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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1434
Lower Court Case Nos. 1D16-618; CA-2015-076

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL S-20, FLORIDA
STATE FIRE SERVICE ASSOCIATION,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

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I. Petitioners Seek Appropriate Relief

Respondent's position is simple: the veto, unless overridden, supersedes State employees' fundamental constitutional right to bargain. Stated differently, there is no meaningful difference to effect change in the workplace between State employees who have exercised their right to bargain, and those who have not. The State's position renders a nullity the right of public employees to bargain.

The State argument overlooks two critical features of public employees' constitutional right to bargain. *First*, the "right" is not enjoyed by all public employees: rather, employees must decide as a group whether to exercise the right; so, public employees who have chosen to unionize possess substantive rights that nonunion employees do not. *And second*, the right to bargain is not self-executing: rather, the exercise of the right to bargain requires employees to follow the intricate bargaining, and impasse resolution procedures set out in the Public Employees Relations Act ("PERA"), Chapter 447, Part II, Florida Statutes. That is to say, when employees follow the procedures of the PERA, they are, *ipso facto*, exercising a constitutional right.

Here, the question is whether employee salaries are determined through a collective bargaining process or a legislative appropriation process, and whether the processes are necessarily identical. The State insists that employee salaries must be determined through the same appropriations process used for union and nonunion

employees alike; that is, the same process as for any other expenditure of public funds. According to the State, the Union is asking the Court to violate the separation of powers doctrine by appropriating money that the legislature and executive declined to appropriate.

However, employee salaries for employees represented by the Union must be determined via a collective bargaining process that should end with a legislative appropriation *not* subject to veto. Thus, the court would not violate the separation of powers doctrine in declaring that the governor's veto cannot stand because his veto is not a part of the collective bargaining process by which salaries are determined.

The Governor's unionized workforce is not comparable to non-employee citizens seeking public funds via the legislative appropriation process. The unionized employees of the Governor sell their services in exchange for public funds. As employees, they have the constitutional right to collectively bargain for an agreement with the governor that establishes salaries and benefits. In recognition of the fact that public employees may not strike, the legislature enacted §447.403(5)(a) and (b), an impasse resolution process to establish salaries and benefits when employees are unable to reach agreement with the governor.

Article I, section 6 recognized that public employees in Florida sought the same right to bargain collectively enjoyed by private employees, which included the right

to strike. The new constitutional provision established a right to bargain collectively while banning public employee strikes. In *Dade County Classroom Teachers Association v. Ryan*, 225 So. 903 (Fla. 1969) the court established that, "[e]xcept for the right to strike, our state constitution guarantees to public employees the same rights of collective bargaining as are granted to private employees." It also recognized that the legislature needed to enact a statute to implement the new constitutional right to bargain. [1]

In *Dade County Classroom Teachers Association v. The Legislature*, 269 So.2d 684, 688 (Fla. 1972), the court noted that although "[j]udicial implementation of the rights in question would be premature at this time," if legislative action was not forthcoming, "[t]his Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility."

[1] "In the sensitive area of labor relations between public employees and public employer, it is requisite that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6. A delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process." *Ryan*, at 906.

In response, the legislature enacted Chapter 447, Part II. Section §447.403, provided a binding statutory impasse resolution process as a substitute for strikes and lockouts. The state's position that appellant is subject to the identical appropriations process to which all other public expenditures are subject has merit only if the constitutional right to bargain collectively is just an empty promise.

Non-employee citizens seeking public funds via the legislative appropriations process are not similarly situated to the governor's own unionized workforce. They do not receive state monies in exchange for their own labor. They do not collectively bargain with the governor for an agreement setting forth the public funds they shall receive. There is no statutorily mandated impasse resolution process to determine the funds they shall receive if they fail to negotiate an agreement with the governor. Instead, they rely upon elected representatives to submit bills on their behalf, which may result in an appropriation subject to veto by the governor. Thus, their receipt of public monies entirely depends upon a legislative appropriation process which may culminate in a veto with no override.

Prior to the adoption of Article I, section 6, employee salaries were always determined via the same legislative appropriations process that determined the expenditure of any other monies. However, following its adoption, the governor can no longer veto an appropriation for employee salaries as if Article I, section 6 did

not exist, and public employees had to lobby for their pay and benefits in the same manner as any other group.

Unlike the case of *Coalition for Adequacy & Fairness in School Funding v. Chiles*, 680 So.2d 400 (Fla. 1996), Petitioner does not ask the court to make or change an appropriation in a manner violating separation of powers. Rather, Petitioner requests that the Court find that resolution of a collective bargaining impasse may not be vetoed in the absence of a compelling state interest. And that the cause be remanded for proceedings consistent with such requirement.

II. The Veto Must Be Exercised in Constitutional Manner

In *Brown v. Firestone*, 382 So.2d 654, 668 (Fla. 1980), the Court wrote that the governor may exercise his veto power "for any reason whatsoever" so long the veto power is exercised "in a constitutional manner." In *Brown*, the governor improperly vetoed qualifications or restrictions within an appropriation without vetoing the appropriation itself, thereby, in effect, unconstitutionally legislating by altering the intent of the appropriation. Here, the State argues that the governor properly vetoed the entire line item and not any qualification or restriction within it, so that whatever *Brown* had to say about a veto being exercised in a "constitutional manner" should not apply.

Brown found unconstitutional a specific misuse of the governor's veto power but did not thereby validate as constitutional all other exercises of the veto power.

In *Brown*, the governor's exercise of the veto power intruded upon separation of powers. Here, the governor's veto eviscerated the constitutional right to bargain collectively, a right effectuated through Chapter 447, Part II. That statute provides for a collective bargaining process culminating in binding legislative action that is *not* subject to veto. See §447.403(5)(a) and (b). Affording the governor the right to veto the legislature's resolution of a bargaining dispute effectively affords him the right to unilaterally impose salaries and other terms and conditions of employment. Such a unilateral imposition of employment terms eviscerates Article I section 6 by returning the process for setting employee wages and terms and conditions of employment to the process which existed before the adoption of the constitutional amendment.

The State again premises its argument upon an assumed identity between the collective bargaining process and the legislative appropriation process. Although the collective bargaining process culminates with a legislative appropriation funding a collective bargaining agreement or an impasse resolution, the two processes may not be treated as essentially identical in all particulars without nullifying the constitutional right to bargain collectively. As the court said in *United Teachers of Dade, etc. Local 1974 v. Dade County School Board*, 500 So.2d 508, 511 (Fla. 1986),

> "[T]he correct analysis…must encompass not only the legislature's, the State Board of Education's, or the local school board's constitutional

> authority to make educational policy decisions, but also must focus on the impact such decisions have on public employees constitutionally guaranteed collective bargaining rights. *Constitutional provisions are to be construed so as to make them meaningful*."

Id. Here, the State argues that State employees who have exercised the right to bargain are in the same position as employees who have not.[2]

III. Article I, Section 6 Constrains The Unfettered Use Of The Veto

"[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions." *Jackson v. Consolidated Government of City of Jacksonville*, 225 So.2d 497, 500 (Fla. 1969) (citation omitted). Rather, the prior constitutional provision and the newer one must "stand and operate together unless the clear intent of the later provision is thereby defeated." *Id.* An implied repeal of the former provision may occur only when the provisions "[a]s adopted are irreconcilably repugnant to each other, and then only to the extent of the repugnancy." *Wilson v. Crews*, 34 So.21d 114, 117 (Fla. 1948)

[2] On page 21 of Respondent's Brief, it is asserted that "all of Petitioners' members have now obtained a raise of $2,000 (and in many cases, $4,500) in the three years since the $2,000 raise was vetoed." This information is not in the record, and more importantly, is inaccurate. Also not in the record, but accurate, is that for year-after-year, the legislature has rejected virtually all of the Union's proposals at impasse, economic or otherwise.

Petitioner agrees that Article I, section 6 and the governor's veto power must "stand and operate together." However, the two provisions *are* irreconcilably repugnant to each other if, as the State argues, the governor may veto the legislative resolution of a collective bargaining impasse over wages for "any reason whatsoever." *Brown, supra* at 668. The repugnancy dissipates only if the governor may exercise his veto power to further a compelling state interest.

The State finds no repugnancy because unionized employees – like any State employees – have the theoretical right to seek a legislative veto override. In this, the State again insists that the employee wages must be determined by the identical appropriations process that determines all other expenditures of public funds. However, PERA establishes a statutory impasse resolution process that nowhere recognizes the governor's the veto power, nor the necessity for the affected employees to seek an override of any veto. The legislature enacted PERA only after the court emphasized the necessity of enacting legislation to effectuate the employees' constitutional right to bargain collectively. *Dade County Classroom Teachers Association v. Legislature,* 269 So.2d 684 (Fla. 1972). The legislature's action ends the matter.

To paraphrase this Court's recent analysis of other language in the PERA, "if the Legislature had intended changes [to a contract] to take effect . . . under any other circumstances, it would have stated as much." *Headley v. City of Miami*, 215 So.3d

1, 9 (2017). *See also Dade County* . . . ('The language of paragraph 4(d) clearly and unambiguously contemplates that the impasse will be resolved exclusively by the legislative body . . . '[t]here is nothing in the impasse proceeding that allows a chief executive officer to reject the resolution of the impasse issues by the legislative body.'" *Id.* (citation omitted). The legislature's action perfects the exercise of the right to bargain.

According to §447.403(5)(a) and (b), the legislature takes binding action after affording both sides an opportunity to appear and present their positions before a legislative committee. By contrast, a veto override is initiated "behind-the-scenes," with lobbying outside the other's presence, or via legislators meeting amongst themselves outside of the presence of the parties. This inchoate post-hearing "process" does not effectuate the "strict duty of fairness" required of the public employer/legislative body in its conduct in the impasse process. *Boca Raton Fire Fighters, Local 1560 v. City of Boca Raton*, 4 FPER ¶ 4040 at 88-89 (Fla. PERC 1978).

A majority vote is required to pass a general appropriations act. However, by Article III, section 8(c), a supermajority is required to override a veto. The legislative resolution of a bargaining impasse under §447.403, Fla. Stat., depends

upon the merits of the parties' respective positions.[3] However, it goes without saying that the legislature's decision to even consider, let alone formally vote an override, depends on any number of things, the least of which may be the desire to effectuate state employees' constitutional right to bargain collectively. In that connection, overrides may occasionally occur in the case of politically unpopular lame duck governors. *See International Association of Firefighters Local S-20 v. State*, 221 So.3d 736, 740 n.1**.** Otherwise they virtually never occur. The dissent properly described overrides as "[n]ot simply a herculean task," but "a near impossible feat" and an "extremely rare occurrence*." Id. at* 740. Meaningful collective bargaining must not depend upon the employees' performing a "near impossible feat."[4]

The State argues that public and private employees do not enjoy identical rights because the salaries of private employees do not depend upon the expenditure

[3] §447.403, Fla. Stat., which implements the constitutional right to bargain, provides that impasses are resolved via "a public hearing," after which "the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues . . . ." The implementing language makes no provision for post "public hearing" vetoes (second bites at the apple as it were), let alone the conceivable overriding of such vetoes in a process where the employees have no right to be heard. Because interpreting the statute otherwise would have the effect of impairing employees' constitutional rights, it should be given a strict construction. *State v. J.P.*, 907 So.2d 1101, 1109 (Fla. 2004).

[4] Respondent asserts that "Amici confuse 'effective' with 'successful for the union," and 'effective process' with a 'process that works in the union's favor." To the contrary, Amici and Petitioner merely ask for compliance with the process adopted by the legislature to implement Article I, section 6.

of public funds to implement a negotiated agreement. However, in this case, the veto *eliminated* bargaining rights rather than merely limiting them. Hence, the State essentially argues that, because bargaining in the public and private sectors is "different," the veto completely supersedes the legislature's statutory impasse resolution process, absent the "near impossible feat" of a veto override.

Respondent relies heavily upon *State v. Florida Police Benevolent Association,* 613 So.2d 415 (Fla. 1992) for the proposition that the constitutional right to collectively bargain was never intended to override the fundamental constitutional principle of separation of powers. However, that case specifically recognizes that there must be a "reasonable accommodation of both the right to collectively bargain and the legislature's exclusive control over the public purse." at 421. In fact, "[w]here the legislature provides enough money to implement the benefit as negotiated, but attempted to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced." *Id*. The Court remanded for a determination of whether the legislative appropriation was sufficient to fund the annual and sick leave provisions of the collective bargaining agreement at issue.

Here, there were sufficient funds to implement the legislature's resolution of the bargaining impasse over a salary increase – indeed, the funds were appropriated by the legislature in the very act vetoed by the Governor. The issue thus becomes

whether, after sufficient funds have been appropriated, one of the two parties to the negotiations at impasse may veto the legislature's resolution of that impasse in the absence of a compelling state interest. The power to veto in such instance is not unfettered as Respondent argues without rendering meaningless the constitutional right to collectively bargain that this court has affirmed must have meaning. *United Teachers of Dade, etc., Local 1974, supra*. As in *State of Florida v. PBA*, 613 So.2d 415, a reasonable accommodation must occur.

In that regard, Respondent would distinguish *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993) as involving the legislature's reduction in an appropriation after the appropriations process was already complete. In the instant case, it insists that the governor vetoed an appropriation *before* completion of the process, reasoning that the process did not end until the legislature decided whether or not to override his veto. However, application of the compelling state interest test must not depend upon the completion of a legislative process that includes the governor's right to veto and the legislature's right to override a veto; this is so because it is the process *qua* process that is the constitutional right. Otherwise one of the parties could veto legislative resolution of a bargaining impasse, requiring the other party to perform the "herculean task" and "near impossible feat" of having the veto overridden. Rather the compelling state interest test must be applied whenever exercise of the veto would otherwise eviscerate the constitutional right *to bargain*.

IV. Accommodating the Veto with the Constitutional Right to Bargain Will Not Raise "Serious Constitutional Concerns," But Rather Involves the Application Of Familiar Constitutional Principles

Petitioner would have the Court ignore settled principles of separation of powers. On one hand, the exercise of the veto operated to destroy the statutorily implemented constitutional right to bargain, and was thus exercised in an unconstitutional manner. On the other hand, the right to bargain and the veto power can be accommodated via application of the strict scrutiny standard.

In *State v. Florida Police Benevolent Association*, 613 So.2d 415 (Fla. 1992) the Court acknowledged that there must be a "reasonable accommodation of both the right to collectively bargain and the legislature's exclusive control over the public purse." In the present case, Petitioner asks the Court to acknowledge that there must be a correlative accommodation of both the right to collectively bargain and the executive's power to veto. That accommodation is application of the familiar strict scrutiny standard.

Such accommodation is consistent with the Court's jurisprudence around the veto. The Court explained in *Brown v. Firestone*, 382 So.2d at 668, "Under the Florida Constitution, the governor may exercise his veto power for any reason whatsoever. The governor must, however, exercise the veto power in a

constitutional manner." *Id.* The "constitutional manner" in this case is the "accommodation" of the right to bargain and the veto power.

CONCLUSION

The Court should reverse the Public Employees Relations Commissions and direct it to issue an order determining that the Governor unlawfully vetoed the legislative resolution resolving the disputed issues at impasse and further directing the Governor to restore to the bargaining unit members the special wage adjustments previously appropriated by the legislature. In the alternative, the Court should remand the case to the Public Employees Relations Commission for application of the *Chiles* standard.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail on May 14, 2018 to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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