political subdivisions and has done so through chapter 119. The communications (public records) belong to the client (government entity), not the lawyer, and the legislature, not this Court, regulates disclosure of public records. Id.[5]

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[5]A similar analysis was applied by the Third District Court of Appeal in Howard v. State Commission on Ethics, 421 So.2d 37, 39 (Fla. 3d DCA 1982), in rejecting a claim that Section 112.313(3), Florida Statutes (1979), prohibiting certain conflicts of interest for public employees, interferes with the plenary jurisdiction of this Court to regulate the practice of law:

> We find nothing in the legislative policy evinced by Sections 112.311 and 112.316, Florida Statutes (1979), construed in pari materia with Section 112.313(3), which interferes with the constitutional authority of the Supreme Court to regulate the practice

Paraphrasing this Court, in the context of this action, the Legislature has the constitutional power to regulate collective bargaining of public employees and has done so through Chapter 447, Part II. By failing to exempt attorneys from the coverage of this law, the Legislature consented, on behalf of the people of the State of Florida, to any alteration in the traditional attorney-client relationship which might result from the exercise by these employees of their constitutional rights to collectively bargain. This Court simply does not have the authority reverse this legislative policy judgment through its authority to regulate the practice of law.

These cases demonstrate that this Court's Article V, Section 15 jurisdiction is flexible, not some kind of black hole which sucks in and obliterates every legislative enactment which has some impact upon the practice of law. Indeed, in The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980), this Court recognized that "the Legislature has constitutional authority to oust the Court's responsibility to protect the public in administrative proceedings," thereby rendering what would otherwise be the unauthorized practice of law authorized. The basis for the Court's holding was the doctrine of separation of powers:

> of law. The statutes enacted by the legislature merely supplement the Canons of Professional Responsibility adopted by the Supreme Court. When an attorney decides to accept public employment, he does so subject to the legislative proscription on his conduct.

> [The federal doctrine of preemption] has a corollary in our constitution which is the critical feature of this issue. This Court has no control over the agencies of this state, and any attempt to exercise it would violate article II, section 3 of the constitution . . . .

Id. at 417. If this provision gives the Legislature the power to cancel this Court's otherwise existing jurisdiction to regulate the practice of law before administrative agencies, there can be no question that the Legislature may regulate the employment relationship between the State and its attorneys as well.

We are not dealing with a circumstance where the Legislature has attempted to dictate to this Court how attorneys conduct themselves while practicing law in the courts of this state or otherwise interfere with this Court's power to regulate the actual practice of law. Rather, this is simply a case where, because the employees involved happen to be attorneys who, like physicians, dentists, nurses, architects, and other professional employees, have special duties and obligations not imposed on other public employees, some modification of the traditional rules of collective bargaining may be required. Neither the collective bargaining process nor this Court's Article V, Section 15 jurisdiction is so inelastic that the two cannot coexist. If Petitioners disagree, they are simply preaching to the wrong congregation. Their arguments should be addressed to the Legislature, not this Court.

Even if this Court had the power to establish policy in this area, Petitioners' flawed arguments would not justify the exercise of that power in this case because they are based upon a biased and

negative view of collective bargaining which is directly contrary to the public policy of this State as expressed by the people through the applicable constitutional and statutory provisions. Although the Petitioners' assault on the collective bargaining process is, to use their phrase, "persistent, relentless and omnipresent," it is contrary to the public policy set forth in Section 447.201, Florida Statutes (1991), which provides:

> It is declared that the public policy of the state, and the purpose of this part, is to provide statutory implementation of s. 6, Art. I of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. It is the intent of the Legislature that nothing herein shall be construed either to encourage or discourage organization of public employees. These policies are best effectuated by:
>
> (1) Granting to public employees the right of organization and representation;
>
> (2) Requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees;
>
> (3) Creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers; and
>
> (4) Recognizing the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Let there be no doubt, therefore, that the Petitioners do not represent the declared public policy in pressing the arguments raised in this case. On the contrary, they simply represent the biased views of an employer who is attempting to avoid having to

engage in collective bargaining with its employees. The Petitioners' unfortunate decision to oppose the exercise by their public employee attorneys of their constitutional right to collectively bargain under the guise of this Court's Article V, Section 15 jurisdiction deserves the following response delivered by the First District Court of Appeal in Duval County School Board v. Florida Public Employees Relations Commission, 353 So.2d 1244, 1249 (Fla. 1st DCA 1978):

> The Public Employees Relations Act is the law of our State. Whether we agree with it or not, we must comply with it. If changes are desired, they must be made by the Legislature.
>
> Every public employer, public employee and union must exert every effort to cooperate with each other and to build respect for each other. Collective bargaining is not and should not be a game. Representatives of the public employer and the union should and must be able to sit down together and negotiate an agreement which will be beneficial and fair to all parties. There is too much at stake to play games. Idealistic? Perhaps. Too much to ask? We think not.

ARGUMENT IV

THIS COURT SHOULD NOT EXERCISE ANY JURISDICTION IT MAY HAVE TO ISSUE AN EXTRAORDINARY WRIT IN THIS CASE BECAUSE IT WOULD DEPRIVE INDIVIDUAL PUBLIC EMPLOYEE ATTORNEYS OF THEIR CONSTITUTIONAL RIGHTS WITHOUT DUE PROCESS OF LAW

As previously stated, the essence of the Petitioners' argument in this case is that this Court should declare that attorneys employed by the State are not "public employees" within the meaning of Section 447.203(3), Florida Statutes (1991). Because this determination has the practical effect of depriving an employee of the constitutional right to collectively bargain, the affected employee must be given notice and an opportunity to contest this determination to satisfy the requirements of due process. School Board of Marion County v. PERC, 330 So.2d 770 (Fla. 1st DCA 1976); see State Department of Administration v. PERC, 443 So.2d 258 (Fla. 1st DCA 1983) (designation as a managerial or confidential employee effectively results in the deprivation of the right to collectively bargain guaranteed by Article I, Section 6 of the Florida Constitution so statutes establishing criteria for such designations must be narrowly construed). The Court would be violating the due process rights of the affected attorneys employed by the State if it grants the relief requested by Petitioners without affording each of them notice and an opportunity to be heard on this issue.

Although SEAG is indirectly representing the interest of these employees in this response, it has not been authorized to be the

legal representative for any of the affected employees for purposes of a judicial determination of their individual constitutional rights. Many attorneys who would be affected by granting the Petition may oppose collective bargaining in general or SEAG in particular. However, that is not the issue. Each of these employees has the right to notice and opportunity to respond before being deprived not only of the right to collectively bargain if the majority of them so choose, but also to engage in concerted activities authorized by Section 447.301, Florida Statutes (1991), to have an effective grievance procedure, and to enjoy the various other benefits awardable to public employees under Chapter 447, Part II, Florida Statutes (1991), even in the absence of a certified bargaining representative. Consequently, this Court should not proceed to grant the relief requested by Petitioners in this proceeding.

The relief requested by Petitioners may also properly be characterized as a request that this Court amend the existing Rules of Professional Conduct or adopt an entirely new rule relating to the collective bargaining activities of attorneys employed by the State. It is clearly not this Court's practice to take such action through a petition for writ of prohibition. Rather, the Court follows its normal procedures for allowing input from the affected parties as well as members of the Bar and the public prior to amending existing rules or adopting new ones. A similar procedure should be followed if the Court seriously entertains the

possibility of granting the relief requested by Petitioners in this case.

ARGUMENT V

PROHIBITION DOES NOT LIE WITH RESPECT TO THE DETERMINATION WHETHER ATTORNEYS EMPLOYED BY THE ATTORNEY GENERAL AND THE OFFICE OF STATEWIDE PROSECUTION ARE OFFICERS RATHER THAN EMPLOYEES WHO ARE EXEMPT FROM COVERAGE UNDER CHAPTER 447, PART II, FLORIDA STATUTES (1991)

The Petitioners' alternative argument that attorneys employed by the Attorney General and the Office of the Statewide Prosecution are officers rather than employees and are therefore exempt from coverage under the collective bargaining law has nothing whatsoever to do with this Court's Article V, Section 15 jurisdiction. Although the inclusion of this argument sheds light on Petitioners' true motivation in bringing this matter before the Court, there can be no question that PERC has jurisdiction to make this determination in the event that the Court rejects Petitioners' primary theory.

Petitioners' argument is based upon the rationale followed by this Court in Murphy v. Mack, 358 So.2d 822 (Fla. 1978) in which this Court determined that deputy sheriffs are not public employees since they hold office by appointment rather than employment and are vested with the same sovereign powers as sheriffs. This determination was made, however, after interpretation of the definition of "public employee" set forth in Section 447.203(3), Florida Statutes (1991), only upon direct appellate review of the decision of the First District Court of Appeal affirming a decision of PERC. PERC has expanded this theory to the constitutional offices of county clerk and property appraiser. Federation of

Public Employees v. PERC, 478 So.2d 117 (Fla. 4th DCA 1985); Florida Public Employees Council 79, AFSCME v. Martin County Property Appraiser, 521 So.2d 243 (Fla. 1st DCA 1988). Consequently, there can be no reasonable argument that PERC is without jurisdiction to determine whether the same theory applies to the Attorney General and Office of Statewide Prosecution. Prohibition, or any other extraordinary writ, is improper and the Court should not permit the Petitioners to bypass PERC and have this issue determined without an evidentiary hearing to develop the facts and afford PERC an opportunity to apply its expertise.

SEAG notes that, contrary to the offices of sheriff, clerk and property appraiser, the statute implementing the Office of the Attorney General, Chapter 16, Florida Statutes (1991), nowhere provides that the Attorney General may appoint deputies or assistants who exercise all of the powers of the Attorney General. This fact alone distinguishes the Attorney General from the other constitutional officers mentioned above and requires that this matter be remanded to PERC for the conduct of an evidentiary hearing.

Section 16.56(3), Florida Statutes (1991), relating to the office of Statewide Prosecutor, provides that the "statewide prosecutor may designate one or more assistants to exercise any [of his] powers". There are unresolved factual questions, however, whether such assistants are employed by the prosecutor and, indeed, whether the prosecutor is in fact a public employer within the meaning of Section 447.203(2), Florida Statutes (1991).

Consequently, these determinations should be made by PERC after development of a factual record.

CONCLUSION

In both private and public employment, attorneys are routinely faced with the challenge of harmonizing the demands of their employment relationship with their professional obligations to their clients. The Rules of Professional Conduct are designed to give these attorneys guidance and provide this Court a mechanism for insuring compliance. These rules do not, and were never intended to, prohibit attorneys from exercising their constitutional rights, including the right to engage in collective bargaining and freedom of association. Yet, the Petitioners seek to deny these rights to attorneys employed by the State without any proof that there is even a problem much less demonstrating a compelling state interest. In so doing, Petitioners seek to have this Court scale the slippery slope of regulation of the employment relationship between the State and its attorneys in an area in which it is ill-suited and constitutionally prohibited to venture.

Whether Petitioners' view of the wisdom of collective bargaining for public employee attorneys is the proper one is a policy question beyond the scope of this Court's authority to answer. Accordingly, this Court should decline Petitioners' invitation to embroil itself in this matter at this time and require them to pursue their many available legal remedies for challenging SEAG's petition for certification.

Respectfully submitted,

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BY:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail this 15th day of July, 1993, to Kimberly J. Tucker, Department of Legal Affairs, The Capitol - Suite PL01, Tallahassee, Florida 32399-1050, Peter J. Hurtgen, Morgan, Lewis & Bockius, 200 South Biscayne Boulevard, Suite 5300, Miami, Florida 33161 and Stephen A. Meck, Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32399-2171.

THOMAS W. BROOKS

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