IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

89181

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

Appellants,

vs.

CASE NO. 96-3535

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

Appellees.
_____/

INITIAL BRIEF OF APPELLANTS
On Appeal from the Circuit Court for the
Second Judicial Circuit
Case No. 88-2944

COUNSEL FOR APPELLANTS
ROBERT A. BUTTERWORTH
Attorney General

KIMBERLY J. TUCKER
Deputy General Counsel
Florida Bar No. 0516937

WILLIAM W. WERTZ
Assistant Attorney General
Florida Bar No. 0850497

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084

Office of the Attorney General
PL 01 - The Capitol
Tallahassee, FL 32399-1050

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PRELIMINARY STATEMENT

This case was remanded by the Florida Supreme Court, in 1992, for development of a factual record necessary to determine the constitutionality of Section 9.3.A(5), of Chapter 88-555, Laws of Florida (1988). *State v. Florida Police Benev. Ass'n*, 613 So.2d 415, 421 (Fla. 1992). As plead and pursuant to the order on remand, this case *only* involves a challenge to that portion of the *1988* Appropriations Act, by several public employee labor unions. However, based upon representations by union counsel concerning the facts and status of this case, the trial court has entered orders which expand the scope of this litigation beyond the Complaint *and* beyond the order on remand.

These trial court orders adjudicate matters relating to collective bargaining between these parties over the past eight years. The appealed orders threaten the fiscal integrity of the State, by ordering the creation of an obligation of more than $500 million in State funds, including the expenditure of almost $300 million from the State treasury in the absence of any valid appropriation by the Legislature; implicate the constitutionality of portions of *all* of the Appropriations Acts enacted during the past eight years; and attempt to nullify express contractual terms contained in ten separate collective bargaining agreements, entered between July 1, 1990 and the present, and ratified by the parties to this litigation.

At hearings in March and August of 1996, union counsel advised the trial court that the Defendants had "refused" to comply with orders of the trial court -- specifically, the March 14, 1990, Order of Judge William Gary entering final summary judgment for the unions -- and the unions asserted that the State had never negotiated over provisions for attendance and leave. Union counsel alleged that the State had failed to negotiate over leave benefits in 1988 (prior to enactment of Section 9.3.A.(5) of Chapter 88-555, Laws of Florida) and all times thereafter. Accordingly, the unions contended that they were entitled to "restoration" of leave, from 1988 to present, using the ratio of leave accrual abandoned by the Legislature when it enacted Section 9.3.A(5) of the 1988 Appropriations Act.

Based only on the bald allegations of union counsel, unsupported by any record evidence or sworn testimony, the trial court issued orders intended to remedy the alleged violation of the plaintiffs' collective bargaining rights by the Defendants spanning the past eight years -- alleged violations which are not plead in the Complaint and which are outside the scope of the case on remand.

Union counsel perfidiously represented the facts and law of this case, failing to advise the trial court that:

1. The March 14, 1990, order of Judge Gary had

been ***quashed***[1] by the Supreme Court in its order on remand.

2. Negotiations *had* taken place over alteration of these leave provisions in 1988, before and after enactment of Section 9.3.A(5).

3. In 1989, the Legislature again modified the annual and sick leave accrual rates and use requirements. However, the unions never amended their Complaint to include a challenge of that proviso.

4. Plaintiff FNA had declared an impasse over this very issue of leave formulas in 1990, and the Legislature, through the impasse resolution process, had rejected the union's request to alter the leave accrual rates back to the August 1986 levels (See Chapter 90-209, Laws of Florida (p. 1485)).

5. Each of the ten subsequently executed collective bargaining agreements entered between the unions and the State, during the period 1990 to present, contain leave provisions, adopting an accrual formula different than that now sought to be judicially imposed by the unions.

6. Each of the ten subsequently executed collective bargaining agreements entered between the unions and the State, during the period 1990 to present, contain a "zipper clause" which expressly states that, *upon ratification, the new agreement supersedes and cancels all previous agreements between the parties, written and oral* -- all of these agreements were ratified by the unions. Further each of these "zipper clauses" expressly acknowledges that, during the negotiations which resulted in the new Agreement, each party had the *unlimited right and opportunity to make demands and proposals with respect to any subject* and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in the new Agreement.

As a direct result of counsels' omissions and

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[1] **Quash.** To overthrow; to abate; to vacate; to annul; to make void. Black's Law Dictionary, Sixth Edition.

misrepresentations, the trial court orders being appealed attempt to enforce a 1990 final judgment order entered by Judge William Gary -- **an order that was *quashed* by the Florida Supreme Court in its order remanding this case.** The effect of the trial court orders is to declare Section 9.3.A.(5) of Chapter 88-555, Laws of Florida, unconstitutional. The orders also implicate the constitutionality of Section 1.1-3.A.(5) of Chapter 89-253, Laws of Florida, and the impasse resolution provisions of Chapter 90-209, Laws of Florida (p. 1485); 91-193, Laws of Florida (p. 1875); Chapter 92-293, Laws of Florida (p. 2626); Chapter 93-184 (p. 1526); Chapter 94-357 (pp. 3208-3209); Chapter 95-429, Laws of Florida (pp. 4054-4055); Chapter 96-424, Laws of Florida (pp. 2741-42).

This appeal is taken pursuant to Rule 9.130(a)(3)(C)(iv)and (5), Fla.R.App.P.

Plaintiffs are several labor unions representing public employees employed by the State of Florida. The Florida Police Benevolent Association (PBA) is the registered bargaining agent of employees for the law enforcement and security services bargaining units. The Florida Nurses Association (FNA) is the certified bargaining agent for the professional health care employees' bargaining unit. The American Federation of State and County Municipal Employees (AFSCME) is the registered bargaining agent for the Florida Public Employees Council 79. The foregoing

are referred to herein by name, or as Plaintiffs, Plaintiff unions, unions or as Appellees.

The State of Florida, Governor Lawton Chiles, and the Department of Management Services (successor agency to the Florida Department of Administration) were the Defendants below and are referred to herein by name, collectively as the State, or as Appellants.

The relevant portions of the records below are contained in appendices prepared by the Appellants and submitted to the Court for its review and use. Reference to the record below is designated herein by reference to the appropriate appendix volume and page number. ("Vol. #, p. #.").

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and Facts submitted by Appellants covers the eight years for which the trial court has ordered relief. The Statement addresses: the procedural history of this case, the history of labor negotiations between these parties, the text of all collective bargaining agreements entered from 1987 to present, and relevant portions of the Appropriations Acts from 1988 to present.

1986

In August of 1986, as a result of collective bargaining between the State and several public employee labor unions, the Department of Administration proposed amendments to Rule 22A-8, F.A.C., of the personnel rules governing Career Service employees. *As negotiated,* annual and sick leave accrual rates were altered, giving Career Service employees 6 hours of annual leave and 2 hours of sick leave, rather than the previous ratio of 4 hours annual and 4 hours sick. However, employees were not permitted to use sick leave until the third consecutive day of illness. In addition, under the negotiated rule, unused annual leave in excess of 240 hours on December 31 of each year could be either converted to sick leave or the employee could receive payment for half of the excess hours at the employee's regular rate of pay.

When presented to the Administration Commission for

approval, however, the negotiated rule was altered to permit employees to use sick leave, starting on the first day of illness, if a doctor's certification was obtained. No challenge was filed by the unions to the Administration Commission's alteration of the negotiated terms of the proposed rule.

1987

In April of 1987, the Department of Administration, Office of State Employees' Insurance, submitted recommendations on the State Employees' Group Insurance Program, to the 1987 Florida Legislature. That report reflected no deficits or projected shortfalls in the trust fund for the Plan. Specifically, the report stated that:

> Although total increases in Plan costs are projected at 15 percent for Fiscal Year 1987-88, current cash reserves in the Plan's Trust Fund are adequate to permit retaining state and employee premium contributions at their current levels, while at the same time assuring adequate reserves to cover all liabilities of the Plan.

(Vol. IV, p. 101). The Recommendations in the Report included keeping "state employee premium contributions at the current levels, and allow the Plan Trust Fund to absorb the projected additional costs." (Vol. IV, p. 102). The Report concluded that:

> Since the current cash reserves in the Trust Fund are significantly more than necessary, it is recommended that increased contributions by the State and employees be deferred for Fiscal Year 1987-88. The Plan costs and the Trust fund balance will have to be reviewed prior to the 1988 Legislative session to determine if increased

> contributions will be necessary in Fiscal Year 1988-89.

(Vol. IV, pp. 119-120). "As of March 31, 1987, the cash reserve balance was $58,6000,000. According to industry standards, $35,000,000 is sufficient for the Plan's cash reserves." (Vol. IV, pp. 103-104).

Subsequently, pursuant to Chapter 447 of the Florida Statutes (1987), the Governor entered into collective bargaining agreements with several unions. ***The agreements were to be effective between July 1, 1987, and June 30, 1990.*** These agreements incorporated by reference Section 22A-8 of the Florida Administrative Code. *State v. Florida Police Benev. Ass'n*, 613 So.2d at 416 (Fla. 1992)(emphasis supplied).[2] The incorporation of the personnel rules on leave did not specify the leave rule as it existed on a particular date. Indeed, each of the contracts

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[2] Specifically, each of the agreements contained the following provisions relating to leave:

> Employees may be granted leave as provided in chapter 22A-8, Personnel Rules of the Career Service System.

7/1/87 - 6/30/90 Agreement between the State and FNA, Article 18, §1. (Vol. I, p. 61; Vol. V, p. 14).

> The attendance and leave provisions as contained in Chapter 22A-8 of the Personnel Rules of the Career Service System shall apply to all bargaining Unit employees.

7/1/87 - 6/30/90 Agreement between the State and PBA (Law Enforcement Unit), Article 18. (Vol. I, p. 31; Vol V, p. 52).

> Employees may be granted leaves of absence as provided in Chapter 22A-8 of the Personnel Rules of the Career Service System.

7/1/87 - 6/30/90 Agreement between the State and Council 79 AFSCME, Article 18. (Vol. V, p. 80).

specifically acknowledged an obligation for the parties to continue discussions, during the term of the contract, regarding attendance and leave, as well as changes in the State employees insurance program.[3] However, the August 1986 version of the leave rule was the rule applied, as it was the rule in effect at that time.

For the first year of the contract, the annual and sick

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[3] Specifically, each of the agreements contained the following provisions relating to further negotiations, during the term of these contracts, over changes in the State employees insurance program and attendance and leave:

Article 32
ENTIRE AGREEMENT

> (C) The State and the Union agree to continue discussions during the term of this Contract on the following subjects:
>
> . . . changes in the State employees insurance program, wage rates, *attendance and leave*, proposed legislation and insurance benefits *shall be subject to negotiations during the second year of this Contract for Fiscal Year 1989-90.*
>
> Except as to the above subjects, the State and the Union, for the duration of this Contract, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Contract, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Contract. (Vol. V, p. 82).

7/1/87 - 6/30/90 Agreement between the State and Council 79 AFSCME, Article 32 (emphasis supplied). See virtually identical provisions contained in 7/1/87 - 6/30/90 Agreement between the State and FNA, Article 32; and 7/1/87 - 6/30/90 Agreement between the State and PBA (Law Enforcement Unit), Article 32. (Vol. I, pp. 34, 57; Vol. V, pp. 16, 55).

leave benefits were administered according to that rule, as revised by the Administration Commission, *rather than as negotiated*. However, the imposition of the requirement to obtain a doctor's certification in order to access sick leave for the first two days of illness became a contributing factor in the fiscal crisis the State experienced with its Health Insurance Trust Fund. The rule had the unintended consequence of exacerbating a burgeoning deficit in the Health Insurance Trust Fund by encouraging utilization of physician visits, even when not medically necessary. *Id.*

By February of 1988, the Fund was in a significantly different fiscal position than it had been the previous Spring. A substantial deficit had developed which required a sizable increase in funding for FY 1988-89. Factors contributing to the deficiency in the Fund included a lack of rate increase for the preceding three years, employee benefit enhancements, state and federally mandated benefit changes, an increase in enrollment of 10,000 members (Vol. IV, pp. 90, 96), and the 1986 changes to the sick leave policy to require obtaining a doctor certification. (Vol. IV, pp. 62, 96).

In a letter from James W. Hopper, Director of State and Special Markets for Blue Cross Blue Shield of Florida, to Carl Ogden, Director of the Office of State Employees' Insurance for the State of Florida, dated March 2, 1988, Mr. Hopper reported

that the number of physician office visits increased significantly after implementation of the State's sick leave policy on 8/1/86. The seven month period following implementation of the negotiated sick leave policy, 1/1/87 to 7/31/87, was compared to the same seven month period for the preceding year. It revealed a 81% increase in the total number of physician office visits and an 86% increase in the total payments for Physician office visits. Although Mr. Hopper notes that other factors, such as increased enrollment, enhanced benefits, and increased utilization contributed to this increase, it is clear that the new rule was playing a factor in depleting the Health Insurance Trust Fund. (Vol. IV, pp. 90, 96).

On March 1, 1988, a report was presented to the Senate Appropriations Committee regarding the fiscal crisis in the Fund. That report revealed that claims were exceeding premiums by approximately $4 million per month. Two years prior, the State Group Health Insurance Trust Fund had a surplus of approximately $72 million. However, according to the Bureau of State Employees Insurance, ***the Trust Fund was subject to depletion prior to the end of current (FY 1988-89) fiscal year.*** (Vol. I, pp. 142-145, 147-149; Vol. II, pp. 1-12; Vol. IV, p. 80; see also same estimate of $4 million monthly shortfall in Vol. IV, p. 97).

On March 22, 1988, several letters were sent between the Department of Administration and the Office of the Governor

regarding the deficit in the Fund, which was then estimated to be $99,665,066 in FY 1988-89. The recommendation was made to request that the Economic Estimating Conference immediately review the issue and produce independent assumptions and projections of the deficit. (Vol. IV, pp. 126, 127).

The Economic Estimating Conference is composed of economists from the Governor's Office and the Legislature who meet regularly to provide economic forecasts and other financial information for use in the budgeting and appropriations process. The Conference is established by Section 216.136(1), Florida Statutes.

On April 4, 1988, an Economic Estimating Conference was held to determine the size of the Self-insurance Trust Fund deficit under the premium structure in place at that time and the impact of changes in premiums. The Conference estimated that the State would experience a deficit of **$122,259,930** in FY 1988-89 and a **$312,013,424** deficit in FY 1989-90 absent a change in premiums or implementation of cost savings measures. (Vol. III, p. 43; Vol. IV, p. 130).

In addition, in April of 1988, the Auditor General prepared a report on the causes of the problems with the Fund. The chart on page 5 of that report shows the significant decline in the trust fund balance from its peak in FY 1984-85. The report includes an analysis of the impact of the 1986 amendments to annual and sick leave (specifically the requirement of a doctor

certification), found in Rule 22A-8.011, F.A.C., on the deficit in the Fund. The Report concludes that:

> It is difficult to determine precisely where the effects of PPC leave off and the effects of the sick leave policy begin (PPC went into effect Statewide on October 1, 1985, and the sick leave policy took effect August 1, 1986). However, it appears that the sick leave policy has exacerbated the trend toward higher utilization of plan benefits and, correspondingly, higher plan costs.
>
> * * *
>
> We recommend that the Department amend Rule 22A-8.011, F.A.C., to discontinue the need for a doctor's note for less than 3 days sick leave. This change is intended to discourage doctor visits that may not be medically necessary.
>
> * * *
>
> Changes to the benefits offered by the State group plan would probably constitute, for many employees, changes in the terms and conditions of employment, which are subject to collective bargaining. It is the Department's obligation under Chapter 447, F.S., to negotiate any benefit changes with the unions representing State employees. Failure to negotiate changes would constitute an unfair labor practice by the State. Therefore, we recommend that the Department negotiate with the employee labor unions as soon as possible concerning the benefit changes being considered by the Department and the Legislature. The Legislature is not bound by the agreement developed by the Department and the unions in adopting annual appropriations (s. 447.309, F.S.).

(Vol. IV, pp. 62, 70)(emphasis in original).

In fact, the Department of Administration *did negotiate* over the amendment of these leave benefits throughout the Spring of 1988, both before and after the enactment of the Appropriations Act in 1988. (*See*,Vol. V, pp. 5-6; Vol. VI, pp. 113-116, 132-143, 150-184). No agreement was ever reached with

the unions, although impasse was not declared by either side. The unions sought to retain the additional annual leave and reduced sick leave balances in the August 1986 Rule, even after the elimination of the doctor certification requirement. The unions also proposed increasing Career Service annual leave balances to be carried over at the end of the calendar year from 240 to 360. The State did not agree to this proposal because the increase in annual leave was linked to the requirement of a doctor certification or failure to gain access to sick leave until the third consecutive day of absence. Without either of these qualifiers, the State would not agree to the increased annual leave balances. (*See*,Vol. V, pp. 5-6; Vol. VI, pp. 113-116, 132-143, 150-184).

On April 11, 1988, Pam Johnson, Division of Economic and Demographic Research, Joint Legislative Management Committee, issued a memorandum regarding cost savings measures for the Fund. The projected savings attributable to a return to the 1986 version of the sick leave policy was $2,004,889 in FY 1988-89 and $2,065,036 for FY 1989-90. (Vol. IV, p. 135).

The severity of the deficiency and the swiftness with which it befell the Fund led to the necessity for immediate implementation of remedial measures. (Vol. I, pp. 142-145, 147-149; Vol. II, pp. 1-12; Vol., p. 8).

Although agreement was never reached during the negotiations between the Executive Branch and the unions regarding alteration

of the use and accrual rates for annual and sick leave, as a means of dealing with the deficit in the Health Insurance Trust Fund, and no impasse was formally declared by either the unions or the State, *the Legislature was advised of the negotiations and of the failure of the parties to reach agreement.* Such notification was made by Adis Vila, Secretary of the Department of Administration, to the Honorable John W. Vogt, Senate President, and the Honorable Jon Mills, Speaker of the Florida House of Representatives. (Vol. VI, pp. 144, 145).[4]

On June 8, 1988, the Florida Legislature enacted the 1988 Appropriations Act, Chapter 88-555, Laws of Florida. Section 9.3.A(5) of the 1988 Appropriations Act, Chapter 88-555, Laws of Florida, contains the provisions enacted by the Legislature to address the fiscal crisis with the Fund. Amendment of Rules 22A-8.010 and 22A-8.011, F.A.C., to return to the pre-August 1986

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[4] The identical letters, dated May 24, read in pertinent part:

> The State has concluded negotiations with the Florida Nurses Association . . . concerning revisions to the State Employees' Group Insurance Plan. Enclosed are the recommended revisions.
>
> While we reached tentative agreement with the Florida Police Benevolent Association, they have declined to sign the attached agreement. We have been unable to reach agreement with the American Federation of State, County and Municipal Employees, Florida Council 79, representing employees covered by the Master Contract. . . .

The same letter was also sent to the Honorable Jon Mills, then-Speaker of the Florida House of Representatives.

version of that rule[5] is one of those remedial measures (including the forfeiture of annual leave balances in excess of 240 hours on December 31 of each calendar year), Chapter 88-555, §9.3.A (5), Laws of Florida, as was the infusion of $59,394,000 in General Revenue and Trust Funds to offset the deficit in the State Health Insurance Trust Fund. Chapter 88-555, §1(4D), Laws of Florida. The 1988 Appropriations Act was signed into law by Governor Bob Martinez on June 29, 1988, to become effective on July 1, 1988.

Subsequent to the passage of this bill by the Legislature, the unions filed an action in the Florida Public Employees' Relations Commission (PERC), against the Florida Legislature, challenging the enactment of Section 9.3.A(5) of Chapter 88-555, Laws of Florida (1988), as an impermissible, unilateral alteration of the collective bargaining agreements and an unfair labor practice. That action was dismissed because the Governor, not the Legislature, is the statutorily designated "public employer" of the employees covered by Chapter 447, Florida Statutes. *See* Section 447.203(2), Florida Statutes.

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[5] The revised language decreased the amount of annual leave to 4 hours and increased the amount of sick leave to 4 hours. Both the doctor certification and the prohibition against the use of sick leave for the first two consecutive days of illness were removed. (Vol. VI, pp. 3-9, 20-22, 25-27). Unused annual leave, in excess of 240 hours, was forfeited, on December 31 of each year. The effective date of this rule, pursuant to the proviso contained in the 1988 Apropriations Act, was July 1, 1988, although the rule was not promulgated until September 26, 1988.

Accordingly, PERC determined that the Legislature was not a proper party. (Vol. I, p. 6).

The unions next challenged the Legislature's actions in altering the leave rule, through proviso, in Circuit Court. They sought declaratory and injunctive relief, asserting that the Legislature had abridged their right to collectively bargain, as guaranteed by Article I, section 6, of the Florida Constitution. In their Complaint for Declaratory and Injunctive Relief, the unions stated that the relief that they sought was as follows:

> 1. In June, 1988, the Florida Legislature enacted, and Governor Bob Martinez signed into law, Senate Bill 1-F, commonly referred to as the 1988 General Appropriations Act. Section 9 of the Appropriations Act deals with the salaries and employment benefits received by persons employed by the State of Florida, including State Career Service System employees (hereafter career service employees). Section 9.3.A.(5) of the law substantially alters the annual and sick leave benefits for career service employees. The changes provided for in Section 9.3.A. were made without negotiations with, or the consent of, the collective bargaining representatives of the State Career Service employees.
>
> 2. This lawsuit seeks a determination of the right of career service employees who are represented by a certified bargaining agent to have their annual and sick leave benefits established and maintained through the collective bargaining process as contemplated by Article I, Section 6 of the Florida Constitution and required by Chapter 447, Part II, Florida Statutes, and not by unilateral legislative fiat. The Florida P.B.A. and the F.N.A. seek injunctive relief returning the previously negotiated annual and sick leave policies for career service employees to the status quo ante the Defendants' unlawful and unconstitutional action.

Complaint, p. 2.[6]

The Complaint in this case was filed on August 10, 1988. (Vol. I, pp. 1-76). No amendment has ever been made to this Complaint.

Even after this litigation was filed, the State continued to negotiate with the unions regarding the accrual rates and use of annual and sick leave. (Vol. VI, pp. 185-195). No agreement was reached nor impasse formally declared by either side during 1988.

1989

In the early part of 1989, negotiations between the parties continued on a variety of issues. On several occasions, union representatives attempted to raise the issue of leave in the negotiation process. Specifically, the unions wanted to return to the high leave accrual rates of 6 hours of annual leave and 2 hours of sick leave. The State's negotiator told them that that issue would be resolved by the courts. (Vol. VI, pp. 196-199). However, substantial discussions continued on various leave options sought by the unions during negotiations.(Vol. VI, pp. 200-204). No agreement was reached regarding leave, nor, more significantly, was impasse declared on this subject by either the State or the unions in 1989.

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[6] Significantly, Plaintiffs also state that "[t]he attendance and leave policies existing on the effective date of the agreement, that is July 1, 1987, are not subject to renegotiation until the 1989-1990 fiscal year." (Vol. I, p. 5, ¶14(b)).

The Legislature issued the 1989 Appropriations Act and again altered the formula for annual and sick leave use and accrual for Career Service employees. See Section1.1- 3.A.(5) of Chapter 89-253, Laws of Florida (1989), [p. 1338].[7] The Legislature changed the annual and sick leave rule to permit the transfer of annual leave, in excess of 240 hours on December 31 of each calendar year (rather than the forfeiture of excess leave directed in the 1988-89 Appropriations Act), to sick leave and, again, specifically imposed the requirement to use the formula for use and accrual of annual and sick leave found in Rule 22A-8.010 and 22A-8.011, F.A.C. as that rule existed on July 1, 1986. Again, these changes were found in the portion of the Appropriations Act which concerned Health, Life and Disability Insurance. **The unions failed to challenge the 1989 proviso through amending their Complaint or filing a new cause of action for declaratory relief or for relief under Chapter 447.** No evidence was presented to the trial court suggesting that any union employees, whose annual leave balances exceeded 240 hours, did not object to

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[7] The 1989 Appropriations Act states in pertinent part that:

> 5) Effective July 1, 1989, provisions for earning, using and retaining annual and sick leave credits for Career Service Employees shall be the same as those contained in Chapter 22A-8.010 and 22A-8.011, F.A.C., as of July 1, 1986. Any annual leave balance in excess of 240 hours as of December 31 of each calendar year shall be transferred to sick leave.

accepting the benefit of transferring their leave balances on December 31, 1989, from annual to sick leave.

Negotiations were underway, by August of 1989, for the new collective bargaining agreements, which would become effective on July 1, 1990. (Vol. VI, pp. 205-207).

1990

Due to the failure to reach agreement with the FNA and AFSCME, an impasse was declared on February 15, 1990, by the State, (Vol. VI, pp. 205-207). The unions requested the appointment of a Special Master by PERC. (Vol. VI, pp. 213-226).[8] **The accrual and use of annual and sick leave was listed as an impasse issue by the FNA.** (Vol. VI, pp. 211-212, 222).[9] AFSCME

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[8] The letter requesting the appointment of a special master to hear the impasse was signed by Donald Slesnick, II, counsel for Plaintiff FNA in the case at bar.

[9] The issues at impasse were listed as follows:

STATE'S Final Position	ASSOCIATION'S Final Position
Employees may be granted leave as provided in Chapter 22A-8, Personnel Rules of the Career Service System. leave.	Return to previous accrual rates,i.e., 2 hours bi-weekly sick leave and remaining leave as annual Employees with no sick leave use annual leave or leave without pay.

BACKGROUND

- The 1988-89 Appropriations Act reestablished annual and sick leave accrual rates to the 1986 level. In addition, the Act removed a requirement that employees furnish a Physician's slip in order to use sick leave from the first day of absence.

- The 1989-90 Appropriations Act provided that employees with over 240 hours of annual

did *not* list leave as an impasse issue.(Vol. VI, pp. 214-219). No impasse was declared by the PBA.

On February 27, 1990, counsel for the PBA, Mr. Johnson, prepared and presented the trial court with a draft order entering final summary judgment in Plaintiffs' favor on their challenge to the 1988 Appropriations Act. (Vol. I, pp. 77-82). On March 9, 1990, Defendants' counsel filed an objection to that proposed order, in part, because of its ambiguity in advising the parties as to the Court's intent with respect to the *1989* Appropriations Act -- it was unclear whether the order, as drafted by Mr. Johnson, was intended to declare a portion of the 1989 Appropriations Act unconstitutional, despite the failure of Plaintiffs to amend their Complaint to include a challenge to Chapter 89-253, Laws of Florida. (Vol. I, pp. 83-84).

On March 14, 1990, Judge William Gary issued his order entering final summary judgment for Plaintiffs. He signed the draft order prepared by Mr. Johnson, without change or clarification of the points of objection raised in Defendants'

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leave on December 31 would not lose the excess leave but instead would have the hours over 240 converted to sick leave.

- As a result of the 1988-89 Act, F.A.C. Rule 22A-8 was amended to conform. The same occurred as a result of the 1989-90 Act.

- The language in the 1988-89 Act has been challenged by the Association in Circuit Court, Leon County, as being unconstitutional, since it was not negotiated. A decision from the Court is still pending.

counsel's letter of March 9, 1990. (Vol. I, pp. 87-91).

An impasse hearing was held before a PERC-appointed Special Master on April 19, 1990, regarding the 1988 Appropriations Act. (Vol. VI p. 228).

On April 24, 1990, Defendants filed their notice of appeal of the March 14, 1990 trial court order. (Vol. I, p. 85-86).

The Special Master's recommended decision was issued on May 4, 1990. (Vol. VI, pp. 228-29). The Special Master declined to issue a recommendation on the leave issue, allegedly due to the pendency of the litigation over the 1988 Appropriations Act leave proviso. (Vol. VI, p. 229).

The 1990 Appropriations Act, Chapter 90-209, Laws of Florida (1990), was signed into law by the Governor on June 26, 1990, effective July 1, 1990. The Act expressly resolves all collective bargaining issues at impasse stating that:

> 5. Collective Bargaining Issues at Impasse
> All other collective bargaining issues at impasse which are not contained in this Act shall be resolved by maintaining the status quo under the language of the *current* Collective Bargaining Agreements.

Chapter 90-209, Laws of Florida, at p. 1485 (emphasis supplied).

During this same period of time, the State and the FNA entered a collective bargaining agreement to be effective on July 1, 1990 through June 30, 1992. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees. The agreement also contained a "zipper clause" which expressly stated that the new agreement "supersedes and cancels *all prior*

practices and agreements". (Vol. V, p. 24) No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, p. 26).

The State and the PBA (law enforcement unit) entered a collective bargaining agreement to be effective on July 1, 1990 through June 30, 1993. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees. This agreement contains similar language in its "zipper clause" to that found in the FNA Contract and, like the FNA agreement, Article 33 expressly states that this agreement "supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary . . ." No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, pp. 61, 63).

The State and AFSCME entered a collective bargaining agreement to be effective on July 1, 1990 through June 30, 1992. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees. This agreement contains similar language in its "zipper clause" to that found in the FNA and PBA Contracts and, like the FNA and PBA agreements, Article 33 expressly states that this agreement "supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary . . ." No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the

Contract. (Vol. V, pp. 90, 92).

1991

On January 25, 1991, the First District Court of Appeal affirmed the trial court's 1990 final judgment, finding section 9.3.A(5) of the Appropriations Act to be invalid under Article I, section 6. *State v. Florida Police Benev. Ass'n*, 580 So.2d 619 (Fla. 1st DCA 1991). The District Court denied rehearing of this order on March 29, 1991. *Id.*

On April 26, 1991, the State filed its Notice of Appeal and Alternative Notice to Invoke Discretionary Jurisdiction, requesting review of the District Court's Order by the Florida Supreme Court.

The 1991 Appropriations Act, Chapter 91-193, Laws of Florida (1991), was signed into law by the Governor on May 28, 1991, effective July 1, 1991. The Act expressly resolves all outstanding collective bargaining issues at impasse,in the same manner as the previous year's Appropriations Act. Chapter 91-193, Laws of Florida, at p. 1875.

1992

The State and the FNA entered a collective bargaining agreement to be effective on July 1, 1992 through June 30, 1995. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees.[10] Like the 1990-92 Agreement, this

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[10] The language regarding leave is identical to that found in the 1990-92 FNA Agreement. See Footnote 9, *supra*.

Agreement contained a "zipper clause" which expressly stated that the new agreement "supersedes and cancels *all prior practices and agreements*".[11] No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, pp. 34, 36).

The State and AFSCME entered a collective bargaining agreement to be effective on July 1, 1992 through June 30, 1995. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees.[12] This agreement contains similar language in its "zipper clause" to that found in the 1990-92 AFSCME Contract and, like that Agreement, Article 32 expressly states that this agreement "*supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary . . .*"[13] No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, p. 103)

The 1992 Appropriations Act, Chapter 92-293, Laws of

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[11] Article 33 of the 1992-95 Agreement is essentially identical to the "zipper clause" found in Article 33 of the 1990-92 Agreement. However, unlike the previous Agreement, there is no express reservation of leave and attendance as a subject contemplated by the parties for further negotiations during the term of this Contract.

[12] The language regarding leave is identical to that found in the 1990-92 Agreement. (Vol. V, p. 100).

[13] The "zipper clause" language is, in all material respects, identical to that found in the 1990-92 Agreement. (Vol. V, p. 103).

Florida (1992), was signed into law by the Governor on July 1, 1992, effective July 1, 1992. The Act expressly resolves all outstanding collective bargaining issues at impasse,in the same manner as the previous two previous two Appropriations Acts. Chapter 92-293, Laws of Florida, at p. 2626.

On December 24, 1992, the Supreme Court ***reversed*** **the district court's order** and remanded the case, ***quashing*** **the previous Circuit Court Order of Judge Gary, dated March 14, 1990.** The Court held that public employees' collective bargaining rights were subject to the legislature's appropriations power and that unilateral changes to the collective bargaining agreements, by the Legislature, were permissible if necessitated by failure to appropriate enough money to fund the agreement as written.

The decision of the Florida Supreme Court directed the Circuit Court to determine:

> whether the legislative appropriation [for fiscal year 1988-89] 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. If these provisions were underfunded, the legislative determination shall control.

State of Florida v. Florida Police Benev. Ass'n, 613 So.2d 415, 421 (Fla. 1992).

In addition, the Court held that:

> Of course, should the legislature be able to show a compelling state interest justifying the abridgment of the right to collectively bargain, its unilateral changes would be enforced.

State of Florida v. Florida Police Benev. Ass'n, 613 So.2d at 421, f.n. 11.

Thus, in order for the State to prevail in this cause, it must demonstrate either:

> 1. That the contract was underfunded, leaving insufficient funds in the appropriation to pay for the contract as negotiated; or
>
> 2. That the State had a compelling state interest justifying the abridgment of the contract, unilaterally.

1993

The State and the PBA (law enforcement unit) entered a collective bargaining agreement to be effective on July 1, 1993 through June 30, 1996. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees.[14] This agreement contains similar language in its "zipper clause" to that found in the 1990-93 Contract and, like that previous Agreement, Article 33 expressly states that this agreement "*supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary* . . ."[15] No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, pp. 70, 72)

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[14] The language regarding leave is identical to that found in the 1990-93 Agreement.

[15] The "zipper clause" language is, in all material respects, identical to that found in the 1990-93 Agreement. (Vol. V, p. 72).

The 1993 Appropriations Act, Chapter 93-184, Laws of Florida (1993), was signed into law by the Governor on May 4, 1993, effective July 1, 1993. The Act expressly resolves all outstanding collective bargaining issues at impasse,in the same manner as the previous three Appropriations Acts. Chapter 93-184, Laws of Florida, at p. 1526.

1994

On remand, the parties filed cross motions for summary judgment, which were considered by the trial court on May 9, 1994. (Vol. I, p. 171).

On May 24, 1994, Judge Smith denied Defendants' motion for summary judgment and "grant[ed] the plaintiffs' motion for summary judgment." Specifically, Judge Smith determined that the appropriation for that year was sufficient and ruled that "the leave benefits *as negotiated* must be enforced." (Vol. I, pp. 171-176)(emphasis supplied).[16]

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[16] Judge Smith's May 24, 1994 Order provides in relevant part that:

> 5. The Court finds the facts in the present case fall clearly within the first category of conduct contemplated by the Florida Supreme Court's evaluation. [i.e. "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." *State of Florida v. Florida Police Benev. Ass'n*, 613 So.2d at 421.].

Significantly, the benefits, ***as negotiated***, would forbid union employees from taking sick leave until the third consecutive day of illness -- regardless of the existence of a doctor certification.

The 1994 Appropriations Act, Chapter 94-357, Laws of Florida (1994), was signed into law by the Governor on June 16, 1994, effective July 1, 1994. The Act expressly resolves all outstanding collective bargaining issues at impasse, Chapter 94-357, Laws of Florida (1994), at 3208-320.

1995

On appeal, the First District Court of Appeal affirmed Judge Smith's May 24, 1994 Order granting Plaintiffs' motion for summary judgment. *State v. Florida Police Benev. Ass'n*, 653 So.2d 1124 (Fla. 1st DCA 1995). Since the District Court merely adopted the 1994 trial court order verbatim, the appellate order suffers from the same lack of finality as the underlying trial court order.

The State and the FNA entered a collective bargaining agreement to be effective on July 1, 1995 through June 30, 1998. With regard to leave, that agreement incorporated Chapter 22A-8 for all unit employees.[17] Like the 1990-92 and 1992-95

Additionally, since the trial court order only applies to employees in the complaining collective bargaining units, the order confers different leave benefits on unit employees than those applicable to Career Service employees generally. This result is directly contrary to the express language of the Contract which envisions no differential between union employees and other Career Service employees with respect to their use and accrual of leave -- a differential imposed by this Order.

[17] The language regarding leave is identical to that found in the 1990-92 and 1992-95 Agreements, although referring to the new rule number (60K-5, Personnel Rules of the Career Service System).

Agreements, this Agreement contained a "zipper clause" which expressly stated that the new agreement "supersedes and cancels *all prior practices and agreements*".[18] No statement reserving the prior leave accrual and use rates, negotiated in 1986, is contained in the Contract. (Vol. V, pp. 44, 46).

The 1995 Appropriations Act, Chapter 95-429, Laws of Florida (1995), was signed into law by the Governor on June 16, 1995, effective July 1, 1995. The Act expressly resolves all outstanding collective bargaining issues at impasse, in the same manner as the previous five Appropriations Acts. Chapter 95-429, Laws of Florida (1995), pp. 4054-4055.

1996

On February 7, 1996, Defendants/Appellants filed a motion for Partial Summary Judgment seeking an order clarifying that the only year for which the unions are entitled to relief is 1988-89 -- *the only year during which the unions filed a challenge to the Appropriations Act*.

At the March 1, 1996, hearing on that motion, the unions challenged the appropriateness of summary judgment as a vehicle for resolution of the question presented, due to the procedural

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[18] Article 33 of the 1995-98 Agreement is essentially identical to the "zipper clause" found in Article 33 of the 1990-92 and 1992-95 Agreements. Like the 1992-95 Agreement, however, there is no express reservation of leave and attendance as a subject contemplated by the parties for further negotiations during the term of this Contract.

posture of the case in light of the 1995 mandate entered by the First District Court of Appeal. Additionally, ***for the first time in this case***, union counsel asserted a right to annual and sick leave benefits under the August 1986 administrative rule to be imposed, without agreement of the parties, from 1988 *to present*. The demand for such benefits to be imposed for the entire eight years that this action has been pending, six years of which covers a period after the undisputed termination of the contracts at issue in this cause, was never argued or pled in any prior proceeding, is absent from the prayer for relief in the Complaint, and is beyond the scope of the order on remand from the Florida Supreme Court, which specifically noted that the agreements were to be effective between July 1, 1987 and June 30, 1990 (*State of Florida v. PBA*, 613 So.2d at 416) and which only spoke to the constitutionality of Section 9.3.A(5) of the ***1988*** Appropriations Act -- *the only legislative or executive action which Appellees challenged in the Complaint at bar*. Despite this, based on the representations of union counsel regarding the vitality of the 1990 Order entered by Judge Gary, (Vol. II, pp. 133-134, 141-145, 146-148, 154-167), the trial court entered an order on March 5, 1996, which held that "[t]he final order of the court, rendered March 14, 1990, is hereby directed to be enforced." (Vol. II, pp. 171).

The 1996 Appropriations Act, Chapter 96-424, Laws of Florida (1996), was signed into law by the Governor on June 7,

1996, effective July 1, 1996. The Act expressly resolves all outstanding collective bargaining issues at impasse, in the same manner as the previous six Appropriations Acts. 1996 Session Laws, p. 2741-2742.

Subsequently, on June 18, 1996, the PBA and FNA filed a Petition for Enforcement of Court's Order and Request for Imposition of Sanctions. Curiously, the unions' attempt to: "petition the Court for enforcement of the final order in this matter ***rendered March 14, 1990,*** and specifically enforced by the Court on March 5, 1996." (Vol. III, p. 1)(emphasis supplied). The unions never even refer to Judge Smith's 1994 nonfinal order granting summary judgment. (Vol. III, pp . 1-7). Additionally, the unions sought sanctions to be imposed against the State Defendants (specifically the Governor), including attorneys [sic] fees and costs, for the Defendants' alleged "continued, unwarranted and blatant violation of the court's orders in this matter."(Vol. III, p. 1). In the petition, the unions allege that the Defendants "have elected to ignore the orders of the court in this matter [for six years]." (Vol. I, p. 4). As grounds for this assertion, the unions point to the failure of the Defendants to "comply with the Court's order of March, 1990" -- ***the same order the Supreme Court quashed by order dated December 24, 1992.*** (Vol. III, p. 5). Union counsel failed to inform the trial court that Judge Gary's 1990 order had been quashed by the Supreme Court, Vol. III, pp. 1-7, although they

attached a copy of the Supreme Court's 1992 decision containing this holding the their petition. (Vol. III, pp. 16-26).

On August 7, 1996, Plaintiff AFSCME filed a similar petition for enforcement of the March 1990 order of Judge Gary. In it, AFSCME's counsel erroneously represents to the trial court that "[t]he [March 14, 1990] order [from Judge Gary] was *stayed* pending several appeals by reason of the effect of Rule 9.130(b)(2), Fla.R.App.P." (Vol. III, p. 39)(emphasis supplied). Union counsel goes on to allege that "contumaciously the Defendants have ignored the duty imposed upon them on March 14, 1990, and of which they were reminded in March, 1996. . ." (Vol. III, p. 39).

On July 30, 1996, Appellants/Defendants filed a motion seeking relief from the 1990, 1994, and March 1996 orders as well as a response in opposition to the unions' motions for enforcement. (Vol. III, pp. 41-85). Those pleadings did not raise the fact that the 1990 final order had been quashed by the Supreme Court in 1992.

A hearing was held on August 14 on all pending motions. (Vol. III, pp. 86-166).

On August 21, 1996, the trial court denied the State's motion for relief from judgment, holding that the motion "merely restates arguments that have been previously advanced and rejected by the Court and the appellate courts in considering this matter," (Vol. III, p. 167). Simultaneously, the trial

court issued its ruling on the petitions for enforcement and sanctions, denying sanctions but granting the motion for enforcement of Judge Gary's (quashed) 1990 Order. (Vol. III, pp. 169-172).

Specifically the court's order states, in pertinent part, that:

> The Defendants are ordered to restore, within the next 90 days, the annual and sick leave credits to the levels required by the Court's March 1990 order for all present career service employees of the State of Florida in the bargaining units represented by the Plaintiffs *for the period of July 1, 1988 through to present.*
>
> The Defendants are directed to develop, within the next 90 days, a plan for payment or restoration of annual and sick leave credits to retired career service employees and other career service employees who are no longer employed by the State of Florida for any reason in Plaintiffs' bargaining units *for the period July 1, 1988 through the present.*
>
> The Defendants are directed to provide the Court, within the next 30 days, the name of a public officer who will be responsible for carrying out this order.
>
> THEREFORE, THE COURT GRANTS the petitions for enforcement of Plaintiffs. Plaintiffs' motion for sanctions is denied.

August 21, 1996 Order, pp. 2-3 (Vol. III, pp. 170-171).

On September 3, 1996, Appellants filed an extensive and detailed Motion for Rehearing, supported by substantial evidence, refuting the bald allegations made by union counsel at the previous two hearings. (Vol. IV, pp. 1-32). Attached to that motion were:

> 1. Records demonstrating that the State had in fact negotiated with the unions regarding alteration of leave in 1988, contrary to their assertions in the Complaint underlying this case (Vol. V, pp. 5-6; Vol. VI, pp. 113-116, 132-143,

155-184);

2. Records demonstrating, in greater detail than had previously been submitted, the reason underlying the Legislature's need to alter the leave rule in the 1988 Appropriations Act (Vol. IV, pp. 42-132; Vol. V, pp. 5-6; Vol. VI, pp. 113-116, 132-143, 155-184);

3. Records detailing negotiations regarding leave between the State and the unions subsequent to enactment of the 1988 Appropriations Act (Vol. V, pp. 19-47, 56-73, 84-104; Vol. VI, pp. 185-229); and

4. Copies of all subsequently negotiated and ratified collective bargaining agreements between the State and these unions, for the period July 1, 1990 through the present. (Vol. V, pp. 19-47, 56-73, 84-104).

On September 4, after Judge Padavano transferred this case and that motion to a new Circuit Court Judge, the Honorable F. E. Steinmeyer, the motions for rehearing and to vacate were summarily denied, on September 5, without hearing or elaboration as to the grounds for denial. (Vol. III, pp. 173-76).

Appellants filed the instant appeal on September 16, 1996.

SUMMARY OF THE ARGUMENT

Based on the trial court's misapprehension regarding the continued vitality of Judge Gary's 1990 final judgment order -- an order ***quashed*** by the Florida Supreme Court in 1992 -- on March 5, 1996, the trial court entered an order specifying that "[t]he final order of the [trial] court, rendered March 14, 1990, is hereby directed to be enforced." On August 21, 1996, the trial court entered an order denying Defendants' motion to vacate the orders of March 14, 1990, and March 5, 1996, and a second order

granting a motion for enforcement of the 1990 order and requiring "restoration" of leave benefits from "July 1, 1988 through the present."

Subsequent motions for rehearing and to vacate pointed out, *inter alia*, that the order of March 14, 1990, had been ***quashed*** by the Florida Supreme Court,[19] and that no final order had been entered after remand. Nevertheless, the trial court, without explanation, denied these motions.

1. The trial court had no power to enforce the *quashed* order of March 14, 1990, and therefore its orders of March 5 and August 21, 1996 must be vacated.

2. The trial court never entered final judgment in this action following remand, and therefore there was no judgment to enforce. The single issue on remand from the Florida Supreme Court was the constitutionality *vel non* of Section 9.3.A(5) of the *1988* Appropriations Act. Within the scope of the Supreme Court's mandate, the trial court *only* had authority to direct relief from *that* proviso for *that* fiscal year--1988-89. The

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[19] The Supreme Court specifically held that:

> For the foregoing reasons, we *reverse* the district court's decision declaring section 9.3.A(5) of the 1988 Appropriations Act to be unconstitutional, *quash the order of the trial court granting summary judgment in favor of the unions*, and remand to the trial court for further proceedings consistent with this opinion.

State v. Florida Police Benev. Ass'n, 613 So.2d at 421 (emphasis supplied).

unions have filed no action seeking relief for any other fiscal year, nor did they attempt to amend the Complaint in this action, assuming that is even possible following remand from the Florida Supreme Court.

3. To the extent the unions claim that employees are entitled to adjusted leave benefits for all subsequent fiscal years to the present, based on the Defendants' purported failure to renegotiate leave benefits, they adduced no evidence to support this claim and, as revealed by the evidence submitted by the Defendants, this claim is without merit. Moreover, even assuming that the Defendnats failed to negotiate leave in subsequent years, the unions' remedies for such refusal, if any, are exclusively under Chapter 447, not in the trial court in this action. To the extent the unions failed to exhaust those remedies, they have been waived.

4. Plaintiffs' bald assertions that the Defendants failed to negotiate leave benefits, *for 1988*, upon which they based their Complaint and on which the Orders in this case have been based, are false. The evidence presented by Defendants demonstrates that the State did, in fact, negotiate with the unions over leave changes and that the unions did, *in fact*, sign and ratify ten separate Contracts, covering the period 1990 to present, that incorporated leave benefits according to the then-existing administrative rules, that expressly superseded and cancelled all previous practices and agreements between the

parties, and that expressly acknowledged that no other understandings existed between the parties. Additionally, in *each* of the subsequent Appropriations Acts, the Legislature has expressly resolved all outstanding impasses between the State and unions representing public employees. To the extent the Appropriations Acts, for 1989 to present, do not alter the agreement terms at impasse, the Appropriations Acts expressly resolve all impasses through "maintaining the status quo under the language of the current collective bargaining agreements." The trial court abused its discretion in not considering this fact.

5. Further, assuming that the state refused to negotiate leave benefits for 1989-90 (as permitted by the collective bargaining agreement in effect from 1987-90) and that it refused to bargain leave benefits in good faith in the bargaining cycles covering the period 1990 to present, the unions failed to exhaust their remedies under Chapter 447, Florida Statutes. The trial court therefore *lacked jurisdiction* to consider any belated claims based on fiscal years 1989 through 1996.

ARGUMENT

I. THE CIRCUIT COURT HAD NO AUTHORITY TO ORDER ENFORCEMENT OF AN ORDER QUASHED BY THE FLORIDA SUPREME COURT IN 1992

The unions, in their petitions for enforcement and at the hearings on March 1, 1996, and August 14, 1996, relied upon the earlier summary judgment of Judge Gary, dated March 14, 1990, as grounds for the relief for which they petitioned. However, this order was ***quashed*** by the Supreme Court -- *in 1992*. Similarly, the previous decision of the First District Court of Appeal, which the unions cited as support for their argument, was ***reversed*** by the Supreme Court. *State v. Florida Police Benev. Ass'n*, 613 So.2d at 421. Accordingly, the trial court's orders of March 5, 1996, and August 21, 1996, improperly ordered the enforcement of Judge Gary's quashed summary judgment Order of March 1990, and should be vacated.

As a direct result of the perfidious representations of fact and law by union counsel, the trial court misapprehended that Judge Gary's 1990 was "affirmed by the Supreme Court". (Vol. III, p. 94 (lines 17-20)). Further, based upon the factually unsupported allegations of union counsel, the trial court also was convinced that the State "willfully disobeyed" the 1990 Court order. (Vol. III, p. 121 (lines 3-7). The trial court rejected argument presented by the State based on the trial court's misunderstanding that the 1991 District Court of Appeal opinion, affirming the 1990 trial court Order, continues to establish law

of this case. Like the 1990 trial court Order, however, this DCA opinion was nullified by the Supreme Court in 1992. Based or omissions and misstatements by counsel, the trial court clearly gave affect to this DCA opinion where none is appropriate. (Vol. III, pp. 123 (lines 23-25) - 124 (lines 1-16), 132 (lines 10-17).

The only issue on remand from the Florida Supreme Court is whether the Legislature's proviso amending Rule 22A-8.011, *in the 1988 Appropriations Act*, was constitutionally permissible. The only year in dispute, by the express terms of the Complaint and within the scope of the case on remand, is *FY 1988-89*. The trial court, and this Court, must confine relief provided to the unions to the matter on remand. *Cone v. Cone*, 68 So.2d 886 (Fla. 1954); *Blackhawk Heating & Plumbing Co. Inc. v. Data Lease Financial Corp.*, 328 So.2d 825 (Fla. 1975)(A trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so.); *See also Hollander v. K-Site 400 Associates*, 657 So.2d 16 (Fla. 3d DCA 1995); *Berger v. Leposky*, 103 So.2d 628 (Fla. 1958); *O.P. Corp. v. Village of North Palm Beach*, 302 So.2d 130 (Fla. 1974)(The judgment of an appellate court, where it issues a mandate, is a final judgment in the cause and compliance therewith by the lower court is a purely ministerial act requiring the consent of the reviewing court before permitting presentation of a new matter affecting the cause); *See also, Thornber v. City of Fort Walton Beach*, 622

So.2d 570 (Fla. 1st DCA 1993). *See generally*, Padavano, Florida Appellate Practice, §14.11.

Accordingly, 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 by determining "whether the legislative appropriation was sufficient to fund the annual and sick leave provisions of the collective bargaining agreement, " *State v. Florida Police Benev. Ass'n*, 613 So.2d at 421, or, alternatively, whether the Legislature had a compelling state interest justifying the abridgment of the right to collectively bargain. *Id.* at 421, n. 11. The *only* legislative act in question is the constitutionality of Section 9.3.A.(5) of Chapter 88-555, Laws of Florida (1988), *id.* at 416, and the only year's benefits affected by that proviso are those benefits accruing in FY 1988-89. The trial court was confined to directing relief from *that* proviso, due in *that* fiscal year, *alone*. Furthermore, under no circumstances could the trial court, on remand, base its order on Judge Gary's quashed order granting summary judgment for the unions.

As a consequence of its misapprehension regarding the state of the facts and law in this case, the trial court entered its March 5, 1996, and August 21, 1996, Orders directing enforcement of the quashed 1990 trial court order. This Court should reverse the September 5, 1996, order denying the motions to rehear and vacate the August 21, 1996, orders and should, and must, quash

the trial court's orders of March 5, 1996, and August 21, 1996, insofar as these orders seek to enforce Judge Gary's order -- *an order that the Supreme Court declared a nullity more than four years ago.*

II. THE UNIONS ARE NOT ENTITLED TO ANY RELIEF REQUESTED FOR FY 1988-89

A. Negotiations Did Take Place

The unions filed this suit under the premise that the alteration of annual and sick leave benefits by the Legislature violated their collective bargaining rights, in the absence of negotiations. They have proceeded in this litigation for eight years on their bald allegations, unsupported by any record evidence, that negotiations over alteration of these leave benefits never occurred. The unions reiterated this claim throughout their petitions for enforcement (Vol. III, pp. 1-7, 38-40) and represented to the trial court during the March 1 and August 14, 1996, hearings that defendants "refused" to bargain over annual and sick leave. (Vol. II, pp.130 (lines 11-16); 134 (lines 10-14); 142 (lines 8-22); 143 (lines 15-18, 24-55): 144 (lines 1-5, 21-25); 145 (lines 1-6, 10-11, 18); 146 (lines 21-23); 155 (lines 21-23); Vol. III, pp. 95, 97-99, 103, 104-107, 111-118, 136-137, 140). Still, the unions offered no evidence whatsoever in support of their arguments -- not at the hearings on March 1, 1996 and August 14, 1996, not with the petitions for relief and other filng made in anticipation of those hearings,

and not in response to Defendants' September 3, 1996, Motions for Rehearing and to Vacate.

However, as is clearly established by the sworn affidavit of Terry Perkins and the attachments to that affidavit, negotiations *did* take place between the State and these unions over the need to return to the pre-August 1986 leave rule. See discussion at pages 1-9, *supra*. (Vol. V, pp. 5-6; Vol. VI, pp. 113-116, 132-143, 150-184). Furthermore, even though impasse was not formally declared by either side, the Legislature was advised by the Secretary of the Department of Administration that negotiations had been undertaken and that no agreement was reached. *See* discussion at page 8, *supra*. (Vol. VI, pp. 144, 145). Chapter 88-555, Laws of Florida was enacted after that notification was served on the Senate President and Speaker of the House of Representatives.

Because the unrefuted record evidence establishes that negotiations, in fact, occurred, contrary to the bald allegations in the Complaint and petitions for enforcement, it was error for the trial court to grant relief to the unions and error for the trial court to deny Appellants' Motions to Rehear and to Vacate.

B. Compelling State Interest Established for Section 9.3.A(5)

Additionally, Appellants submit that judgment should be entered in their favor for all claims relating to FY 1988-89. Although the non-final order of Judge Smith in 1994 determined that there was sufficient funding in the budget to fund the leave

benefit, as negotiated (a conclusion Appellants do not agree is supported by the record in this case), the trial court has not made any finding as to whether there was a compelling state interest justifying the enactment of Section 9.3.A(5) of Chapter 88-555, Laws of Florida. Such a finding is required of the trial court under the Order on remand.

Appellants' submit that, based upon the undisputed evidence contained in this record, regardless of the availability of funds, the Legislature had a compelling state interest for altering the leave rule.

The August 1986 rule, as amended by the Administration Commission, was causing an unnecessary and significant expenditure of taxpayer dollars and over-utilization of physician services, by encouraging employees to obtain medical certifications in the absence of medical need. This unintended consequence benefited no one -- not the employees and not the citizens of this State. Abandonment of this ill-conceived rule was in the best interest of the employees and the public, and benefited both. Elimination of the August 1986 leave rule played an integral and necessary part in preserving the fiscal integrity of the Health Insurance Trust Fund. Maintaining the solvency of that Fund was a compelling state interest, justifying alteration of the leave rule.

This Court should, accordingly, direct entry of judgment for the State based upon the unrefuted evidence establishing the

existence of a compelling state interest for the alteration of leave in Section 9.3.A(5), as permitted by the order on remand. See, *State v. Florida Police Benev. Ass'n*, 613 So.2d at 421, n. 11.

III. THE UNIONS ARE NOT ENTITLED TO RELIEF AFTER FY 1988-89

A. FY 1989-90

As described more fully in the Statement of the Case and Facts, the Legislature again directed an alteration of the accrual and use rates for annual and sick leave in proviso contained in the FY 1989-90 Appropriations Act, Chapter 89-253, Laws of Florida, at p.. 1338. *See* discussion at page 11, *supra*.[20] However, the unions have never amended their Complaint to include a challenge of this legislative enactment and the Statute of Limitations for raising such a challenge has long since passed.

Accordingly, the trial court erred in granting relief beyond FY 1988-89, as the remedy conferred is outside the relief available under the Complaint as pled and beyond the scope of the Order on remand.

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[20] See citation to the text of Chapter 89-253, Laws of Florida, at p. 1338, in Footnotes 2 and 6, *supra*.

B. FY 1990-91: The Legislature Rejected the Union Request to Return to the August 1986 Leave Accrual Rates in Resolving the Impasse Declared by the FNA in 1990

As described more fully in the Statement of the Case and Facts, in 1990, the FNA declared impasse on the question of returning to the August 1986 formula for leave accrual and use. The FNA requested and received review of that question by a Special Master. *See* discussion at pages 12-14, *supra*. Although the Special Master declined to issue a recommendation on this impasse issue, due to the pendency of litigation, the Legislature specifically addressed resolution of this issue in the Appropriation Act.[21]

The unions failed to advise the trial court that the FNA had raised this issue through impasse and did not inform the trial court that the Legislature had expressly adopted a contrary resolution than that sought by the Plaintiffs. See Chapter 90-209, Laws of Florida, at p. 1485. In fact, Mr. Slesnick, counsel for the FNA, expressly advised the court, first, that the

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[21] The Legislature expressly resolved *all* impasse issues presented to them in 1990 stating that:

> All other collective bargaining issues at impasse which are not contained in this act shall be resolved by maintaining the status quo under the language of the current Collective Bargaining Agreements.

Chapter 90-209, Laws of Florida, at p. 1485.

The agreements in place on July 1, 1990, the effective date of the 1990 Appropriations Act, all contain provisions for leave incorporating Section 22A-8, F.A.C., and provisions expressly nullifying any previous agreements between the parties. See citation of Articles entitled "ENTIRE AGREEMENT", *supra*.

Legislature's impasse resolution of this leave dispute "wasn't relevant to this case"[22] and then, at the August 1996 hearing, denied that impasse procedures were ever utilized in this case over leave.[23]

As a direct consequence of union counsels' misrepresentations to the trial court and obfuscation of the

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[22] During the March 1, 1996, hearing, Mr. Slesnick stated to the Court that:

> But let me assure you that the records would show -- if there were records -- that not only did unions complain and vociferously oppose the institution of the new career service rules but went to impasse before the legislature over the imposition of the new career service rules. But that wasn't relevant to this case because we were already in litigation and already going up to the appellate trail twice over this issue.

(Vol. II, p. 154, (lines 7-15)).

[23] At the August 14, 1996 hearing, Mr. Slesnick advises the trial court as follows:

> But Mr. McCoy fails to understand -- because I don't believe until now, he has been intimately involved with labor relations, is that the principal -- one of the founding principles of contract negotiations is that once you negotiate and mutually agree on something, it stays just like that, until you mutually agree to change it.
>
> Or in the alternative, until you come to a complete deadlock, and you go through a legal process called impasse, and that porocess changes it.
>
> *Neither of those things ever happened.* So there's nothing speculative about saying that once we negotiated a leave system, it stayed that way until today, unless we negotiated a change, or unless we went through an impasse and we came to a legal conclusion through the impasse system under 447. *Nothing was done like that.*
>
> So that it is not speculative to say that the leave system stays just the way it was negotiated in 1988. . .

Vol. III, p. 115, (lines 3-25)).

relevant facts in this case, the unions have obtained a judicial remedy in direct contravention of the impasse resolution of this leave issue by the Legislature, in Chapter 90-209, Laws of Florida, during Chapter 447 impasse resolution proceedings.

Even assuming, *arguendo*, that the enactment of Section 9.3.A(5) of Chapter 88-555, Laws of Florida, was unconstitutional and the unions are entitled to restoration of leave benefits under the August 1986 version of Chapter 22A-8, F.A.C., such restoration cannot extend beyond June 30, 1990, because to order otherwise is contrary to the express resolution of this issue, by the Legislature, through the impasse resolution mechanisms of Chapter 447, contained in Chapter 90-209, Laws of Florida, at p. 1485.

C. The Trial Court's Ruling is Contrary to the Express Terms of the Contracts Subsequently Executed by these Parties and Funded by the Legislature

Each of the subsequent contracts negotiated with, and ratified by, the unions after the expiration of the collective bargaining agreements in 1990 contained leave provisions. None of these contracts incorporates the 1986 version of Rule 22A.8.011; rather, the administrative rule in place at the time of the execution of each of these agreements was expressly incorporated. (Vol. V, pp. 9-140, 155-185; Vol. VI, pp. 1-110).

More significantly, ***each*** of the subsequent Contracts, signed and ratified by these unions, contained the following clause, expressed in the Article entitled "ENTIRE AGREEMENT":

> This Contract, upon ratification, *supersedes and cancels all prior practices and agreements, whether written or oral*, unless expressly stated to the contrary herein, and constitutes the complete and entire Contract between the parties, and concludes collective bargaining for its term.
>
> The parties acknowledge that, during the negotiations which resulted in this Contract, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Contract.[24]

(Emphasis supplied). The trial court's orders render this clause a nullity, providing the unions benefits outside the terms of the negotiated Agreements.

When arguing for imposition of the August 1986 rule, from 1988 *to present*, the unions failed to advise the trial court that such a remedy was in direct contravention of the express terms, contained in the "zipper clauses," of the ten subsequently executed collective bargaining agreements.

Even assuming, *arguendo*, that the enactment of Section 9.3.A(5) of Chapter 88-555, Laws of Florida, was unconstitutional and the unions were entitled to restoration of leave benefits under the August 1986 version of Chapter 22A-8, F.A.C., such restoration cannot extend beyond June 30, 1990, because to order otherwise is contrary to the express, negotiated terms of the

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[24] See the citation to this Clause, for each of the Agreements entered during the period 1990 to present, between the State and each of these unions, cited in the Statement of the Case and Facts.

above-referenced clause from each of the succeeding collective bargaining agreements, ratified between 1990 and the present.

Indeed, the 1987-90 collective bargaining agreements at issue in this case, contemplated *renegotiation* of the attendance and leave rule in FY 1989-90 -- a fact acknowledged by the unions in their Complaint. (Vol. I, p. 5 ¶14(b)).[25] Accordingly, alteration of leave was permissible in the third year of this contract. To the extent such an alteration occurred, with or without bargaining, the unions' recourse for challenging such alteration in FY 1989-90 is through Chapter 447, not through this declaratory judgment action regarding the constitutionality of Section 9.3.A(5) of Chapter 88-555.

If, as the unions have maintained, the state refused to revisit "attendance and leave" for the Fiscal Year 1989-90 or to negotiate leave benefits in subsequent bargaining cycles their remedies are exclusively under Chapter 447, in particular section 447.403 (resolution of impasse) and sections 447.501-504 (unfair labor practices).[26] In addition, section 447.309(5) provides that the term of existence of any collective bargaining agreement is limited to three years. The unions do not contend -- indeed, could not contend -- that they did not negotiate new agreements for the period covering 1990 to present.

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[25] *See* footnote 5 for text.

[26] Section 447.501(1)(c) prohibits public employers from refusing to bargain collectively or failing to bargain in good faith.

In any event, neither Judge Smith in his 1994 order nor the Florida Supreme Court in its 1992 decision addressed this issue. Neither decision remotely suggests that what happened in 1989 or in *subsequent bargaining cycles* could possibly be a factor in this case. As a matter of law, whatever happened is legally irrelevant because subsequent negotiations are subject to proceedings under Chapter 447, Florida Statutes, and not contained within the prayer for relief in the unions' Complaint.

Employee leave is a mandatory subject of collective bargaining under Chapter 447. *City of Miami v. F.O.P. Miami Lodge 20,* 571 So.2d 1309, 1321-22 (Fla. 3d DCA 1989) (on rehearing *en banc), approved* 609 So.2d 31 (Fla. 1992). The unions' failure to pursue their right to bargain over leave benefits through procedures available under Chapter 447 gives them no right to seek "restoration" from the trial court, or this Court, of what they allegedly failed to negotiate under Chapter 447. The remedy for the State's alleged refusal to negotiate leave benefits is for the union to invoke the statutory impasse procedure. *City of Casselberry v. Orange County Police,* 482 So.2d 336 (Fla. 1986). As this Court has held, a union can passively waive its right to bargain over various issues. *Board of County Comm'rs of Jackson County v. International Union, etc.,* 620 So.2d 1062 (Fla. 1st DCA 1993). But even if the contrary were true, the union's remedies, if any, for what it supposedly failed to achieve at the bargaining table from 1989-96 are

exclusively under Chapter 447.

D. The trial court orders are contrary to the Legislature's resolution of impasse issues

As noted in the Statement of the Case and Facts, each of the Appropriations Acts, from 1990 to present, contain proviso language resolving any outstanding impasses between the State and these unions. Pursuant to the express terms of that proviso language, the Legislature expressly resolved such impasses by "maintaining the status quo under the language of the current collective bargaining agreements."[27]

Union counsel failed to advise the trial court that impasse had been resolved in each of the Appropriations Acts from 1990 through the present. In each of these years, the Legislature expressly resolved any existing impasses by "maintaining the staus quo under the language of the *current* collective bargaining agreement." (i.e. the collective bargaining agreements in place on the effective date of the Appropriations Act). Accordingly, the Legislature has expressly resolved impasses to preclude imposition of previous collective bargaining agreements -- as sought by these unions and ordred by the trial court.

Even assuming, *arguendo*, that the enactment of Section 9.3.A(5) of Chapter 88-555, Laws of Florida, was unconstitutional and the unions were entitled to restoration of leave benefits

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[27] See the citation to this Clause, for each of the Appropriations Acts enacted during the period 1990 to present, cited in the Statement of the Case and Facts.

under the August 1986 version of Chapter 22A-8, F.A.C., such restoration cannot extend beyond June 30, 1990, because to order otherwise is contrary to the express terms of the Legislature's impasse resolution provisions in the past seven Appropriations Acts and is beyond the authority of the trial court to order.

E. This leave benefit could not be imposed beyond one Fiscal Year

As the Supreme Court noted in its previous ruling in this case:

> Although generally the funding of a collective bargaining agreement is thought of in terms of financing wages, the providing of benefits to public employees, including annual and sick leave benefits, also necessarily requires the expenditure of public funds and therefore implicates the legislature's appropriations power.

State v. Florida Police Benev. Ass'n, 613 So.2d at 418, n. 3.

> . . . [Further, a]s is true in most states where public employees bargain, the enforcement of the monetary terms of the agreement is subject to the appropriations power of the legislature. . .
>
> Accordingly, the collective bargaining agreements entered into by the unions in this case were subject to the appropriations power of the legislature, as are any agreements entered into by public employees. Indeed the agreements themselves recognize this. The fact that this contingency differentiates public bargaining from private bargaining does not present an abridgment of the right to collectively bargain, but rather an inherent limitation due to the nature of public bargaining itself.

State v. Florida Police Benev. Ass'n, 613 So.2d at 419.

The Supreme Court has made it explicitly clear that:

> Once the executive has negotiated and the legislature has accepted *and* funded an agreement, the state and all its organs are bound by the agreement under the principles of contract law. The act of funding through a valid appropriation is the point in time at which the contract comes into existence.

Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), *citing State v. Florida Police Benev. Ass'n*, 613 So.2d at 418-19 n. 5 (emphasis in original).

Furthermore, as the Court emphasized, the Legislature's legal obligation to fund any agreement *ends* with the conclusion of *each* fiscal year:

> [T]he legislature's legal obligation terminated on June 30, 1992, as counsel for the unions conceded in oral argument. We therefore are of the opinion that the legislature was under no legal obligation to provide the same level of funding beyond that date. It is clear to us that the legislature has authority to reduce base salaries as it deems appropriate, subject however to the terms of any contracts it has with its employees. Because the legislature chose not to fund the raise the second year it effectively assented only to a three-percent raise ending June 30, 1992; there was nothing to require the state to extend the three-percent increase beyond that date.

Chiles v. United Faculty of Florida, 615 So.2d at 678 (on motion for clarification).

The trial court had no authority to effectively rewrite subsequently executed contracts to augment the leave benefits they contain, based on what the Legislature did in Fiscal Year 1988. The Legislature did not fund the benefits the unions seek from 1989 to present. As a matter of law, therefore, the trial

court had no authority to extend through 1996 the obligation it found the Legislature incurred respecting leave benefits in 1988-89.

F. No Agreement of the parties exists to support the remedy ordered

Finally, as determined by the Supreme Court of Florida in its decision in *Palm Beach Junior College v. United Faculty*, 475 So.2d 1221, 1227 (Fla. 1985), the trial court is without authority to dictate the remedy ordered here, in the absence of an express agreement between the contracting parties. In *Palm Beach Junior College*, the Court expressly rejected an attempt by PERC to order a remedy "imposing an agreement where none has been reached" by the parties. The Court disapproved the District Court opinion affirming this remedy and remanded the case for further proceedings. The Court directed that, because "it is impossible to determine what the parties might have agreed to without the dispute . . . [t]he parties should be returned to the status quo as it existed at the moment impasse was declared." *See also, Palm Beach Junior College v. United Faculty Etc.*, 425 So.2d 133, 144 (Fla. 1983)(dissenting opinion of J. Shaw)(rejecting the notion that PERC has the authority to dictate Contract terms, in the absence of final agreement of the parties and noting that such impasse resolution is vested solely in the legislative body under Chapter 447).

Here, the trial court attempts to impose a remedy which is

expressly *contrary* to the terms of the collective bargaining agreements entered between these parties. The trial court surely is without authority to do this.

G. Abuse of Discretion

To the extent that the unions rested their case on the State's alleged refusal to negotiate, from 1989 to present, the lower court in fairness was obligated to consider the evidence offered by the Defendants in their motion for rehearing and motion to vacate, which directly contradicted the bald, unsworn allegations provided to the trial court by union counsel, and on which the trial court's orders and remedies are based. *Ragen v. Paramount Hudson, Inc.*, 434 So.2d 907 (Fla. 3d DCA 1983), *reh. denied*, 444 So.2d 417 (Fla. 1984). To do otherwise -- to penalize the State in the amount of $500 million or more in the absence of any record evidence in support of such a holding -- is a gross abuse of discretion. Such a result is unsupported by the facts or law of this case, the evidence in the trial court record, and the express terms of the Contracts between these parties and the Appropriations Acts (from 1988 through present) that animate those Agreements and render them binding upon the State. This remedy was ordered despite a complete absence of any record evidence or sworn testimony in support of such an extraordinary and sweeping result -- the orders directing this remedy should be vacated.

IV. THE DEFENDANTS HAD NO OBLIGATION TO PROVIDE THE UNIONS ANY RELIEF OR RESTORE ANY BENEFITS BECAUSE NO FINAL JUDGMENT HAS BEEN ENTERED IN THIS ACTION.

No final judgment has been entered in this case subsequent to remand from the Supreme Court. The 1994 order, by Judge Smith, merely granted summary judgment for the unions. That order is *not* a final order.

Judge Smith's 1994 order granting summary judgment for the unions reads in pertinent part that:

> THEREFORE THE COURT DENIES the defendants' motion for summary judgment and GRANTS the plaintiffs' motion for summary judgment.

(Vol. I, p. 175).

This order did not require the defendants to restore benefits for more than one year. It could not have done so, because no determination was ever made with respect to the sufficiency of funding for any year other than Fiscal Year 1988-89. The 1989 Appropriations Act, for example, also provided that annual and sick leave would be determined according to the administrative rule in effect as of July 1, 1986. Section 1.1-3.A.(5), Chapter 89-253, Laws of Florida. That proviso also extended the benefit of permitting Career Service employees to roll annual leave balances, in excess of 240 hours on December 31 of each year, into sick leave, rather than merely forfeiting such excess balances. The unions never challenged that proviso, and, obviously, no court determined its constitutionality, nor has any Court been petitioned to make such a determinination.

Moreover, the 1994 order lacks the requisite words of finality to render it the final judgment in this cause. See *Shupak v. Allstate Insurance Company*, 356 So.2d 1298 (Fla. 3d DCA 1978)(Trial court order which stated "Ordered and adjudged that the motion for summary judgment be, and the same is hereby granted," was merely authorization for final judgment; it did not constitute a final judgment, nor was it an order from which interlocutory appeal could properly lie."); *McCready v. Villas Apartment*, 379 So.2d 719 (Fla. 5th DCA 1980)(Order which simply read "The Motion of [certain parties] for Summary Judgment is granted," was not a final judgment and therefore not an appealable order.); *See also Amelco Investment Corp. v. Bryant Electric Co.*, 487 So.2d 386 (Fla. 1st DCA 1986); *Nolan's Towing and Recovery v. Marino Trucking, Inc.*, 581 So.2d 644 (Fla. 3d DCA 1991); *BCH Mechanical, Inc. v. McCoy*, 584 So.2d 1067 (Fla. 5th DCA 1991). *See generally*, Padavano, Florida Appellate Practice, §17.2, n. 5.

As admitted by the unions' counsel in the March 1, 1996, hearing, Judge Smith's 1994 order "granting summary judgment" was not final and did not enter judgment in the unions' favor. (Vol II, pp. 166-167.)[28] Therefore, the District Court's order

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[28] No final judgment or order entering final summary judgment was ever entered by the Circuit Court to render this order final. Indeed, Plaintiffs admit that Judge Smith's order and the mandate of the First District Court of Appeal affirming that order are not "self-executing." (Vol.

affirming that non-final order and its subsequent mandate is not "self-executing" and does not alter the parties position in this cause. In fact, Defendants' improper appeal of this non-final order could not confer jurisdiction on the appellate court to rule on that non-final order, because the appellate court *lacked jurisdiction* to hear the appeal and jurisdiction cannot be conferred by the parties nor waived as grounds for challenging

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II, pp. 166-167).

At the March 1, 1996, hearing on Defendants' Motion for Partial Summary Judgment, the following exchange occurred between the court and Plaintiffs' counsel:

COURT: . . . So I think for today the best resolution is for me to say that the motion for summary judgment is denied. I don't know whether there is any need - - this mandate is really almost in the nature of a self-executing mandate because Judge Smith already entered a final judgment, did he not?

MR. SLESNICK: Judge Gary.

MR. JOHNSON: Judge Gary entered the final judgment. And then Judge Smith just addressed the funding issue.

He was given a very narrow issue. And basically he said Judge Gary's order is correct because I find that there is no funding question involved.

COURT: Well, I think what we need to do then is to say that the motion is denied and that the effect of the order now and the effect of the mandate is to reinstate in full force the judgment that was originally entered by Judge Gary. And it may be enforced at this point.

Vol I, p. 166, lines 13-25, p. 167, lines 1-7.

Plaintiffs' Counsel failed to advise the Court that Judge Gary's order, on which they relied in asserting their right to enforcement of judgment, had been ***quashed by the Florida Supreme Court in 1992.*** Furthermore, even the most cursory examination of Judge Smith's 1994 order reveals that he at no time says, "basically" or otherwise, that "Judge Gary's order is correct", as Plaintiffs' counsel represented to the trial court. Nor would such a ruling have been legally appropriate in light of the Supreme Court's order quashing Judge Gary's 1990 order.

that order. *See, Ramos v. Univision Holdings, Inc.*, 655 So.2d 89 (Fla. 1995). (Supreme Court quashed district court order affirming a trial court order denying summary judgment. The court noted that a district court is generally without jurisdiction to review nonfinal order denying a motion for summary judgment.) *See also, BCH Mechanical Inc. v. McCoy, supra.*

Accordingly, no order has been entered in this case, subsequent to remand, entitling the unions to the relief for which they petitioned the trial court in 1996. The orders of August 21 and March 5, 1996 should be quashed, as should the trial court's September 5, 1996 orders denying Defendants' motions to rehear and vacate those orders.

V. THE TRIAL COURT DID NOT HAVE JURISDICTION OVER CLAIMS OUTSIDE FISCAL YEAR 1988-89: THE UNIONS FAILED TO EXHAUST THEIR STATUTORY AND CONTRACTUAL REMEDIES AS REQUIRED BY LAW.

The trial court also erred in awarding benefits through "the present" for the more fundamental reason that it lacked jurisdiction to hear complaints relating to negotiation deficiencies for the years 1989-96.[29] Any claims the unions have for the failure of the State to further negotiate leave benefits can be asserted only through exhaustion of the remedies set forth

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[29] Rule 1.140(h)(2), Fla.R.Civ.P., provides that the defense of lack of jurisdiction of the subject matter may be raised at any time. The Appellants raised this jurisdictional argument in their motion for rehearing in the trial court.

in Chapter 447 (impasse and unfair labor practices) or through appropriate grievance procedures outlined in the collective bargaining agreement in effect for these years.

This Court long ago ruled that it is inappropriate for a circuit court to intervene in the administrative process governing labor disputes. *Duval County School Board v. Armstrong*, 336 So.2d 1219 (Fla. 1st DCA 1976). More recently, in *City of Miami v. Fraternal Order of Police*, 378 So.2d 20 (Fla. 3d DCA 1979), *cert. denied*, 388 So.2d 1113 (Fla. 1980), the Court held that the plaintiff union, in not invoking the labor contract grievance arbitration procedures, failed to exhaust its administrative remedies, and the city employer was not estopped from belatedly asserting the union's failure to exhaust those administrative remedies as a defense. The Court declared that: "[n]o principle is more firmly established than the requirement that, before resorting to the courts, one must pursue and exhaust *any extrajudicial or administrative remedies which may provide the relief.*" *City of Miami v. Fraternal Order of Police*, 378 So.3d at 23 (emphasis added) (citations omitted). The Court concluded: "the exhaustion doctrine [applies] to the interpretation of collective bargaining agreements, such as the one involved in this case." *Id.* (citations omitted). *See also Kilpatrick v. Dade County School Board*, 606 So.2d 698 (Fla. 3d DCA 1992), citing with approval *City of Miami v. Fraternal Order of Police, supra.* In *Kilpatrick* the plaintiff suffered summary

judgment against her for failing to exhaust available administrative remedies.

In the instant case, the complaining unions have failed to exhaust their contractual and statutory remedies and are therefore barred from pursuing any claims based on what they failed to negotiate from 1989 to the present. Any suggestion that they are entitled to pursue such claims in court would disregard the jurisdictional nature of these policies.

The court in *City of Miami v. Fraternal Order of Police*, noting the frequent application of the exhaustion doctrine to labor contract cases, proclaimed:

> By far the most influential and important cases which so hold are those rendered by the Supreme Court in the so-called 'Steelworkers Trilogy,' *United States Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1409, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1338, 4 L.Ed.2d 1424 (1960) and the subsequent decisions (citations omitted)...the high court [has] applied the statutorily expressed federal policy ...to require that actions for breach of collective bargaining agreements...may not be maintained unless the complaining employee, or his union, first attempts and exhausts the 'use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress.'

City of Miami v. Fraternal Order of Police, 378 So.2d at 24 (citations omitted).

The court went on, in language applicable to the instant case, stating:

> [p]articularly since the Florida Public Employees Relations Act, which governs the agreement before us,

> similarly requires inclusion of a grievance procedure which terminates in final and binding arbitration, Sec. 447.401, Fla. Stat. (1977), *we hold that these principles as enunciated by the Supreme Court are directly applicable to this case.*

Id. (emphasis supplied).

That rationale and ruling demand to be applied to this case. The unions had remedies under Chapter 447 for the State's alleged failure to negotiate. The facts of this case compel the same result as that reached in *City of Miami v. Fraternal Order of Police.*

The Steelworkers Trilogy is more vital today than it was in 1960 because of the Supreme Court's recognition that labor disputes should be submitted not to courts but to those administrative forums possessing "greater institutional competence." Such recourse "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties presumed objectives in pursuing collective bargaining." *AT&T Communications Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 650, 106 S.Ct.1415, 89 L.Ed.2d 648 (1986) (quoting *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 371-372, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984)).

There is no doubt that the courts uniformly have adopted the mandatory exhaustion of remedies' doctrine of the Steelworkers Trilogy and that this fundamental requirement would preclude the trial court from exercising jurisdiction over the unions'

purported claims for subsequent fiscal years and bargaining cycles. *See, e.g., City of Miami v. Fraternal Order of Police, supra.*, 378 at 23-24; *Wallace v. Civil Aeronautics Bd.*, 755 F.2d 861, 865 (11th Cir. 1985) (adopting and citing the Trilogy rationale); *Pyles v. United Air Lines,Inc.*, 79 F.3d 1046, 1051 (11th Cir. 1996) (citing the Trilogy to uphold dismissal of a former employee's Florida breach of contract suit because he failed to exhaust the collective bargaining grievance arbitration procedures and remedies).

Here, the unions have failed to exhaust available administrative remedies from 1989 to the present, or, as revealed by the record and express text of the Appropriations Acts referred to herein, the unions did avail themselves of the impasse resolution mechanisms outlined in Chapter 447 and the Legislature determined to maintain the "status quo" of the "current" agreements. To ignore this jurisdictional issue is to usurp controlling labor policies which compel exhaustion of administrative remedies as well as to disregard subject matter jurisdiction limits. Accordingly, the trial court orders which are the subject of this appeal should be vacated.

CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's orders of March 5, 1996, August 21, 1996, and September 5, 1996.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Florida Bar No. 114422

KIMBERLY J. TUCKER
Deputy General Counsel
Florida Bar No. 0516937
(904) 487-1963
Fax: (904) 487-2564

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084
(904) 488-9935
Fax: (904) 488-4872

WILLIAM W. WERTZ
Assistant Attorney General
Florida Bar No. 0850497
(904) 488-1573
Fax: (904) 488-4872

Office of the Attorney General
PL 01 - The Capitol
Tallahassee, FL 32399-1050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by hand delivery to: **GENE "HAL" JOHNSON,** Esq., 300 East Brevard Street, Tallahassee, Florida 32301; and **BENJAMIN R. PATTERSON,** III, Esq., P.O. Box 4289, Tallahassee, Florida 32315-4289; and by express mail to **DONALD D. SLESNICK II,** Esq., 10680 N.W. 25th Street, Suite 202, Miami, Florida 33712-2108; this 21st day of October, 1996.

Kimberly J. Tucker
Deputy General Counsel