IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida and FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,

Appellants,

vs. CASE NO: 89,181

FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., FLORIDA NURSES ASSOCIATION, et. al.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

For purposes of continuity with the Court's previous decision in State v. Florida Police Benevolent Association, 613 So.2d 415 (Fla. 1992), the abbreviations and references set out below will be used throughout the text of this brief:

> Appellees, FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., FLORIDA NURSES ASSOCIATION and FLORIDA PUBLIC EMPLOYEES COUNCIL 79, AFSCME: "the unions";
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> Appellants, State of Florida, Lawton Chiles, Governor of the State of Florida and Florida Department of Management Services: "the governor"; and
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> Chapter 88-555, Laws of Florida: "the 1988 Appropriation Act."

All references to the Florida Statutes will be to the 1987 version unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

The governor's appeal in this case is not from the final judgment entered in this case on March 5, 1996, but from three orders entered thereafter by the circuit court. The appeals are of orders supplementary to the judgment. Union App. at 1-3.[1]

The appeal was filed pursuant to Rule 9.130, Fla.R.App.P. Jurisdiction of this court was invoked under the procedure described in Rule 9.125, Fla.R.App.P.

The orders referenced in the governor's notice of appeal are entitled "Order Denying Defendants' Motion for Relief from Judgment," "Order Denying Motion to Vacate Orders of August 21, 1996," and "Order Denying Motion for Rehearing and Order Denying Motion to Vacate March 5, 1996 Order." The first two orders were entered on August 21, 1996. The final order under appeal was entered on September 5, 1996. Union App. at 12-13.

This action was filed in the circuit court in 1988 seeking declaratory and injunctive relief. The unions,

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[1]To the extent possible, the unions will utilize the appendix prepared by the governor. It will be cited as: Gov. App. at _____. Other matters of record not contained in the governor's appendix can be found in the appendix to this brief and will be cited as: Union App. at _____.

employee organizations representing State employees, alleged the governor had unilaterally altered their 1987 bargaining agreements that increased the annual leave entitlement of bargaining unit members while decreasing the sick leave entitlement. The alteration had the effect of reducing the annual leave and increasing the sick leave. The governor's change was implemented because the legislature, in Section 9.3.A(5) of the 1988 Appropriations Act, directed the governor to revert to the former practice by which annual leave and sick leave had been conferred. The unions demanded in their complaint restoration of the *status quo ante*, that is a return to the previously negotiated annual and sick leave policies. Gov. App. at Vol. I., pgs. 1-87.

The governor answered the complaint on September 6, 1989. Union App. at 14-18. At that time, the governor admitted all the material facts of the complaint and raised three affirmative defenses none of which are relevant to any issue presented by the governor in his brief before this Court. The affirmative defenses raised in the answer concerned (1) an argument that the adoption of a uniform career service leave rule, affecting non-bargaining unit members as well as bargaining unit members, that reduced leave benefits for all career service employees subsequent to the legislative statements in the 1988 Appropriations Act

was a matter contemplated by the parties in their agreements; (2) the effect of the "savings clause" contained in the unions' bargaining agreements; and (3) an argument that the unions had neglected to challenge, in a rule-making proceeding, the adoption of the rule changing leave and this failure in some way estopped the unions from pursuing an action seeking declaratory and injunctive relief. Id. at 16-18. No motion to amend the answer was ever filed.

Subsequent to the filing of the answer, both the governor and the unions filed motions for summary judgment in the matter. Each argued it was entitled to relief as a matter of law. Union App. at 19-34 and 35-50.

On March 14, 1990, the trial court determined there were no material facts in dispute, granted summary judgment to the unions, and declared Section 9.3.A(5) of the 1988 Appropriations Act to be unconstitutional as a violation of Article I, Section 6, of the Florida Constitution. Gov. App. at Vol. I, pgs. 87-91. As a remedy to the unilateral change in leave benefits, the court ordered:

> Defendants are directed to return the annual and sick leave benefits of the State career service employees represented by Plaintiffs which are the subject of the complaint to the status quo ante retroactive to the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act and make said employees whole, by restoring to

> them the appropriate annual and sick leave credits warranted as if the aforementioned benefits were in full force and effect at all times subsequent to the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act.

Id. at 96.

The governor subsequently and on April 19, 1990, filed a notice of appeal to the District Court of Appeal, First District. Gov. App. at Vol. I, pg. 85-86. In his principal brief, the governor quoted and underlined the relief directed by the circuit court as cited above. In footnote 5, on page 10, of the brief, however, the governor advised the court the appeal was concerned "only with that portion of the March 14, 1990 order which declared Section 9.3.A.(5) unconstitutional on Article 1, § 6 grounds." The governor said, "No appeal is taken of any other aspect of the Court's order...." Union App. at 89. Nonetheless the governor argued in the brief that the relief "impacts the 1989 and 1990 Appropriations Acts, although they are not subjects of this action." Id. at 95. The governor argued on pages 19, 32, and 34 of his brief that return to the *status quo ante* was improper. Id. at 98, 111 and 113.

The district court of appeal rejected the governor's legal arguments in its opinion of January 25, 1991. It

affirmed the decision of the circuit court finding the governor's principal argument on separation of powers and "other arguments to be without merit." State v. Florida Police Benevolent Association, Inc., 580 So.2d 619, 620 (Fla. 1st DCA 1991).

The governor then proceeded to invoke the discretionary and appellate jurisdiction of the Florida Supreme Court. The Florida Supreme Court reversed the trial court and remanded the case to the court for an additional determination as to "whether the legislative appropriation was sufficient to fund the annual and sick leave provisions of the collective bargaining agreement. If it was, these provisions of the collective bargaining agreement must be enforced." State v. Florida Police Benevolent Association, 613 So.2d 415, 421 (Fla. 1992).

On March 1, 1994, the governor moved for summary judgment in the trial court on the remanded case. Gov. App. at Vol. I, pgs. 92-110. The governor submitted no affidavits, depositions or documents, other than the legislative act in question, in support of the motion for summary judgment and to oppose the motion for summary judgment submitted by the unions. The argument of the governor was that the legislative intent found in Section

9.3.A(5) constituted an express allocation of money relative to the leave benefits. Id. at 97.

In his motion, the governor did suggest in footnote 2 that he understood that the relief to be granted, should the unions prevail, would be restoration of the *status quo ante* retroactive to the effective date of Section 9.3.A(5) of the 1988 Appropriations Act. In the footnote, the governor states: "The State assumes the unions--if they were to prevail--would not object to an 'offset' for the increased, yet unnegotiated, rate of sick leave." Id. at 96.

On May 9, 1994, the trial court heard argument on the issues posed in the Supreme Court's decision. Based on the competing motions for summary judgment before it, the court found that the undisputed material facts showed that the legislature does not, and did not, separately appropriate money for the funding of annual and sick leave. "The funding of such benefits is not a separate appropriations issue subject to specific action by legislature...." It granted on May 24, 1994, the unions' motion for summary judgment. Gov. App. at Vol. I, pgs. 171-175.

The governor proceeded to file a motion for rehearing of summary judgment on June 3, 1994. In the motion, the governor conceded that "the summary judgment has the effect

of a final judgment." Union App. at 119. In his argument, the governor insisted the decision of the Florida Supreme Court as reported in State v. Florida Police Benevolent Association, *supra*, demanded the impossible from the State, "Since the legislature does not ... fund annual and sick leave benefits separately from salary...." Id.

The governor then argued the incorrectness of this Court's decision, stating:

> Under the rationale of the Florida Supreme Court's decision, defendants would have to show a line-item in the budget specifying a monetary value for leave benefits; and to show that the specified amount was less than the amount necessary to fund benefits as negotiated. Given the undisputed facts that the legislature does not separately fund leave benefits, it would be manifestly unjust to require defendants to make such a showing. Not only would such requirement be manifestly unjust, it would be factually impossible.

Union App. at 119-120.

The governor explicitly asked the trial court to reject the decision of this Court: "[D]efendants are urging this court not to adhere strictly to the directions on remand in this case." Id. at 120-121. On June 16, 1994, the circuit court, Judge L. Ralph Smith, entered its order denying the motion for rehearing. Union App. at 125.

On July 15, 1994, the governor noticed the second appeal in this matter and stated of the order of May 24, 1994: "The nature of the order is a final order granting summary judgment in favor of the Plaintiffs and denying Defendants (sic) motion for summary judgment." Union App. at 126-127. On April 25, 1995, the District Court of Appeal, First District, filed its opinion reported in State v. Florida Police Benevolent Association, 653 So.2d 1124 (Fla. 1st DCA 1995). It affirmed stating that the order of the circuit court "on remand speaks eloquently for itself." Id. It further stated:

> Neither party contends that material facts remain in dispute or that summary judgment is in any way inappropriate. The State's arguments that the summary judgment is wrong as a matter of substantive law are foreclosed by the law of the case.

Id., 635 So.2d at 1126.

The governor did not appeal the decision to this Court or file any petition with this Court in reference to the April 25, 1995, opinion of the district court of appeal. The district court of appeal issued its mandate on May 11, 1995. Union App. at 128.

After the issuance of the mandate, and on May 15, 1995, the governor filed a motion to recall the mandate and a

motion for rehearing, clarification and certification. Union App. at 129-30 and 131-34. The governor's motion for rehearing advised that the governor "did not dispute what had become 'law of the case.' Rather, the governor always contended that it would be a manifest injustice to apply the law of the case." Id. at 132, paragraph 5. The governor admitted, "It was not then, and still is not, the legislature's practice to separately appropriate career service benefits [such as annual leave and sick leave]." Id. at 132, paragraph 2. The governor argued that the court's opinion did not "acknowledge or consider the manifest injustice exception to law of the case." The court denied the motions filed by the governor.

Upon remand, and on February 7, 1996, the governor filed a motion for partial summary judgment. Gov. App. at Vol. II, pgs. 1-14. In the motion, the governor argued that the unions "are entitled to relief for only one fiscal year out of the three-year duration of collective bargaining agreements entered with the State." Id. at 1. The governor stated, "The unions are entitled to relief for the 1988-9 fiscal year only." Id.

At the hearing held on the motion, the counsel for the governor advised the court: "And the state agrees based on the law in certain events that were and were not prudent

after the remand of this case from the Florida Supreme Court that the unions are entitled to relief for that year, [1988-89,] the middle year of the three year agreement." Gov. App. at Vol. II, pg. 105. Counsel for the governor further advised the court: "So at this point, the state agrees that the unions are entitled to relief for that second year or middle year of their three year contract." Id. at p. 111. The circuit judge then inquired, "[Y]ou agree that you owe for the middle year, right ... whatever benefits that were approved they are entitled to for that middle year?" To which the counsel for the governor stated, "Yes, your Honor." Id. at p. 118.

At the conclusion of the hearing and on March 5, 1996, the court entered an order denying the Defendant's motion, "reinstating" and "enforcing" the final order of the court rendered on March 14, 1990. Gov. App. at Vol. II, pg. 167 and 171. By reference to the March 14, 1990 order, the trial court reinstated the remedy initially directed, i.e.:

> Defendants are directed to return the annual and sick leave benefits of the State career service employees represented by Plaintiffs which are the subject of the complaint to the *status quo ante* retroactive to the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act and make said employees whole, by restoring to them the appropriate annual and sick leave credits warranted as if the aforementioned benefits were in full

> force and effect at all times subsequent to the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act.

No appeal was pursued by the governor of this order. No effort was made by the governor to meet his obligation, or even partially meet his obligation, to restore the leave that even he conceded had been improperly taken from bargaining unit members.

On June 18, 1996, the Florida Police Benevolent Association and the Florida Nurses Association filed a petition to enforce the court's order.[2] Gov. App. at Vol. III, pgs. 1-37. The governor opposed the petitions arguing that the unions were not entitled to such relief at least in part because of "their failure to pursue relief from the automatic stays during the State's appeals." Gov. App. at Vol. III, pg. 50.

On July 30, 1996, the governor filed, in addition to the referenced response to the petition for enforcement, a motion for relief from judgment. Gov. App. at Vol. III, pgs. 84-85. The grounds of the motion asserted "that it is no

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[2]Florida Public Employees Council 79, AFSCME, filed a separate petition for enforcement and adopted by reference that filed by the other unions. Gov. App. at Vol. III, pgs. 38-40.

longer equitable for this Court's 1990, 1994 and 1996 orders to have prospective application." Id.

On August 14, 1996, the court considered the governor's motion for relief from judgment, and the unions' petitions for enforcement. It considered the oral presentations of the parties. After hearing argument, the court on August 21, 1996, entered an order denying defendants' motion for relief from judgment, and an order granting the unions' petitions for enforcement. Gov. App. at Vol. III, pgs. 169-172.

The governor filed two motions on September 3, 1996. One was a motion for rehearing and the other was a motion to vacate orders of August 21, 1996. Gov. App. at Vol. IV, pgs. 1-32.

The governor's motion for rehearing was accompanied by approximately 530 pages of documents and affidavits that had not previously been submitted by the governor in response to any motions by the unions for summary judgment or in support of any motion by the governor for summary judgment. Gov. App. at Vol. IV, V and VI. These materials were submitted over eight years after this litigation began.

This appeal by the governor followed denial of the motion to vacate and of the motion for rehearing.

SUMMARY OF THE ARGUMENT

It is the position of the unions that the governor's appeal in this matter must be denied. The arguments advanced in his brief are contrary to the record evidence, the governor's admissions and the law of the case.

The governor's legal contention that the unilateral leave modification was lawful is totally without merit. The trial court's determination finding Section 9.3.A(5) of the 1988 Appropriation Action unconstitutional is proper and governed by the law of the case doctrine. Moreover, the governor has on several occasion conceded the legislature's action was improper and the trial court's order on that issue enforceable.

The governor's legal contention that the remedy directed by the trial court is improper is also without merit. The circuit court has clearly fashioned a remedy in this matter which is consistent with private sector law and Florida's public sector law.

Moreover, the governor's argument that his subsequent conduct, through legislative act and negotiations with the unions, limits the appropriate remedy in this matter is not correct from either an equitable or legal standpoint. The governor has not complied with the trial court's order by

restoring the leave benefits to the *status quo ante* and, thereafter, engaging in meaningful negotiations with the unions concerning leave benefits.

The governor is the wrongdoer in this matter and should not be given the "benefit of the doubt." The Court should require the governor to meet his obligations under the trial court's order. To do otherwise will effectively deny the employees which the unions represent the right to bargain collectively and in a meaningful manner.

RESPONSE TO ARGUMENTS I and II

THE CIRCUIT COURT'S MARCH 5, 1996 ORDER WHICH REINSTATES AND ENFORCES THE CIRCUIT COURT'S MARCH 14, 1990 ORDER FINDING SECTION 9.3.A(5) UNCONSTITUTIONAL IS PROPER AND SPECIFICALLY ACKNOWLEDGED BY THE GOVERNOR AS ENFORCEABLE.

It is the position of the unions that the governor cannot argue in good faith that the circuit court had no authority to reinstate and enforce its initial order rendered in March, 1990, which determined Section 9.3.A(5) of the 1988 Appropriations Act is unconstitutional. Not only is the reinstatement and enforcement of the March 14, 1990 order consistent with the Court's directive found in State v. Florida Police Benevolent Association, Inc., 613 So.2d 415, 421 (Fla. 1992), but the governor has specifically acknowledged the impropriety of the section and the enforceability of the order.

The governor has advanced three arguments which contest the circuit court's determination finding Section 9.3.A(5) of the 1988 Appropriations Act to be unconstitutional. The unions will demonstrate these arguments are not only incorrect but are not advanced in good faith.

The procedural history of this case is well-documented. In 1988, the unions instituted a legal action which

contested the constitutionality of Section 9.3.A(5) of the 1988 Appropriations Act on the basis that it constituted a unilateral alteration of negotiated leave benefits by the legislature in violation of Article I, Section 6, of the Florida Constitution.

The governor responded to the complaint making several **significant admissions** including: (a) Section 9.3.A(5) altered the formula for calculating the accrual rate for annual and sick leave of career service employees represented by the unions; (b) the modifications of the accrual rate for leave benefits were implemented by the governor, and **(c) the modifications in the accrual rate for leave "were accomplished without negotiations with, impasse resolution or the agreement" of the unions.** Compare, Paragraphs 15-17, Complaint for Declaratory Relief, Gov. App. at Vol. I, pg. 5 and Paragraphs 15-17, Answer and Affirmative Defenses, Union App. at 15. Additionally, while the governor raised several affirmative defenses to the complaint, there was no claim the change in accrual rates was necessitated by a compelling state interest.[3]

[3]In fact, none of the governor's several motions for summary judgment claim the change in accrual rates was necessitated by a compelling state interest.

As this Court is well-aware, on March 14, 1990, the circuit court granted summary judgment in favor of the unions. In doing so, the court found: (a) the governor had admitted all the material facts of the complaint, (b) Section 9.3.A(5) altered the annual and sick leave benefits of the career service employees, (c) the changes were "accomplished unilaterally, without negotiations with, impasse resolution or the agreement" of the unions, and (d) the governor "neither allege[d] nor establish[ed] a compelling state interest for the unilateral" change in the leave benefits. The court concluded that, under the circumstances, Section 9.3.A(5) was unconstitutional as an abridgement of Article I, Section 6. Gov. App. at Vol. I, pgs. 88-90.

The governor appealed the March 14, 1990 order. In his brief to the court, the governor advised the court that the appeal was concerned "only with that portion of the March 14, 1990 order which declared 9.3.A(5) unconstitutional on Article I, § 6 grounds" and further advised it, "No appeal is taken of any other aspects of the Court's order...." Union App. at 89, fn. 5.

In 1993, this case was returned to circuit court by this Court. A fair reading of this Court's decision does not establish the lower court's factual determinations were

rejected. Instead, it appears the Court was requiring the lower court to make additional findings of fact and legal determinations. Specific instructions to this effect were given. See 613 So.2d at 421.

The circuit court carried out the directives of this Court in its order of March 24, 1994. It made findings of fact and drew legal conclusions based upon the facts presented to it. The district court of appeal reviewed and affirmed the circuit court's second order. State v. Florida Police Benevolent Association, Inc., 653 So.2d 1124 (Fla. 1st DCA 1995).

When the case returned to the circuit court after review by the district court of appeal, the court reviewed the case in light of the order; reinstated the original order, and directed that it be enforced. **The governor did not object to the court's enforcement of the circuit court's original order and did not appeal the court's March 5, 1996 order which specifically enforced the order.**[4] In fact, the governor has repeatedly acknowledged the validity of the original order and utilized it as a basis of his argument relating to the remedy in this case, stating "Defendants

[4]In actuality the governor could not object. None of the facts underlying the order had changed during the interim, and the legal analysis remained appropriate in light of the circuit court's findings on remand.

have attempted good faith compliance with all this Court's order, which effectively return the parties to the *status quo ante* as of June 30, 1988." See Governor's Response Opposing "Petition for Enforcement." Gov. App. at Vol. III, pg. 41.

With these facts before the Court, it is appropriate to examine the governor's contentions relating to the reinstatement and enforcement of the circuit court's original order in this case. The governor's first argument is that the court erred when it reinstated and enforced the circuit court's March 14, 1990 order. The governor asserts that the trial court had authority to rule solely on the question of the constitutionality of Section 9.3.A(5) of the 1988 Appropriations Act consistent with the instructions of this Court. Governor's Brief at 36.

The unions agree the circuit court's responsibility was to determine the constitutionality of Section 9.3.A(5). The record is abundantly clear the court performed that task consistent with this Court's instructions. The court examined the additional factual and legal issues posed by this Court. It concluded those facts and legal issues supported the original order of the circuit court in the case. Therefore, it reinstated and enforced the original

order. Significantly, this was done without objection or timely appeal of the judgment by the governor.

The unions would submit the circuit court's action in reinstating and enforcing the March 14, 1990 order is consistent with facts and the law. Furthermore, the governor is estopped from contesting the validity of the court's order, under the circumstances, especially in light of the governor's failure to timely appeal the judgment and the subsequent reliance on the terms of order in opposing the unions' petitions for enforcement. The action of the trial court reinstating and enforcing the original circuit court order should be upheld.

The governor's next argument contests the circuit court's orders in this matter on the basis that negotiations over the change in leave benefits had "in fact" occurred. Governor's Brief at 37. The simple response is this matter is controlled by the law of the case doctrine;[5] however, in specific response to this argument, the unions would assert

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[5]The law is well-settled that once an appellate court has decided a question of law, the decision of the court becomes the law of the case and it may not be relitigated. Padovano, *Florida Appellate Practice*, § 14.12 at 246. This legal principle, known as the law of the case doctrine, is not limited to issues explicitly decided, but also precludes consideration of a point that could have been, but was not, presented in a prior appeal. Padovano, *Florida Appellate Practice*, § 14.2, note 1 (1995 Supplement) and *Tillman v. Smith*, 560 So.2d 344 (Fla. 5th DCA 1990).

the governor's position is not only contrary to the evidence, but it is not advanced in good faith.

In 1990, the governor admitted the changes in the accrual rates for annual and sick leave provided for in Section 9.3.A(5) occurred unilaterally and without negotiations. Union App. at 15. Additionally, the unions provided affidavits supporting this factual assertion. Union App. at 25-30. The court made a specific finding to this effect in the original order. At no time on appeal to the district court of appeal or this Court did the governor ever contend that negotiations with the unions relating to the modifications in annual and sick leave required by Section 9.3.A(5) had occurred.

For eight years, this was not a disputed factual issue. On the contrary, it was an admitted fact. The governor cannot in good faith advise this Court to the contrary. It is simply contrary to the evidentiary record and must be rejected.

The governor's third argument relating to the validity of the circuit court order in this matter advances, for the first time, the contention that the legislature had a compelling state interest for altering the leave rule. Governor's Brief at 38. Once again, this issue is controlled

by the law of the case doctrine; however, in specific response to this argument, the unions would assert the governor's position is not only contrary to the evidence, but it is not advanced in good faith.

The record evidence in this case establishes that the governor has neither contended or presented evidence to establish the legislature had a compelling state interest for altering the accrual rates for annual and sick leave. On the contrary, the circuit court's initial order specifically found: "The Defendants neither allege nor establish a compelling state interest for the unilateral modification of the annual and sick leave benefits." Gov. App. at Vol. I, pg. 89. None of the governor's motions for summary judgment filed in the case advance this legal argument or provide factual support for the argument. At no time on appeal to the district court of appeal or this Court did the governor contend that the legislature's conduct in this matter was necessitated by a compelling state interest.

For eight years, this legal argument has not been advanced either factually or substantively. Clearly, the governor has not carried the burden of establishing a compelling state interest for the unilateral modification of the annual and sick leave benefits. 613 So.2d at 419, fn. 6. This argument must be rejected.

RESPONSE TO ARGUMENTS III, IV and V

THE REMEDY DIRECTED BY THE CIRCUIT COURT TO RETURN THE LEAVE BENEFITS TO THE *STATUS QUO ANTE* IS PROPER AND APPROPRIATE UNDER THE FACTS OF THE CASE.

While the governor has advanced numerous arguments in his initial brief for setting aside the trial court's order in this case, the governor's major concern is the remedy directed by the court. The governor argues essentially that the remedy is an abuse of discretion and extends the leave benefits beyond their appropriate term. These arguments are not valid. The trial court's order is consistent with well-settled labor policy, the announced policy of this Court and the circumstances of this litigation.

As just stated, the primary issue in this case is the remedy directed by the trial court when it initially determined the proviso language of Section 9.3.A(5) and the governor's conduct in implementing the section was unconstitutional as a violation of Article I, Section 6 of the Florida Constitution. The court ordered a "make-whole" remedy by requiring the leave benefits be restored to the *status quo ante* the unconstitutional conduct. This Court agreed with the remedy directing that, if the legislative appropriation was sufficient to fund the negotiated leave

benefits, then such benefits must be enforced. 613 So.2d at 421.

At the outset, it must be noted that the remedy directed by the court is consistent with both private sector labor policy and Florida's public sector labor policy. Legal scholars in both sectors have recognized that the primary way to ensure "meaningful" collective bargaining is to order "the *status quo ante* be restored and that employees be made whole for any benefits that the employer has unilaterally discontinued." Morris, The Developing Labor Law, Volume II at 1665, Section Edition (BNA 1983). See also Vause, Labor and Employment in Florida-Law, Policy and Practice, Volume I, Section 3.8 at III-15 (Stetson University College of Law 1989). The *status quo ante* has been specifically recognized by the United States Supreme Court in the case of Fibreboard Paper Product Corp. v. N.L.R.B., 379 U.S. 203, 215 (1964) (employer's unilateral termination of maintenance work upon expiration of labor agreement found to be unlawful, remedy ordering employer to reinstate maintenance worker with back pay and to bargain with union held proper). It has been utilized by the Florida Public Employees Relations Commission on numerous occasions, Marion County P.B.A. v. City of Ocala, 5 FPER ¶ 10088 (1979), *aff'd*, 392 So.2d 26 (Fla. 1st DCA 1980) and Pinellas County P.B.A. v. City of

Dunedin, 8 FPER ¶ 13102 (1982), and has, in fact, been recognized by this Court. See Palm Beach Junior College v. United Faculty of Palm Beach Junior College, 475 So.2d 1221, 1227 (Fla. 1985) (employer and union returned to status quo existing at point of employer's unlawful conduct).

Clearly, the remedy directed by the trial court is appropriate. It is consistent with both private and public sector labor policy. More importantly, it is consistent with the fact that the right to bargain collectively is a fundamental right. This Court has repeatedly recognized the judiciary's responsibility to make that right "meaningful" and "effective," not "hollow and useless." See Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So.2d 358, 362 (Fla. 1988), United Teachers of Dade v. Dade County School Board, 500 So.2d 508, 511 (Fla. 1986) and City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487, 491 (Fla. 1981).

An examination of the governor's attack on the remedy directed by the trial court reveals that it falls into three categories: (1) the lack of a final order in the matter, (2) subsequent action of the legislature, and (3) the expiration of the unions' collective bargaining agreement which initially formed the basis of the complaint for declaratory

relief. None of these arguments are valid or provide a basis for rejecting the remedy directed by the trial court.

The governor's argument asserts that no relief in this matter is warranted because no final order has issued in the case. Governor's Brief at 52. This position cannot be maintained by the governor in good faith. In fact, the governor has on two occasions expressly represented to the district court of appeal that final judgments had been entered in the case.

When the governor filed his appeal of the trial court's initial order finding Section 9.3.A(5) unconstitutional, the district court of appeal made specific inquiry into the "finality" of the trial court's order via an order to show cause. Union App. at 56-57. The governor represented to the court that the order was final and explained:

> The question in the case at bar is whether the language of the March 14, 1990 order granting Plaintiffs' motion for summary judgment, etc., was final for purposes of Fla.R.App.P. 9.030. Specifically, that order states, in pertinent part, that:
>
> > The court therefore declares Section 9.3.A.(5) of the 1988 General Appropriations Act to be unconstitutional as a violation of Article I, Section 6 of the Florida Constitution. Plaintiffs' renewed motion for summary judgment is GRANTED. Defendants are directed to return annual and

> sick leave benefits of the State career service employees represented by Plaintiffs which are the subject of the complaint to the status quo ante the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act and make said employees whole, by restoring to them the appropriate annual and sick leave credits warranted as if the aforementioned benefits were in full force and effect at all times subsequent to the effective date of Section 9.3.A.(5) of the 1988 General Appropriations Act.

March 14, 1990 Order of the Circuit Court, p.4.

No additional judicial labor was required in this cause after the entry of this order. The rights of the parties were explicitly determined and the cause was disposed of on its merits. Accordingly, despite the absence of express "words of finality" such as "judgment is entered for Plaintiffs," the intent of the order as final seems apparent because of the finality of the terms of the order.

Further evidence of the intent of the trial court to construe this order as "final" can be found in Attachment 3. The certified computer docket sheet from the circuit court states that the case was "reopened" on April 19, 1990, the date Appellants filed their Notice of Appeal and Directions to Clerk. Attachment 3, p. 1. Indicating that the case was closed in the eyes of the court upon entry of the order denying the motion for rehearing.

Union App. at 64-65. (emphasis added) Based upon the governor's representation, the district court accepted jurisdiction over the case. Union App. at 74.

Later, in 1994 when the governor appealed the circuit court's order on remand, it was specifically represented to the district court of appeal that the order was a final order. Union App. at 126-127. The district court of appeal accepted jurisdiction over the case.

Finally, it is clear the circuit court order of March 5, 1996, was considered by the governor to be a final order. On July 30, 1996, the governor filed a motion for relief from judgment "pursuant to Fla.R.Civ.P. 1.540" of the "Court's 1990, 1994 and 1996 orders...." Significantly, such a motion can be directed only to judgments or other final orders. See Trawick, Florida Practice and Procedure, § 26-8, at 431 (Harrison Co. 1994 Edition).

Simply put, the governor cannot at this late date maintain in good faith there is no final order in the case. This argument must be rejected.

The next argument advanced by the governor raises the issue of subsequent legislation which re-enacts the identical proviso language found unconstitutional by the trial court in this case. Governor's Brief at 40.

Accompanying this contention is a related argument asserting that the legislature cannot be forced to "fund" the leave benefits beyond the first year in issue on the basis of Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993). Governor's Brief at 48.

As with previous arguments advanced by the governor, the impact of the court's ordered remedy beyond the 1988-89 fiscal year and the application of the case of Chiles case to the facts in this case have been reviewed by the district court of appeal and rejected. Union App. at 95. See State v. Florida Police Benevolent Association, 580 So.2d at 121 and State v. Florida Police Benevolent Association, 653 So.2d at 1126. As previously noted, the governor did not appeal the second decision of the district court of appeal. Thus, these arguments are, once again, governed by the law of case doctrine.

The unions do, however, want to address these two arguments in more depth because they demonstrate a fundamental misunderstanding of this entire litigation. From the outset of the litigation in 1988, the primary legal issue involved in the case focused on the legislature's involvement in the collective bargaining process, specifically the use of an appropriations act to unilaterally change mandatory subjects of bargaining without

first negotiating such changes with the appropriate bargaining agent of the affected public employees.

In its first decision in this case, this Court struck a balance between the competing interests of the employees' fundamental right to bargain collectively and the legislature's exclusive power over public funds. The test applied by the Court was articulated as follows:

> Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced. This result would not impede upon the legislature's exclusive power over public funds, because the funds would already be there to enforce the benefit. Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement.

613 So.2d at 421.

On remand, both the trial court and the district court of appeal found "the facts in the present case fall clearly within the first category of conduct contemplated by the Florida Supreme Court's evaluation". Gov. App. at Vol. I, pgs. 4-5 and 653 So.2d at 1126. Thus, the proviso language

in Section 9.3.A(5) was found to be unconstitutional and the negotiated benefits enforceable. Id.

The Chiles case is not contrary to the law enunciated by this Court in the instant case. The conduct contemplated by the court in its order on clarification in Chiles falls definitively within category two of the test because the legislature made a specific decision "not to fund the raise," a mandatory subject of bargaining which requires a specific appropriation by the legislature. Chiles v. United Faculty of Florida, 615 So.2d at 678.

In contrast to Chiles, the undisputed facts in this case establish that leave benefits are not, nor have they ever been, funded by the legislature. Thus, leave benefits are not within the legislature's control of appropriations in the context of the career service employees' constitutional right to bargain collectively.

The governor cannot rightfully invoke the legislature's improper intrusion into the collective bargaining arena as a basis for denying the unions and the career service employees which they represent an effective, make-whole remedy in this case. The trial court, the district court of appeal and this Court recognized as much by requiring the governor to return leave benefits to the *status quo ante* the

legislature's unconstitutional action, mandating the benefits be returned to their lawful negotiated levels. Certainly, continued legislative intrusion into this area, by enactment of the same proviso language declared unconstitutional in this case, does not offer the governor the basis for precluding the unions from a fair and effective remedy. That is accomplished in a single manner: reinstatement of the negotiated level of benefits and subsequent good faith negotiations between the governor and the unions.

Thus, the governor's contention that the legislature's subsequent enactment of proviso language with the same constitutional infirmities serves to limit the remedy directed by the trial court is without merit. Likewise, the governor's effort to apply the Chiles case to this case is equally without merit.

The final argument advanced by the governor is a multi-faceted attack on the remedy directed by the trial court based upon the governor's version of the "negotiations" with the unions which allegedly followed the unilateral and unconstitutional modifications of the annual and sick leave benefits. It must be noted that almost the entirety of the argument involves legal issues and facts which were not presented or argued at hearing before the trial court prior

to entrance of its substantive orders in the case. Instead, the governor elected to submit the material, 550 pages of argument and documentary matter, well after the trial court had reinstated and directed enforcement of the initial order of the court and even, after the unions' petitions for enforcement had been granted. Simply put, these arguments and documentary matter were not submitted "at the last second"; they were submitted "after the last second." See Gov. App. at Vol. IV, V and VI.

The facts which were presented by the governor to the trial court when examining the unions' petitions for enforcement are relatively straight forward. As found in the governor's response opposing the unions' petition for enforcement, the facts reveal:

> (1) The governor admitted the leave credits had not been restored to the *status quo ante* although "the State put considerable thought into the details of restoring leave credit for the 1988-89 fiscal year." Gov. App. at Vol. III, pg. 51.
>
> (2) The governor asserted the State "attempted to re-open negotiations as to leave benefits contemporaneously to the 1996 Legislative session." Id.
>
> (3) The governor asserted that "[g]iven that leave benefits were a longstanding and well-known issue, the State anticipated resolution in short order." Id.

(4) The governor asserted the State had not "avoided compliance" with the court's orders since such an allegation ignores "the automatic stay provisions of Fla.R.App.P. 9.310(b)(2)." Id. at 50.

The plain and undisputed facts are the governor did not restore the leave benefits to the *status quo ante* and, thereafter, engage in "meaningful" collectively bargaining with the unions. Instead, the governor avoided compliance with the trial court's March 14, 1990 order under the terms of the automatic stay provisions of Fla.R.App.P. 9.310(b)(2). "Re-opening" negotiations as to leave benefits --a "longstanding and well known issue"--in only 1996. Even then, the governor did not restore the leave benefits of the covered employees to the *status quo ante*.[6]

Based upon these undisputed facts, the unions suggest that the governor elected not to comply immediately with the trial court's order. Six years later and having lost the case, the governor requests that this Court accept "speculation" as to the possible results of negotiations had he complied with the court's orders. There is no factual basis for this Court to accept the governor's speculation as to possible results of negotiations or legislative action

[6]As admitted by the governor, when the unions petitioned the circuit court for enforcement of its order; the governor withdrew from further negotiations. Gov. App. at Vol. III, pg. 77.

once the *status quo ante* was restored.[7] The trial court did not engage in such speculation, and this Court should not overturn the remedy enforced by the court based upon the governor's speculation.

As the trial court recognized, the law is well-settled:

> A supersedeas on appeal from a final judgment stays the execution but does not undo the performance of the judgment. (citation omitted) Being preventive in its effect the stay does not undo or set aside what the trial court has adjudicated (citation omitted), it merely suspends the order. (citation omitted) City of Plant City v. Mann, 400 So.2d 952, 953-954 (Fla. 1981).

It is the court's responsibility to restore the situation as equitably as practically possible to the same status as would have existed if the stay order had not been ordered. 400 So.2d 953-54.

In the instant case, the governor chose not to restore the benefits to the pre-1988 negotiated levels and not to negotiate with the unions from the restored benefit levels. **The law provides in such circumstances that "each party is free to choose its course of action after judgment knowing in advance the risks involved."** (emphasis added) City of

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[7]Under the governor's speculation and position, the restoration of the *status quo ante* and negotiations would apparently have accomplished nothing.

Lauderdale Lakes v. Corn, 371 So.2d 1111, 1112 (Fla. 4th DCA 1979), *rev'd on other grounds*, 415 So.2d 1270 (Fla. 1982). The governor took the risk and avoided compliance with the court's initial order for six years. Having lost the case, the governor cannot and should not be permitted to avoid the consequences of this error in judgment.[8] The only reasonable remedy is that recognized by the trial court, restoration of the *status quo ante* and, then, meaningful negotiations.

There is, however, a more fundamental flaw in the governor's "subsequent conduct" argument. The flaw flows from a single fact which the governor cannot dispute: the governor has never restored the annual and sick leave benefits to the *status quo ante* and then entered into "meaningful" negotiations with the leave benefits restored. Succinctly stated, the governor suggests to the Court that the starting point for negotiations with the unions as a result of his unconstitutional, unilateral action is the improperly imposed leave benefits, not the lawfully negotiated leave benefits. This is contrary to the law and the fundaments of collective bargaining.

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[8]The governor's argument on the remedy issue essentially asks the Court to "give the benefit of the doubt" as to the possible results of leave negotiations to the wrongdoer, the governor. Clearly, both equity and the law dictate an opposite result. The governor should not profit from his failure to comply with the numerous orders of the State's courts finding his conduct in this matter to be improper.

It is apparent that the governor fails to grasp the significance of the unconstitutional conduct involved in this case. As recognized by Justice Boyd in the case of United Teachers of Dade v. Dade County School Board, 500 So.2d at 517 (Boyd, J. dissenting), a unilateral change in matters which are subjects of mandatory bargaining is to "'be viewed as tantamount to an outright refusal to negotiate on that subject.'" [Quoting National Labor Relations Board v. Katz, 369 U.S. 736, 746 (1962).] The essence of an employer's unilateral conduct is to strip employees of the fair and meaningful exercise of a the right to bargain collectively. In this State, collective bargaining is a fundamental right.

As previously stated, because of the devastating impact of an improper unilateral change in the right to bargain collectively, the courts and labor boards have consistently utilized a "make-whole" remedy against employers committing such violations. *Supra* at 24-26. Violating employers are typically required to: (1) return the unilateral change to the *status quo ante* the unlawful conduct, (2) engage in good faith negotiations once the *status quo ante* is restored and (3) make the employees whole for the period of time the unlawful conduct persisted. *Supra* at 24-26.

The governor argues that his unlawful conduct is in some manner cured without ever meeting his obligation to return to the *status quo ante* and negotiating with the lawful, negotiated benefits in place. Contrary to law and sound labor policy, the governor argues that it is "okay" that the starting point of negotiations to cure the unlawful conduct is the unlawfully imposed level of leave benefits and not the lawfully negotiated level.

This is simply not true. The remedy recognized by the courts, the labor boards and the trial court requires the parties to be restored to their lawfully obtained positions, that a "level playing field" for negotiations be returned, and that negotiations then proceed. The governor has never returned negotiations to the "level playing field" from which meaningful negotiations can proceed. This is the basis of the remedy imposed by the trial court. It is sound both legally and from a policy standpoint. The governor's argument on this issue must be rejected in its entirety.[9]

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[9]The unions have not overlooked arguments made by the governor relating to the issue of exhausting administrative remedies; however, under the circumstances of this case, it has no application or is governed by the law of the case doctrine.

CONCLUSION

Based upon the foregoing discussion and analysis, the unions and the career service employees they represent request this Court to reject the governor's appeal and remand the case to the trial court for full implementation of directives found in its order granting the unions' petitions for enforcement. In this manner, the right of the State's career service employees to bargain collectively will be made both effective and meaningful.

DATED this 15th day of November, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellees, has been furnished, by mail, to ROBERT A. BUTTERWORTH, Attorney General, KIMBERLY J. TUCKER, Deputy General Counsel, LOUIS F. HUBENER, Assistant General Counsel, WILLIAM W. WERTZ, Assistant General Counsel, Office of the Attorney General, Plaza Level 001, The Capitol, Tallahassee, Florida 32399-1050, this 15th day of November, 1996.

OF COUNSEL