017

FILED
SID J. WHITE
SEP 30 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LAWTON CHILES, as Governor of the State of Florida,

Appellant,

vs.

Case No. 93,665
DCA No. 97-2359

STATE EMPLOYEES ATTORNEYS GUILD and RAYMOND J. GREENE,

Appellees.
_____/

APPELLEES' ANSWER BRIEF

THOMAS W. BROOKS
Florida Bar No: 0191034

ANTHONY D. DEMMA
Florida Bar No: 0945870

MEYER AND BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302
(850) 878-5212 - Telephone
(850) 656-6750 - Facsimile

ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS

CONSTITUTIONS:

Page No.

FLORIDA STATUTES:

STATEMENT OF THE CASE AND OF THE FACTS

Appellees accept the State's somewhat argumentative statement of the case except those portions which characterize, rather than simply report, the holdings of this Court in State ex rel. Chiles v. Public Employees Relations Commission, 630 So.2d 1093 (Fla. 1994) and that of the First District Court of Appeal in the decision here for review. Appellees address these points in the arguments which follow.

Appellees cannot accept the State's statement of the facts because none exists. Despite its recognition that the First District declined to address the constitutionality of Section 447.203(3)(j), Florida Statutes (1995), in SEAG v. State, 653 So.2d 487 (1st DCA 1995), because of the lack of the factual record, the State failed to provide this Court with any of the evidentiary or ultimate facts found by Circuit Judge Nikki Ann Clark after almost three full days of testimony. Because this Court's review of Judge Clark's finding that Section 447.203(3)(j) was unconstitutional depends upon the correctness of her factual findings, they are summarized below.

The circuit court's factual findings were made in response to factual assertions made by the State in support of the challenged statute which were summarized by the court as follows:

> The state asserts that it has a compelling interest in maintaining a confidential relationship with its attorneys and that any collective bargaining by the employee

> attorneys would preclude such a relationship. The state argues that the nature of collective bargaining as an adversarial process under which management and employees bargain to further their respective interests is incompatible with an attorney/client relationship. The state further argues that negotiations regarding conditions of employment, discipline, and discharge of attorneys improperly affects the attorney/client relationship and would result in breaches of the code of ethics regulating lawyers in terms of confidentiality, fidelity to the client, and the client's right to discharge an attorney.

(R. 231). While the circuit court found that the State had a compelling interest in preserving the attorney/client relationship between its agencies and the lawyers which they employ, it concluded that the State failed to show a compelling state interest in preventing all collective bargaining by its employee attorneys. (R. 234-35). The circuit court found "no evidence to support the position that government employed attorneys would abandon their ethical obligation of confidentiality, fidelity and loyalty by becoming members of a labor organization," and that there "is no inherent conflict created by lawyers collectively bargaining with clients." (R. 234-35).

To evaluate the validity of the State's asserted justifications for banning all collective bargaining by government attorneys, the circuit court considered, at Appellees' urging, evidence from other jurisdictions where government attorney collective bargaining takes place. Upon evaluation of this evidence, the court found as follows:

> None of the evidence presented in this case shows that collective bargaining by government attorneys in other jurisdictions has harmed the relationship between the government attorney and the employing agencies. Governmental entities that allow their attorneys to collectively bargain have been able to effectively conduct their legal affairs, meet their legal obligations, and carry out their respective missions. Contrary to the defendant's assertions, collective bargaining by government attorneys in other jurisdictions has not limited or otherwise interfered with the ability of any agency to obtain from among its attorney employees the most capable legal counsel for any given case.
>
> Likewise, there is no evidence in the record that government attorney collective bargaining impugns or denigrates the ethical standards of the attorneys so employed. To the contrary, there is evidence that government attorneys who collectively bargain continue to maintain high ethical standards required by rules relating to professional conduct and ethics.

(R. 236-37).

With respect to the ethical propriety of a government attorney's union suing to enforce collective bargaining rights, Judge Clark found persuasive, based upon expert testimony by Florida State University Law Professor Orin Slagle, the opinion of the California Supreme Court in Santa Clara County Counsel Attorneys Association v. Woodside, 869 P.2d 1142 (Ca. 1994), which found no violation of the duty of loyalty where government attorneys file suit through their union to enforce their statutory collective bargaining rights. (R. 237-39). Noting that there have been suits filed by government attorneys for discrimination based upon gender, race, disability and other prohibited reasons in the

absence of collective bargaining which have not interfered with the State's ability to carry out its legal affairs, the court concluded that "[t]here is no reason to believe that suits by union government attorneys would impact the operations of a state agency any more than a suit by state employed attorneys who were prohibited from unionizing." (R. 239-40).

Finding that the State had failed to prove that imposing a blanket ban on collective bargaining by all government attorneys is the least intrusive means for protecting the attorney/client relationship between agencies and their employee attorneys, the circuit court found that these other jurisdictions "have fashioned collective bargaining procedures which accommodate both the state's interest in attorney competence and loyalty and the employee/attorneys' right to collectively bargain." (R. 240-41).

In conclusion, Judge Clark stated

> The court recognizes that the State would prefer not to be subjected to what it perceives as the undesirable process of collective bargaining. However, collective bargaining is not on trial in this case. The People of the State of Florida, through the State Constitution, have mandated that this process be available to all employees, whatever it burdens or benefits.
>
> It is not the province of the Legislature nor of this Court to nullify the political judgment of the people of the State of Florida, but rather to uphold that judgement whenever possible. The evidence presented in this case does not establish that collective bargaining by state-employed attorneys will have the dire consequences postulated by the State. To the contrary, the evidence clearly

> establishes that state governments, like private companies, are perfectly capable of carrying out their legal affairs with their attorneys exercising collective bargaining rights with little or no adverse consequences.

(R. 241-42).

SUMMARY OF THE ARGUMENT

The First District Court of Appeal declined to address the constitutionality of Section 447.203(3)(j), Florida Statutes (1995), in SEAG v. State, 653 So.2d 487 (Fla. 1st DCA 1995), because there was no record upon which the challenged statute could be evaluated under the strict scrutiny standard. Such a record was made and the First District affirmed the determination of the circuit court that Section 447.203(3)(j) was unconstitutional because the State failed to prove that there was a compelling state interest implemented in the least intrusive means possible to exclude all persons employed as attorneys by the State from the right to collectively bargain. Because the decisions of both courts are supported by competent substantial evidence and are based upon the correct application of the pertinent legal principles, these decisions must be affirmed.

The First District correctly determined that the State was required to prove that it had a compelling state interest implemented by the least intrusive means possible to justify the significant abridgment of the constitutional right to collectively bargain that Section 447.203(3)(j) entails. This Court has repeatedly held that the right to collectively bargain guaranteed by Article I, Section 6 of the Florida Constitution is a fundamental right which may be abridged only upon a showing of a compelling state interest. In Hillsborough County Governmental

Employees Association, Inc. v. Hillsborough County Aviation Authority, 522 So.2d 358 (Fla. 1988), this Court specifically applied the least intrusive means test as part of the strict scrutiny standard. The State's argument that this Court has formulated a lesser test for abridgments of Article I, Section 6 is plainly wrong. There is no basis for applying a different test for abridgments of Article I, Section 6 than the other fundamental rights contained in the declaration of rights. Consequently, this Court should reject the State's ill-conceived invitation to abandon the precedent which this Court has developed to protect the right to collectively bargain in the same manner as other fundamental rights.

The strict scrutiny standard reverses the usual presumption of the validity of legislative acts and places the burden upon the State to prove that the challenged legislation serves a compelling state interest implemented by the least intrusive means. The State cannot meet this difficult burden based upon speculative or hypothetical harm, which is all that the State alleged in this case. Rather, it must present evidence of actual harm and the First District was eminently correct in affirming the finding of the circuit court that the State had failed to meet this stringent burden in this case.

The fundamental premise of the State's arguments is that attorney collective bargaining necessarily interferes with the ability of attorneys to adhere to their ethical obligations to

their clients. This premise is, however, simply erroneous as a matter of fact and law. The State made essentially the same arguments in State ex rel. Chiles v. PERC, 630 So.2d 1093, 1095 (Fla. 1995), which it makes here - that attorney collective bargaining is inherently in conflict with the attorney/client relationship and the attorney's adherence to ethical requirements. The First District was correct in interpreting this Court's finding in that case that collective bargaining by state-employed attorneys does not encroach upon its jurisdiction to regulate the conduct of attorneys as an implicit rejection of the State's fundamental premise.

Moreover, the State presented absolutely no proof to support its premise, failing to satisfy even a rational basis standard in this case. It not only failed to present any evidence that the asserted evils actually occurred in other jurisdictions having attorney collective bargaining, it also failed to present a single decision from a court or bar association finding the inherent conflict it so strenuously asserts. In contrast, Appellees presented substantial evidence to the contrary in the form of case law, opinions from the American Bar Association and the Florida Bar, and expert testimony. In addition, Appellees presented testimony from witnesses from other jurisdictions, including New York, Wisconsin, California, the federal government, and the private sector, who have significant personal and professional experience with attorney collective bargaining who testified

without contradiction that such bargaining has not resulted in any of the negative consequences postulated by the State as inevitable.

The legal and ethical principles applicable to attorney collective bargaining set forth in Santa Clara County Counsel Attorneys Association v. Woodside, 869 P.2d 1142 (Ca. 1994), are applicable in Florida under its essentially identical ethical rules. Directly addressing the inherent ethical conflict issue, the court found that government attorney collective bargaining does not create any per se violation of the duty of loyalty or any other ethical obligation. Rather, such attorneys overstep ethical boundaries only when the attorney allows any antagonisms steaming from labor relations to overstep the boundaries of the employer/employee relationship and actually compromise client representation, thus providing a realistic accommodation between an attorney's professional obligations and the rights an attorney has an employee.

Lacking any factual or legal support for its position, the State attempts to sidestep the persuasive force of Appellees' evidence by creating the strawman of "consent." This bogus argument fails because it would be absurd to conclude that other jurisdictions would knowingly consent to a process which has the dire consequences on the attorney/client relationship alleged by the State to be inevitable. More significantly, as Judge Clark found, any necessary consent to attorney collective bargaining was

given by the people through the enactment of Article I, Section 6 as previously interpreted by this Court.

The State's status as client does not give the Legislature the power to abridge fundamental constitutional rights such as the right to collectively bargain without satisfying the compelling state interest test. This Court has frequently recognized that the rules regulating the professional conduct of attorneys which it promulgates may be modified or abrogated by legislative or constitutional enactments and both ethics experts who testified in this case agreed. Therefore, the State's "rights" as client emanating from such rules do not justify the broad abridgment of the right to collectively bargain caused by Section 447.203(3)(j).

There is no reason for this Court to consider whether assistants and deputies to the Attorney General and the Statewide Prosecutor are officers or public employees for purposes of Article I, Section 6 in this appeal. Appellees' declaratory judgment action raises a facial challenge to the constitutionality of Section 447.203(3)(j) which does not require a determination of which individual attorney positions qualify as public employees. The State is simply seeking to bypass the normal administrative process for resolving such issues through the Public Employees Relations Commission and to receive a determination directly from the courts in an essentially non-adversarial context because the individuals directly affected by the State's claims are not parties to this proceeding.

ARGUMENT

I.

THE LOWER COURTS APPLIED THE CORRECT LEGAL STANDARD, INCLUDING THE LEAST INTRUSIVE MEANS TEST, IN DETERMINING THAT SECTION 447.203(3)(j), FLORIDA STATUES (1995) IS UNCONSTITUTIONAL

A.
The Least Intrusive Means Test Is an Inherent Part of the Compelling State Interest Test

The State concedes, as it must, that the compelling state interest test applies to the challenge Appellees have raised in this case. It stubbornly refuses to concede, however, despite direct authority from this Court, that the least intrusive means test is an inherent part of the strict scrutiny standard. The State has obviously taken this plainly erroneous position because it recognizes that it cannot satisfy the least intrusive means test.

This issue was settled by this Court in 1988 in Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority, 522 So.2d 358, 362 (Fla. 1988), where this Court stated:

> The right to bargain collectively is, as a part of the state constitution's declaration of rights, a fundamental right. As such it is subject to official abridgement only upon a showing of a compelling state interest. This strict-scrutiny standard is one that is difficult to meet under any circumstance. . ..

The employers in that case argued that the goals of uniformity in personnel rules and equal pay for equal work were compelling state

interests sufficient to justify the abridgement of the right to collectively bargain. This Court held:

> [U]niform personnel administration is not so compelling an interest as to warrant the abridgement of an express fundamental right. The goal of equal pay for equal work is a noble one, and one that should be maintained whenever possible. However, there must exist some less intrusive means of accomplishing that goal without impeding so dramatically on the right to collectively bargain. Moreover, the right to collectively bargain is not necessarily inconsistent with the goals of uniformity and equal pay for equal work.

Id. (Emphasis supplied). Justice Kogan, the author of the Hillsborough opinion, reiterated the applicability of the least intrusive means test to abridgements of Article I, Section 6 in his dissent in State v. Florida Police Benevolent Association, Inc., 613 So.2d 415, 425 (Fla. 1992) (Kogan J., dissenting) (legislature has authority to take unilateral action if it can "demonstrate the existence of a compelling state interest that is being advanced by the least intrusive means available," citing Hillsborough). The least intrusive means test was again applied in the context of Article I, Section 6 in Chiles v. United Faculty of Florida, 615 So.2d 671, 673 (Fla. 1993), where this Court held that the legislature could reduce previously approved salaries set forth in a collective bargaining agreement based upon a compelling state interest which leaves "no other reasonable alternative means of preserving its contract with public workers, either in whole or in part."

The State seeks to sidestep this controlling precedent by suggesting, for the first time in this appeal, that the test for abridgement of a fundamental right which is not self-executing is somehow less stringent and seeks to have this Court apply what the State contends is a lesser standard set forth by the First District in United Faculty of Florida v. Board of Regents, 417 So.2d 1055 (Fla. 1st DCA 1982). In that case, which was the first case to apply the principles set forth by this Court in City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), the First District held that the State must demonstrate a "strong showing of a rational basis for abridgement which is justified by a compelling state interest" to justify the exclusion of graduate assistants from the definition of public employee in Section 447.203(3), Florida Statutes (1981).[1] As the First District correctly acknowledged in the decision under review, however, this holding was superceded by this Court's Hillsborough decision, a result first reflected in the First District's statement of the appropriate test in the initial SEAG appeal in 1995. SEAG v. State, 653 So.2d 487 (Fla. 1st DCA 1995).

The State has failed to put forth any principled basis for applying a less stringent test to abridgement of the right to collectively bargain than for other fundamental rights. Nothing in this Court's prior decisions interpreting Article I, Section 6

---

[1] As demonstrated herein, the State failed to meet even this supposedly lower standard in this case because, as the circuit court found, there is no evidence supporting a complete ban of all attorney collective bargaining.

supports such a conclusion. To the contrary, this Court's decisions, beginning with Dade County Classroom Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969), demonstrate a continuing commitment to preventing unjustified legislative encroachment on the right of public employees to collectively bargain. This Court should summarily reject the State's transparent attempt to turn back the clock and diminish this fundamental employee right merely to serve its own special interest as an employer.

The State's assertion that the strict scrutiny standard should be relaxed in this case because of the State's "right" to consent or refuse to consent to its attorneys undertaking an allegedly inherently conflicting interest is patently ridiculous. There is only one compelling state interest test and it does not vary depending upon the conflicting rights asserted by the State. The State has not, and cannot, cite any authority for this outlandish assertion.

Moreover, the State's position erroneously assumes that attorney collective bargaining creates inherent ethical conflicts. As Judge Clark found, and as addressed in more detail herein, this assertion is simply not true. Accordingly, this Court should reject the State's argument that the lower courts applied the wrong constitutional standard in this case.

B.
The Lower Courts Did Not Require That the State Present Conclusive Empirical Data Demonstrating its Asserted Interests

The State claims that the lower courts misapplied the compelling state interest test by requiring conclusive empirical data demonstrating that lawyers who participate in collective bargaining will in fact violate their ethical obligations. Of course, neither the circuit court or the district court did any such thing. Rather, these courts simply required the State to prove its claims rather than merely asserting them, as is necessary under the compelling state interest test.

Legislation subject to the compelling state interest test comes to the Court without the usual presumption of validity. The strict scrutiny standard reverses the presumption of constitutionality and imposes the burden of justification on the government, not the party challenging the statute. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278 (1973).[2] In evaluating an alleged compelling state interest a court

> must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of

---

[2] The Florida courts follow federal precedent in interpreting and applying the compelling state interest test. Florida Board of Bar Examiners re: Applicant No. 63161, 443 So.2d 71 (Fla. 1983); In re: Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

> each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 213, 107 S.Ct. 544, 548 (1986). Under the strict scrutiny standard, the State cannot meet its burden based upon speculative or hypothetical harm. Rather, it must present evidence of actual harm. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2829 (1989); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 226, 109 S.Ct. 1013, 1022 (1989); Palmore v. Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879, 1882 (1984). In this case, the State has strenuously argued that attorney collective bargaining would harm the attorney/client relationship and cause those attorneys to violate their ethical obligations, but it presented absolutely no evidence that it would do so or was so likely do so that banning all attorney collective bargaining was necessary. Consequently, the lower courts appropriately concluded that the State failed to meet its burden of proof.

Because publically employed attorneys in Florida have not had the opportunity to engage in collective bargaining, the only logical alternative to test the validity of the State's asserted need to totally ban all attorney collective bargaining was to examine the experience in other jurisdictions where attorney collective bargaining has occurred. If the State's assertion of inevitable and inherent conflict of interest is true, one would logically expect that these problems would have surfaced in these

other jurisdictions irrespective of "consent." Considering such evidence is consistent with a court's obligation under the standard quoted above to determine the legitimacy and strength of the asserted interests and the extent to which those interests require the significant infringement of a fundamental right. The United States Supreme Court has considered the extent to which other jurisdictions having the same or similar interests have found it necessary to burden the fundamental right at issue in applying the compelling state interest test.

In Butterworth v. Smith, 494 U.S. 624, 110 S.Ct. 1376 (1990), the Court applied the compelling state interest test to a Florida law which prohibited a grand jury witness from ever revealing her testimony, contrary to the practice in the majority of other states. Finding that the State's asserted interest did not meet the strict scrutiny standard, Justice Rehnquist stated:

> We also take note of the fact that neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of States found it necessary to impose an obligation of secrecy on grand jury witnesses with respect to their own testimony to protect reputational interests or any of the other interests asserted by Florida. . . . While these practices are not conclusive as to the constitutionality of Florida's rule, they are probative of the weight to be assigned Florida's asserted interests and the extent to which the prohibition in question is necessary to further them.

494 U.S. at 634-35, 110 S.Ct. at 1382-83.

In this case, the circuit court examined the collective bargaining process for attorneys in these other jurisdictions and found that, despite the adversarial nature of collective bargaining and the antagonism and litigation it some times spawns, collective bargaining by government attorneys in other jurisdictions has not harmed the relationship between the attorneys and their employing agencies; has not prevented these governmental entities from effectively carrying out their legal affairs; and has not caused government attorneys to abandon their ethical obligations. (R. 236-37). Judge Clark concluded, therefore, that the State had failed to satisfied the least intrusive means test because these other jurisdictions "have fashioned collective bargaining procedures which accommodate both the State's interest in attorney competence and loyalty and the employees/attorneys' right to collectively bargain," and there was no evidence that the same could not be done in Florida. (R. 240-41). This is not a requirement of conclusive empirical proof. It is a requirement of proof sufficient to justify the degree of abridgment involved, not mere speculation.

Accordingly, the lower court's application of the compelling state interest test was correct and should be affirmed.

II.

THE DISTRICT COURT CORRECTLY AFFIRMED THE CIRCUIT COURT'S JUDGMENT FINDING SECTION 447.203(3)(j), FLORIDA STATUTES (1995) UNCONSTITUTIONAL BECAUSE THAT JUDGMENT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

As established in the preceding argument, application of the compelling state interest test is fact intensive despite the State's efforts to obscure this issue. As the District Court correctly concluded, the trial court's findings are presumptively correct and may not be disturbed unless clearly erroneous. Florida East Coast Railway v. Department of Revenue, 620 S.2d 1051 (Fla. 1st DCA 1983). This Court may not substitute its judgment for that of the trial court by reevaluating or reweighing the testimony and evidence. Marshall v. Johnson, 392 So.2d 249 (Fla. 1980). The test is whether the judgment of the trial court is supported by competent evidence. Id.; Shaw v. Shaw, 334 So.2d 13 (Fla. 1976).

Judge Clark received extensive testimonial and documentary evidence relevant to the alleged evils claimed to necessarily emanate from attorney collective bargaining by the State. After carefully considering and weighing all of this evidence, she concluded that there was no evidence justifying a blanket ban on all attorney collective bargaining and that the State had therefore failed to satisfy its heavy burden under the compelling state interest test. Because these findings are supported by

overwhelming competent substantial evidence, they must be affirmed by this Court.

A.
The State as Client-Employer must Accommodate the Fundamental Constitutional Rights of its Attorney-Employees, Including the Right to Collectively Bargain

The State erroneously attempts to portray its status as a client as omnipotent, all other interests of its attorney-employees being subservient to the client's right to have the attorney-client relationship exist just as the client dictates. The circuit court recognized, however, that this premise is simply invalid. Where the State chooses to carry out its legal affairs through in-house counsel rather than contracting with private law firms, it voluntarily creates an employer-employee relationship which brings with it numerous responsibilities and obligations which would not otherwise exist. One of these obligations is the accommodation of the fundamental constitutional and statutory rights of its attorney-employees.

The State has no inherent right as client which is superior to fundamental public policies which are established by the people through their Legislature or through the Constitution itself. There can be no reasonable dispute that, as Appellees' ethics expert Professor Orin Slagle testified, attorneys do not forfeit their constitutional rights by becoming lawyers. (T. 503-04). Rather, as the California Supreme Court noted in Santa Clara County

Counsel of Attorneys Association v. Woodside, 869 P.2d 1142, 1157, (Ca. 1994), "The growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee." In Florida, one of these rights is the right to collectively bargain guaranteed by Article I, Section 6 of the Florida Constitution.

The ethics experts for both parties agreed that the attorney-client relationship as prescribed by the Rules of Professional Conduct is subject to alteration by law.[3] For example, the right to terminate a lawyer at will under the Rules of Professional Conduct is superseded if there is a statutory provision that provides that the attorney-employee in question can be discharged only for cause. (T. 426-28; 502-04). This Court has recognized this supremacy of the law in several cases where open public meeting or public records laws conflicted with the attorney-client privilege emanating from the Rules of Professional Conduct.

In Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985), this Court held that the Sunshine Law applies to meetings between a city council and a city attorney held for the purpose of discussing settlement of pending litigation involving the city notwithstanding its impact upon the confidentiality assured by the attorney-client privilege. A similar result was reached in the

---

[3] In fact, the State's expert stated that "if the Florida Constitution says that the lawyers have a right to unionize, that will have to apply, and not the Florida ethics rule." (T 405).

City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985), in which this Court held that the attorney-client privilege provision of the Florida Evidence Code did not exempt from the Public Records Act written communications between a lawyer and the public entity client. In The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980), this Court held that the Legislature had the power to authorize non-lawyers to engage in the practice of law in administrative proceedings even though such activity would constitute the unauthorized practice of law under this Court's rules. If the traditional model of the attorney-client relationship between the State and its lawyers can be altered by statutes based upon public policies not specifically recognized and protected in the Constitution, it follows that this relationship can also be altered by the implementation of fundamental rights guaranteed in the Constitution itself.

This Court has also recognized, however, that even very strong public policies such as the open meeting laws cannot justify the abridgement of the fundamental constitutional guarantee of collective bargaining. In Bassett v. Braddock, 262 So.2d 425 (Fla. 1972), this Court held that Article I, Section 6 created a constitutional exception to the Sunshine Law because of the potential adverse impact of requiring that collective bargaining with governmental entities be conducted in public. If the right to collectively bargain can prevail over a public policy as strong as that underlying the Sunshine Law, which has now been elevated to

constitutional status, then there is no question that it prevails over the State's interest in continuation of the precise manner in which it conducts its legal affairs which has no particular basis in statute or the Constitution.

Thus, the very premise of the State's argument to this Court is erroneous. The question to be asked is not whether the State can continue to conduct its legal affairs exactly how it wants to, but whether the State can continue to effectively conduct its legal affairs if its attorneys choose to exercise their right to collectively bargain, not over the fulfillment of their professional obligations, but the determination of their wages, hours and terms and conditions of employment. Only if the answer to this question is "no" can the State's interest be compelling enough to satisfy the strict scrutiny standard. As the circuit court found, the evidence presented in this case establishes that the State of Florida, like other states, is "perfectly capable of carrying out [its] legal affairs with [its] attorneys exercising collective bargaining rights with little or no adverse consequences." (R 242).

The State's disagreement with this conclusion is based not upon an assertion that there is no evidence to support it, but upon the assertion that its "rights" as client are preeminent and that the Legislature defines the scope of those rights to which determination the courts must defer. This argument is plainly at odds, however, with the strict scrutiny standard which, as

previously noted, reverses the usual presumption of validity afforded legislative acts. Thus, the Legislature's judgment that it was required to deny all state employed attorneys the right to collectively bargain in order to preserve its "rights" as client is due no deference whatsoever if it cannot satisfy the strict scrutiny standard. Obviously, the State's mere disagreement with the lower courts' conclusions, no matter how strong, does not satisfy the compelling state interest test. That is, however, all that the State's brief establishes.

B.
Attorney Collective Bargaining Does Not Prevent the State from Effectively Carrying out its Legal Affairs

1. There Is No Inherent Conflict Created by Attorneys Collectively Bargaining with Their Client-Employer

The State's arguments on pages 16 through 22 its brief purport to establish that collective bargaining by attorneys with their client-employer is inherently inconsistent with the duties of confidentiality, fidelity and loyalty. The circuit court's specific rejection of this assertion (R. 235) is amply supported by both the law and the evidence.

First, as the First District recognized in the decision under review, this erroneous argument was made to and necessarily rejected by this Court in State ex rel. Chiles v. PERC, 630 So.2d 1093 (Fla. 1994). In response to the State's vigorous and forceful

assertion of an inherent and irreconcilable conflict, this Court held that "collective bargaining by state-employed attorneys does not encroach upon this Court's jurisdiction over the admission of attorneys to the practice of law or the discipline of attorneys." Id. at 1095. While this Court did not explicitly state that it was rejecting the State's inherent conflict theory, it necessarily did so. It is simply inconceivable that the Court would have permitted PERC to proceed if it actually believed that collective bargaining by attorneys would necessarily have the onerous and drastic consequences asserted by the State.

In an identical circumstance, the Commonwealth Court in Pennsylvania rejected the City of Philadelphia's request to enjoin the agency proceedings because collective bargaining by the City's attorneys would impair or destroy their ability to represent it in accordance with the rules of professional conduct, stating:

> There is nothing in the Rules of Professional Conduct which prohibits an attorney from being a member of a union. While the City presents examples of scenarios which it believes could result in a bargaining unit member violating the Rules of Professional Conduct, the fact that attorney-employees are members of a union does not in and of itself, in our view, create a situation that inevitably places those attorneys in violation of an ethical rule. In fact, when responding to questions imposed by this Court at oral argument, the City's counsel was unable to provide a single example of a situation where an attorney's membership in a bargaining unit would be certain to result in a violation of an ethical rule.

Philadelphia ex rel. Harris v. Pennsylvania Labor Relations Board, 641 A.2d 709, 712, (Pa. Cmwlth. 1994). The City subsequently made

the same argument before the Pennsylvania Labor Relations Board Hearing Examiner who stated:

> [The Commonwealth Court's] conclusion rejects the City's argument that the formation of an exclusive representative, and the attorney's participation in what may become an adversarial process of collective bargaining, in itself constitutes an impermissible infringement upon the attorney/client relationship. . . .
>
> Given the Court's opinion, the examiner must conclude that the City's argument before the Board, premised upon divided loyalty, is substantially weakened. For if the more stringent standards of the Rules of Professional Conduct-which expressly deal with the attorney's duty of loyalty to the client-are not offended by the organization of Law Department Attorneys, then it is certainly more difficult to conclude that the attorney should be denied the rights guaranteed by the Act for essentially the same reasons. . . . In any event the Court in City of Philadelphia ex rel. Harris did not view the possible tension associated with collective bargaining as sufficiently disruptive of the attorney-client relationship to justify judicial intervention concerning the legislative scheme.

In The Matter of The Employees of City of Philadelphia, Case No. PERA-R-92-315-E (Sept. 9, 1994). (Pl. Ex. 30, pp. 72-73).

This reasoning applies in this case. Simply put, the Legislature's endorsement of the State's argument through the enactment of Section 447.203(3)(j) does not give it any more merit than it had when first considered and rejected by this Court in 1994.

Appellees' ethics expert, Professor Orin Slagle, testified without contradiction that there is no such inherent conflict based upon his exhaustive research of the case law and literature on the subject. (T 42-84).[4] The circuit court was not provided with any ethics opinion or ruling from any jurisdiction prohibiting collective bargaining by attorneys with their employer-clients. To the contrary, the pertinent ethics opinions from the American Bar Association and the Board of Governors of the Florida Bar expressly recognized the propriety of attorney collective bargaining as long as the Rules of Professional Conduct are strictly followed. (Pl. Ex. 1-3).[5] The leading case in this area, Santa Clara County Counsel Attorneys Association v. Woodside, 869 P.2d 1142, 1157 (Ca. 1994), relied upon the ethics opinion of the American Bar Association Committee on Ethics and Professional Responsibility (Pl. Ex. 3)in concluding that "government attorneys who organize themselves into an association pursuant to law and who proceed to bargain collectively with their employer/clients are not per se in violation of any duty of loyalty and any other ethical obligation."

---

[4] The State's ethics expert, Professor Ronald Rotunda, did not testify that attorney collective bargaining created an inherent conflict. Rather, his opinion was based upon the specific collective bargaining process in Florida, which he erroneously believed was materially different than that in other jurisdictions. (T 372-76). In fact everything is not negotiable in Florida as Rotunda erroneously assumed. (T 147, 160, 593-600, 614-16).

[5] Although these ethics opinions speak primarily in terms of union membership, it is clear that they presume that such membership will lead to participation in collective bargaining activities.

Rather, it is only when the attorney violates actual disciplinary rules does the attorney overstep ethical boundaries. Id.

The State's attempts to distinguish this case, while understandable, are unavailing. This decision is well reasoned and directly applicable to this case. The court's conclusion that there is no per se violation of an ethical duty by attorney collective bargaining has nothing to do with whether the right to bargain emanates from a statute or a constitutional provision. Rather, it is based upon an evaluation of the pertinent ethics opinions in an attempt to make "a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee" due to the "growing phenomenon of the lawyer/employee." Id. The circuit court expressly accepted Professor Slagle's opinion that the rationale of Santa Clara on this issue was applicable in Florida under essentially identical ethical rules.[6] (R. 239). The State offered no credible testimony to the contrary.

Moreover, the fact that the right to collectively bargain in Florida emanates from the Constitution rather than a statute, as it apparently does in California, renders the State's consent argument irrelevant. As argued herein, the people of the State of Florida

---

[6] Florida Board of Governors Advisory Ethics Opinion 77-15, (May 13, 1978) (Pl. Ex. 1) follows the ABA opinions relied upon by the Santa Clara court. This opinion superceded the facially unconstitutional prior opinion rendered October 25, 1977, relied upon by the State, which was withdrawn after a legal challenge was filed in federal court.

gave any necessary consent by the inclusion of Article I, Section 6 in the Constitution. Although the California legislature may have the discretion to repeal the collective bargaining law at its whim, the Florida Legislature simply does not have the same discretion because of the constitutional nature of the right which the Florida collective bargaining statute implements.

The circuit court also correctly rejected the notion that the filing of grievances, unfair labor practice charges, or lawsuits to enforce collective bargaining rights were inherently unethical. There is no right to collectively bargain without such remedies, so any theoretical ethical concerns must give way to preservation of the fundamental right.[7] Santa Clara, 869 P.2d at 1157-58. As the circuit court concluded, there is no evidence that the impact of such suits will be any greater than that of suits which can be filed by attorney employees to enforce other constitutional and statutory rights even in the absence of collective bargaining.[8] (R 239-40).

---

[7] The analysis of the Court in Santa Clara on this issue has even more persuasive force in Florida because of the constitutional rather than statutory basis of the right to bargain.

[8] Professor Rotunda, the State's ethics expert who is also a constitutional law scholar, conceded that the State must now accommodate legal actions by its attorney employees to enforce civil and constitutional rights. (T 404-05). Appellees' labor law expert agreed. (T 621-24).

2. Attorney Collective Bargaining in Other Jurisdictions Has Not Had the Adverse Effects Postulated by the State

Over the State's objection, the circuit court was presented with testimony from witnesses with personal experience with attorney collective bargaining in the states of New York, Wisconsin, California and in federal government agencies. This testimony forms the basis for the circuit court's conclusions that collective bargaining by government attorneys in other jurisdictions has not harmed the relationship between these attorneys and their employing agencies; "that governmental entities that allow their attorneys to collectively bargain have been able to effectively conduct their legal affairs, meet their legal obligations and carry out their respective missions;" that "collective bargaining by government attorneys in other jurisdictions has not limited or otherwise interfered with the ability of any agency to obtain from among its attorney employees the most capable legal counsel for any given case;" that "there is no evidence that attorney collective bargaining impugns or denigrates the ethical standards of the attorneys so employed;" that "government attorneys who collectively bargain continue to maintain high ethical standards required by" ethical rules; that "government agencies that allow attorney collective bargaining have not suffered any adverse impact from such bargaining;" and that these other jurisdictions "have fashioned collective bargaining procedures which accommodate both the state's

interest in attorney competence and loyalty and the employee attorneys right to collectively bargain." (R. 236-37, 240-41). The record amply supports these findings. (Pl. Ex. 21, 24-34, 39-42, 44; Pl. Ex. 22, pp. 4-12, 15, 22-23, 26, 29-33, 40-46, 51-52; Pl. Ex. 23, pp. 4-10, 25-30, 33-40, 42, 60-62, 68; Pl. Ex. 24, pp. 15-17, 24, 26, 30-32, 38-43, 51-53). In fact, collective bargaining has enhanced the relationship between the attorneys and the employer in these jurisdictions. (Pl. Ex. 21, pp. 39-42, 44; PL. Ex. 23, pp. 33-35, 60-62; Pl. Ex. 24, pp. 40-43).

The circuit court was also presented with testimony from Appellees' labor law expert, William E. Powers, Jr., to the same effect, based not only upon his professional opinion, but also upon his personal experience with attorney collective bargaining for both labor and management while he was employed as a field attorney and a supervising attorney with the National Labor Relations Board. (T 596-97, 616-21). Mr. Powers also testified that there are no material differences between the collective bargaining schemes in New York, Wisconsin, California, Oregon or Pennsylvania and that in Florida's public sector, particularly in the area of scope of mandatory negotiations (T. 593-95, 603, 620). Professor Slagle further testified that there are no material differences in the ethics rules in the other states which have attorney collective bargaining and the ethics rules in Florida. (T. 486-87, 493-94, 525-26).

The State attacks the circuit court's findings based upon this testimony not because there is no evidence to support them, but because the court allegedly gave this testimony too much weight in light of the "findings" of the Legislature supporting the enactment of the challenged statute.[9] This argument is, of course, on its face insufficient to overturn the circuit court's findings of fact as previously argued.

Moreover, although it had the opportunity to do so, the State presented not a single witness in opposition to Appellees' witnesses from other jurisdictions. The State did in fact contact officials from Wisconsin and California who were members of the management bargaining teams which negotiate with the attorney bargaining units in those states. The only testimony presented, however, relates to whether there were existing collective bargaining agreements with attorney unions in those states. (D. Ex. 16, 17). The circuit court therefore properly inferred from the failure of the State to present evidence contradicting Appellee's witnesses that no such contradictory evidence exists.

In stark contrast to the State's evidence, Appellees presented witnesses with many years of direct personal and professional experience with attorney collective bargaining. Each of Appellees'

---

[9] Actually, the Legislature made no findings itself. Rather, the State's position is based solely on the bill analysis drafted by staff. A review of the transcripts of the committee hearings on the bill creating Section 447.203(3)(j) reveals no consistent rationale for its adoption. (D. Ex. 27, 29-33).

witnesses are attorneys who have significant experience with attorney collective bargaining and were, as a result of their positions of employment, in a position to have become aware if attorney collective bargaining had caused anywhere near the kind of ethical or other problems alleged to be inevitable by the State.

Dennis Moss, from California, represents the Association of California State Attorneys and Administrative Law Judges, which is a labor union representing a statewide bargaining unit of state-employed attorneys and hearing officers. In this position, Mr. Moss had regular contact with the leadership and negotiating representatives for the union and testified that he would have been consulted had such problems been experienced by the union representatives or raised by management. (Pl. Ex. 24, p. 15-17, 30-32, 40-44).

Richard Casagrande, from New York, has been involved with private and public sector attorney collective bargaining in New York for approximately 20 years. He has been both an attorney represented for purposes of collective bargaining with his employer and a management representative bargaining with his employee attorneys. Further, in his current capacity as General Counsel and Executive Director of the Professional Employees Federation (PEF), which represents a statewide bargaining unit of more than 700 attorneys employed by the State of New York in various executive agencies, Mr. Casagrande has been involved on a daily basis with the union representatives conducting collective bargaining and grievance

resolution activities on behalf of PEF and with the management representatives negotiating on the behalf of the State of New York. (Pl. Ex. 22, pp. 4-8, 11, 15, 22-23, 51-52).

Sherwood Zink of Wisconsin has been employed as an attorney for the State of Wisconsin in various executive department capacities over the past 25 years; has held various high level positions within the Wisconsin Bar Association, including membership on the Executive Committee and Board of Governors; has been a member of the Wisconsin State Attorneys Association since about 1975; has served as president of that organization for approximately eight years; and has participated in collective bargaining activities on behalf of the union. (Pl. Ex. 23, pp. 4-10).

Stephen DeNigris, a member of the Florida Bar, served for approximately four years as a field attorney for the Federal Labor Relations Authority, the federal agency counterpart to PERC. During that time he was a member of a bargaining unit that included field attorneys and the non-attorney labor relations specialists in the FLRA's Washington, D.C., regional office. Mr. DeNigris was therefore in a position to become aware of any ethical and attorney-client relationship problems associated with government attorney collective bargaining, both because he routinely handled federal agency labor-management disputes, including those involving federal agency attorney units, and because of his personal involvement in an attorney unit. (Pl. Ex. 21, p. 9-13).

The State not only did not submit any testimony to rebut the testimony of these witnesses, it did not present a single witness who had any personal experience whatsoever with attorney collective bargaining, including its labor law expert. It is therefore not surprising that Judge Clark credited Appellees' witness testimony over the State's speculative assertions, particularly where it had the burden of proof under the strict scrutiny standard.

Because attorney collective bargaining has not occurred in Florida, the best benchmark to evaluate the significance of the State's asserted interest is to determine whether other jurisdictions having attorney collective bargaining have found it necessary to impose the significant restrictions sought to be justified by the State in this case. The circuit court did so, and the unequivocal conclusion was that these other jurisdictions did not find it necessary to do so. This finding alone provides a sufficient basis for this Court to affirm the final judgment.

3. The Collective Bargaining Process in Florida Is Not Materially Different from Those in Other Jurisdictions Having Attorney Collective Bargaining

The State asserted at trial and in its brief that Florida's public sector collective bargaining law as implemented by PERC is uniquely hostile to maintenance of the attorney-client relationship. In fact, the testimony of the State's ethics expert is premised primarily on the assertion that in Florida, everything is mandatorily negotiable, including the surrender of attorneys'

ethical obligations. (T. 334-35, 373, 380). The circuit court correctly rejected these erroneous assertions in making her findings regarding the Florida collective bargaining process. (R 227-30).

Contrary to Professor Rotunda's assumption, everything is not negotiable in Florida. Although the scope of mandatory negotiations in Florida may be considered relatively broad, there is no material difference in the scope of negotiations in Florida and those of other private and public sector jurisdictions. Although some differences do exist with regard to particular subjects, the basic scope of negotiations is essentially the same as it relates to the issues involved in this case. (T. 205, 593-95). In fact, the scope of mandatory negotiations in Florida can be considered more narrow than in the private sector because several significant subjects such as union dues deduction, grievance procedure with binding arbitration, and a management rights provision are mandated by statute in Florida, but must be negotiated between the parties in the private sector. (T. 593-96). Moreover, as the circuit court found, Section 447.209, Florida Statutes (1995), sets forth various matters which the public employer has the right to determine unilaterally without going through collective bargaining, including the right to direct employees, which includes the determination of which attorney should be assigned to handle a particular legal matter. Manatee Education Association v. Manatee County School Board, 7 FPER ¶12017 (1980) (assignment and reassignment of employees to tasks within the scope of their basic employment duties

is a management right). Any restriction on these management rights resulting from collective bargaining could occur only with the consent and agreement of the public employer and its legislative body. (T. 147, 160, 593-600, 614-16); §§ 447.203(14) and 447.309(1), Fla. Stat. (1995).

PERC has also recognized that certain subjects of bargaining are illegal and cannot be bargained or agreed to by the parties even if they want to do so. For example, a provision which required bargaining unit employees to contribute a portion of their leave time to a pool to be used by employee union representatives to do union business during work time was held to be illegal in Delaney v. City of Hialeah, 9 FPER ¶14339 (1984), aff'd, 458 So.2d 372 (Fla. 1st DCA 1984). A proposal by a union representing publicly employed attorneys to relieve the attorneys of any of their obligations under the Rules of Professional Conduct would similarly be held by PERC to be an illegal subject of bargaining because it would be a clear violation of public policy to permit a public employer to enter into such an agreement.[10] (T. 518, 600-02).

With respect to the issue of at will employment of attorneys, Section 110.604, Florida Statutes (1995), provides that "employees

---

[10] Of course, there is no reason to believe that any attorney union would ever intentionally do so. Contrary to the State's hyperbole, attorney unions negotiate agreements not materially different than other unions. (Pl. Ex. 20a, 20c, 20q, 20r). In Wisconsin, the agreement contains a specific provision stating that the attorney's ethical obligations take precedence over any conflicting contract provision or work rule. (Pl. Ex. 20r, Art. VIII, §2).

in the Selected Exempt Service shall be subject to termination at will." In order for that at will status to change, the Legislature would be required to amend this statute, even if there were an agreement in collective bargaining negotiations establishing just cause for discipline or discharge.[11] (T. 413-16); § 447.309(3), Fla. Stat. (1995). However, both ethics experts agreed that a statute authorizing something other than at will employment for state employed attorneys would override any ethics rule to the contrary. (T. 426-28, 502-04). Nor do the Rules of Professional Conduct in Florida prohibit attorneys from negotiating anything other than at will employment. Rather, the comment to the applicable rule, Rule 4-1.2, states only that an attorney may not ask a client to surrender the right to terminate the lawyer's services. Thus, even in a private client context, a lawyer may negotiate the terms of his discharge within ethical limits. (T. 498-502); Cohen v. Radio-Electronics Officer's Union, District III, MEBA, 679 A.2d 1188 (N.J. 1995). Because the Florida Legislature has the power to authorize, as it did prior to placing attorneys in the Selected Exempt Service,[12] the employment of its in-house attorneys on something other than an at will basis, it would not be improper for a union

---

[11] § 447.309(3), Fla. Stat. (1995). Similar provisions exist in New York and California. (Pl. Ex. 10, § 3517.6; Pl. Ex. 11, § 204-a(1)).

[12] Prior to 1985, state employed attorneys were included in the Career Service System and were therefore not terminable at will. (Pl. Ex. 6-9).

representing those attorneys to request in collective bargaining negotiations that the State agree to simply ask the Legislature to do so again. (T. 502-03, 506-08).

In sum, there is nothing unique about the collective bargaining scheme in the Florida public sector which is likely to make attorney collective bargaining materially different from such bargaining in other jurisdictions. (T. 616-21).

4. Any Required "Consent" to the Effects of Attorney Collective Bargaining Has Been Granted by the People Through Article I, Section 6 of the Florida Constitution

The State attempts to blunt the persuasive force of the circuit court's findings by arguing that experience in other jurisdictions is irrelevant because, in those jurisdictions the legislatures have waived any conflicts and consented to a "debased" relationship with their attorneys. This argument is both irrelevant and absurd.

It is absurd because there is no reason to believe that the legislatures in other states knowingly consented to the necessary destruction of the attorney-client relationship which the State argues is the inevitable consequence of attorney collective bargaining. The more rational answer is that arrived at by the circuit court, that attorney collective bargaining simply does not have such dire consequences.

The argument is irrelevant in Florida because the right to collectively bargain emanates from the Constitution itself.

Consequently, the Legislature simply does not have the power to consent or not in the area of collective bargaining. As this Court has previously determined, the people have presumptively consented to collective bargaining and its effects on the employer-employee relationship by all employees by the adoption of Article I, Section 6, and the Legislature may only negate this consent if it can demonstrate a compelling state interest justifying the denial of this right to particular employees.

In City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), this Court reiterated that the intent of the people in adopting Article I, Section 6 was to provide public employees with the same rights of collective bargaining as granted private employees. Thus, if private attorneys have the right to collectively bargain with their client-employers, so too do public employees unless the compelling state interest test is satisfied.

The National Labor Relations Board has long recognized the right of private attorneys to collectively bargain with their employers, specifically rejecting the position urged by the State in this case in 1948:

> The fact that attorneys are "officers of the court" and "fiduciaries" is not a sufficient bases for denying them the benefits of the NLRA since their wages, hours, and conditions of employment remain matters to be determined by their employer rather than by the courts.
>
> The client/attorney relationship does not preclude these employees from exercising their statutory right to bargain collectively since the entire

> association between the employer and its attorneys is pervaded by an employer/employee relationship.

Lumberman's Mutual Casualty Co. of Chicago, 75 NLRB 120, 21 LRRM 1107, 1108 (1948). Private attorneys have enjoyed collective bargaining rights both before and after the adoption of Article I, Section 6 in 1968. Wayne County Neighborhood Legal Services, Inc., 229 NLRB 1023 (1977); Airline Pilots Association, International, 97 NLRB 122 (1951). Thus, under the straightforward City of Tallahassee analysis, publically employed attorneys also enjoy the right to collectively bargain with their client-employers.

The State argues that the people cannot be deemed to have consented to collective bargaining by their attorneys because there was no private sector precedent in Florida for such bargaining by attorneys when Article I, Section 6 was ratified. This position is clearly in error as the above-cited NLRB cases demonstrate.

Moreover, a similar argument was rejected in City of Tallahassee. The public employer argued that this Court was considering rights of employees under state statutes, not under the federal labor laws, when it held in Dade County Classroom Teachers Association v. Ryan, 225 So.2d 903, 905 (Fla. 1969), that "with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6." This Court disagreed and clearly stated that its holding in Ryan in fact did refer to employee rights under the federal labor laws. 410 So.2d at 490. Therefore, paraphrasing this

Court in City of Tallahassee, if private attorneys may collectively bargain, then under the plain language of Ryan so too may publicly employed attorneys.

The Legislature has no more authority to refuse to consent to government attorney collective bargaining than it does to refuse to consent to its attorneys' exercise of the rights of religious freedom, freedom of speech and press, due process and numerous other basic rights guaranteed by the state and federal constitutions. Just as with these other fundamental rights, the Legislature must satisfy the strict scrutiny standard to restrict the right of publically employed attorneys to collectively bargain, which it has clearly failed to do.

The State's "consent" argument was not even mentioned by either lower court although it was argued below just as forcefully as before this Court. That is so, Appellees submit, because it is patently frivolous. Accordingly, this Court should likewise reject it out of hand.

III.

THIS COURT SHOULD NOT CONSIDER THE PUBLIC EMPLOYEE STATUS OF ASSISTANTS AND DEPUTIES TO THE ATTORNEY GENERAL AND THE STATEWIDE PROSECUTOR IN THIS CASE

Although the State claims in its third argument that the district court erred when it stated that the circuit court's determination that assistants and deputies to the Attorney General and the Statewide Prosecutor are officers, not public employees, had "no affect beyond the present case," it made no argument to that effect and provided this Court with no basis for disturbing the district court's disposition of Appellees' cross-appeal below. What the State actually argued, on page 38 of its brief, was that the public employee status of these positions "must be resolved by this Court prior to any further proceedings in this case . . .." Because that is obviously not so, the State's arguments should be rejected.

There is not now, and never has been, any reason to adjudicate the public employee status of assistants and deputies to the Attorney General and the Statewide Prosecutor in order to determine whether Section 447.203(3)(j) is facially unconstitutional. This case has never been about which attorney classifications should or should not be included in any bargaining unit which might be certified by PERC. Rather, Appellees' facial challenge has been based upon the exclusion of <u>all</u> attorneys from the constitutional right to collectively bargain, whomever they may be. Because there is no question that there are hundreds of attorneys employed by the

State who are not assistants or deputies to the Attorney General or the Statewide Prosecutor, it simply does not matter whether they are public employees or not for purposes of determining the constitutionality of Section 447.203(3)(j). Appellees cross-appealed the circuit court's conditional determination of this issue and the district court rejected the appeal as moot. The State is therefore not adversely affected by the district court's ruling on the cross-appeal and this Court has no jurisdiction to review the district court's comments why it affirmed the circuit court's ruling on the motion for partial summary judgment.

The State is being disingenuous when it asserts that resolution of this issue is necessary, even at this stage of the proceedings, in order to address the Appellees' "overbreadth" argument. It was obviously not necessary to do so, as demonstrated by the complete absence of any argument by the State regarding the employee status of these positions in the first two arguments of its brief which concerned the merits of the constitutional issue. Indeed, if the State's theory were correct, it would have made this argument first rather than last. The real reason that this issue is being raised once again is to bypass the normal administrative procedures and have this issue determined by the courts in an essentially non-adversarial context.

Although it was ignored in the Court's opinion, this Court will recall that the State made the same argument in the original writ of prohibition case in 1994 as an alternative to its main argument.

It has continued to follow the same strategy in each of the appeals to the district court as well as before the circuit court. Obviously, if it cannot have all attorneys employed by the State statutorily banned from collective bargaining, the State seeks to cut its losses by at least having the lawyers who work for the Attorney General and the Statewide Prosecutor eliminated from the exercise of such rights. As the district court correctly noted, however, this is a determination for PERC in the first instance, if and when a petition to represent attorneys employed by the State is filed in the future. The State's interests will be fully protected by awaiting such a proceeding.

Assistants and deputies to the Attorney General and the Statewide Prosecutor may or may not be entitled to collective bargaining rights the same as other public employees. But that is not, and has not ever been, the issue in this declaratory judgment action. Neither of the Appellees represents the individuals who occupy these positions and therefore do not have an incentive to advocate the other side of the arguments raised by the State in this case. Thus, there is no true case or controversy in this case sufficient to give this Court jurisdiction to adjudicate what amounts to a separate and distinct claim raised by the State solely by way of a motion for partial summary judgment.

More importantly, the affected employees have never been given notice and an opportunity to become parties to this proceeding, even though an adverse ruling would deprive them of a constitutional

right. In School Board of Marion County v. PERC, 330 So.2d 770 (Fla. 1st DCA 1976), the First District raised, on its own motion, a concern that PERC designated some employees as managerial and confidential employees by agreement of the union and the employer, without providing notice to the individual employees so affected. The court recognized that, because the exclusion of an employee from the definition of public employee deprives that employee of constitutional right, the affected employee should be given notice and an opportunity to contest such a determination at some point in the proceedings. This principle applies in this situation as well. As the district court recognized, resolution of this question should come only when it is necessary and only in the appropriate adversarial context after the affected individuals have received proper notice.

Accordingly, this Court should once again ignore the State's attempt to inject this irrelevant issue into these proceedings and affirm the district court's decision.

CONCLUSION

It is the duty of this Court to protect the fundamental rights of the citizens of Florida from over-reaching by the Legislature. The statute challenged in this case is, without question, an example of such legislation.

After carefully considering all of the evidence, the circuit court rendered a decision which is not only supported by the evidence, but compelled by that evidence. The district court likewise carefully reviewed the circuit court's application of the law to these facts and affirmed the judgment appealed in all respects. The State has attempted to divert attention from the strength of the evidence relied upon by the circuit court by attacking the collective bargaining process. However, as Judge Clark noted in the final judgment, the collective bargaining process is not on trial in this case. It is the strength of the State's alleged justification for denying all of its attorneys the right to collectively bargain which is on trial, and the evidence requires a directed verdict against the State.

Although it is clear that the Legislature opposes the organization of its attorneys for purposes of collective bargaining, the choice of whether to do so is vested by the Constitution and Chapter 447, Part II, Florida Statutes, in the attorneys themselves through a secret ballot election. Prior to such an election, the State will have a full opportunity to exclude from any bargaining

unit all attorneys who are managerial or confidential employees and to make its case against the wisdom of such bargaining. These procedures fully protect all of the legitimate interests of the State.

Accordingly, the judgment of the district court should be affirmed.

Respectfully submitted,

MEYER AND BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302
(850) 878-5212

By: _____
THOMAS W. BROOKS
Florida Bar Number: 0191034
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 29th day of September, 1998, to: Louis F. Hubener, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; Kim Tucker, Esquire, 938 Main Road, Isleboro, Maine 04848; and Jack Ruby, Esquire, Public Employee Relations Commission, Koger Executive Center, Turner Building, Suite 100, 2586 Seagate Drive, Tallahassee, Florida 32301-5032.

_____
Thomas W. Brooks