IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No: SC12-520

RICK SCOTT, PAM BONDI, and JEFF ATWATER, as the FLORIDA STATE BOARD OF ADMINISTRATION, et al.,

Appellants,

vs. **L.T. Case Nos.: 2011 CA 1584**
1D12-1269

GEORGE WILLIAMS, et al.,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS A MATTER OF GREAT PUBLIC IMPORTANCE

ANSWER BRIEF OF APPELLEES INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, CANNON, PADUANO, AND PENNY

On Behalf of Appellees International Union of Police Associations, AFL-CIO, Jason Cannon, Joseph Paduano and Gary Penny

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INTRODUCTION

This is an appeal by the Appellants (the State) of the trial court's determination that significant legislative amendments to the Florida Retirement System applicable to current employees are unconstitutional because they impair the employees' contract with the state, are a taking of property without just compensation, and impair the employees' right to bargain collectively.

STATEMENT OF THE CASE AND FACTS

Appellees, International Union of Police Associations, AFL-CIO, Jason Cannon, Joseph Paduano and Gary Penny (jointly the "I.U.P.A.") hereby adopt in its entirety the Statement of the Case and Facts filed on behalf of the primary named Appellees and Intervening Appellees Park and Haire ("Appellees").

SUMMARY OF THE ARGUMENT

The I.U.P.A. herein addresses particular applications of the trial court's decision to local governments. The I.U.P.A. otherwise adopts the Argument of Appellees.

The decision of the trial court struck down provisions of the Chapter 2011-68, Laws of Florida ("the Act"). The Act applied to members of the Florida Retirement System (FRS) and did not distinguish between members employed by

the State of Florida and members employed by local governments. While the Act may have secondary impacts on local government employees and their employers, these impacts are not before the Court and consideration of these impacts is not necessary for a full resolution of the appeal. Pension systems at the local government level are varied, as are the rights and obligations of the parties to such systems, and addressing the attributes of such systems is not relevant to the issues appeal. Further, any doctrine recognizing the use of the governmental appropriations power to avoid contractual obligations is not generally applied to local governments and such a change in Constitutional jurisprudence is not justified or necessary in this case.

ARGUMENT

Standard of Review

This Court reviews an order on summary judgment *de novo*. *E.g., Volusia County v. Aberdeen at Ormond Beach*, L.P., 760 So.2d 126, 130-31 (Fla. 2000).

In considering the constitutionality of statute, the wisdom of legislative policy is not before the Court; the only issue before the Court is whether the challenged statutes violate the Florida Constitution. *E.g., Sebring Airport Auth. v. McIntyre*, 783 So.2d 238, 244-45 (Fla. 2001). Legislative acts are accorded a presumption of constitutionality; courts are obligated to construe challenged

legislation to effect a constitutional outcome whenever possible. *E.g.*, *Florida Dep't of Revenue v. Howard*, 916 So.2d 640. 642 (Fla. 2005).

I. THE CIRCUIT COURT PROPERLY VOIDED THE CHANGES TO THE FRS.

Intervening Appellees, International Union of Police Associations, AFL-CIO, Jason Cannon, Joseph Paduano and Gary Penny (jointly the "I.U.P.A.") hereby adopt in its entirety the Argument filed on behalf of the Appellees. The remaining portions of I.U.P.A.'s argument are meant to supplement the Argument of Appellees and accompanying Amici.

A. The rights and obligations of local governments, or their employees and unions, in pension alterations beyond those created by the Act are not relevant to the disposition of this case.

The Appellants and supporting Amici make broad pronouncements regarding what has been done or can be done with regard to pension alterations at the local government level. *See e.g.* League of Cities Amicus Brief, Pg. 3, 7 (Public employers have the right to prospectively reduce pension benefits and alter plan provisions, even for active employees); League of Cities Amicus Brief, Pg. 4-5 (Cities have made decisions that "have included the reduction of future pension benefits, changes in retirement eligibility criteria, and increases in employee contributions; all applicable to current employees."); League of Cities Amicus

Brief, Pg. 10 (Public employers may reduce pension benefits and increase employee contributions so long as not done retroactively); Florida Senate, *et al.* Amicus Brief, Pg. 11 (There is a "longstanding recognition" of the limitations on collective bargaining rights imposed by the Legislature's appropriations power). Many of these pronouncements are made without any factual basis and without any analysis as to whether the alterations would be permissible if constitutional contract and bargaining claims existed.

A number of the general pension alterations raised by Appellants and the Amici may not implicate constitutional bargaining rights based on the facts surrounding the alterations. For example, in many instances pensions have been altered based on unions and local governments engaging in collective bargaining and reaching an agreement. In other instances, unions have waived the right to bargain, either in a collective bargaining agreement or because the pension alteration was beneficial to the employees. Finally, in many other instances collective bargaining obligations may not exist, for example because the employees covered by the pension plan are not unionized.

Similarly, regardless of the outcome of this case, whether a particular pension is a constitutionally protected contract will vary based on the facts related to that pension. *See* Appellant's Initial Brief on the Merits, Pg. 12 (Acknowledging that at a minimum a constitutionally protected contract exists to rights and benefits

already earned). Moreover, when there is a constitutionally protected contract right, the particular benefits that are protected can also vary greatly. Thus, claims that a government in general "may make" or "has made" some particular pension alterations, absent a factual basis and a legal analysis of the potential constitutional contract and bargaining rights, are immaterial to the analysis in this case.

In addition, the State and several Amici have cited numerous pension cases that specify the rights and obligations of the parties to alter pension plans, but do not address either the constitutional contract or collective bargaining claims at issue here. Rather, the arguments and supporting cases again explicate the general authority of governments to alter pension plans absent any claim of a contractual or collective bargaining right.

For example, the League of Cities cites *Lake County Board of Trustees of the Town of Lake Park Firefighters' Pension Plan v. Town of Lake Park*, 966 So.2d 448 (Fla. 4th DCA 2007) in support of its claim that "a plan sponsor is able to freeze or terminate its defined benefit plan and enroll its employees in a defined contribution plan, so long as all benefits are earned up to the time of the freeze or plan termination are preserved and non-forfeitable." League of Cities Amicus Brief, Pg. 11. However, the Court in *Lake County* made no such broad finding. Instead, the Court held that based on the City's obligations under Florida Statutes, "there could be no impairment or reduction in benefits or other pension rights

accruing to any firefighter Plan member." *Lake County*, 966 So.2d at 452 (Interpreting Florida Statutes § 112.0515, Fla. Stat. (2006)). The Court did not address, nor did the parties apparently raise, any arguments regarding the rights or obligations of the parties under either a constitutional contract claim or a collective bargaining claim. *Id*. at 449 (The Plaintiff Town filed a complaint seeking a declaration of it rights and responsibilities under Florida Law); *see also Id.* at 450 (The Defendant Board filed a counter claim alleging the Town violated three Florida Statutes and breached an agreement).

The League of Cities also argues in its Amicus that local governments may unilaterally alter virtually any benefit not tied to accrued service. League of Cities Amicus Brief, Pg. 8. The League specifically claimed that this Court's "decision in *Nation* makes it clear that benefits that are not tied to accrued service may be changed for existing members." *Id.* (*citing Nation v. City of Fort Lauderdale*, 419 So.2d 630 (Fla. 1982)). However, the Court in *Nation* did not directly address either a constitutional collective bargaining claim or a constitutional contract claim. Instead, the contested issue was whether the retirement plan was voluntary or mandatory. *Id*. at 630 ("Nation contends that the [pension plan] is a voluntary pension plan."); *see also City of Ft. Lauderdale v. Nation*, 400 So.2d 1275, 1276 (Fla. 4th DCA 1981)("there is no argument that the legislative object in view amounted to a deprivation (although this individual Fire Captain suffered a loss)

inasmuch as the amendment increased the basic benefits. The crucial question is: Was the participation voluntary?"). Whether the FRS is voluntary or mandatory is not at issue in the case at bar.

B. The trial court's decision does not require that the Governor negotiate with local governments.

The State incorrectly argues that the "[Circuit Court] Order would require the Governor to engage in collective bargaining" with local and regional governments. *See* Appellant's Initial Brief on the Merits, Pg. 29. The IUPA recognizes that the State does not bargain with local and regional governments. The State need only ensure that legislation passed by the State does not prohibit unions representing local government employees from collectively bargaining as to retirement benefits. *See City of Tallahassee v. PERC*, 410 So.2d 487, 489 (Fla. 1981). Here, as explained by the primary Appellees, the legislation passed by the State essentially precludes unions representing local and regional government employees from negotiating regarding the FRS pension plan and changes to this plan. Thus, the pension plan change here has the "practical effect … [of] barring negotiations on retirement matters." *Tallahassee*, 410 So.2d at 489. An effect that this Court found violates the Constitutional rights of the unions representing local government employees to engage in collective bargaining. *Id.*

C. Allowing local governments to unilaterally avoid their contractual obligations by refusing to fund appropriations would be a substantial departure from current Florida Constitutional jurisprudence.

The argument that the appropriations power or police power can excuse a local government's violation of an existing contract is baseless. *See* League of Cities Amicus Brief, Pg. 13-14. First, this argument is unsupported by any legal citation or analysis. Second, the argument is directly contrary to this Court's holding in *Tallahassee*, that the right to collectively bargain under Article I, Section 6 of the Florida Constitution limited the City's ability to unilaterally alter city employees' retirement benefits. *See City of Tallahassee v. PERC*, 410 So.2d 487 (Fla. 1981). In so doing, the Court explicitly rejected the City's argument that Article X, Section 14 of the State Constitution precluded bargaining over pensions, the exact same argument made by League of Cities here. *Compare Id.* at 491 and League of Cities Amicus Brief, Pg. 13.

Adopting the argument that local governments can unilaterally avoid their contractual obligations by refusing to fund appropriations would entail a substantial modification to Florida Constitutional jurisprudence. The appropriations limitation set forth in by this Court in *PBA* arises from the separation of powers doctrine, applicable to the State Government. *See State v. Florida PBA*, 613 So.2d 415, 419 (Fla. 1993). This Court has further held that the

separation of powers doctrine that served as the basis for the holding in *PBA* is not applicable to local governments. *See Locke v. Hawkes*, 595 So.2d 32, 36 (Fla. 1992)("We hold that our separation of powers provision was not intended to apply to local governmental entities and officials"). This is in part because, unlike the Governor and the State Legislature, a mayor and a county commission are not "mutually exclusive" entities; rather, both act as the "governing body". *See Citizens for Reform v. Citizens for Open Gov't, Inc.*, 931 So.2d 977, 989-90 (Fla. 3d DCA 2006). Accordingly, "[c]onstitutional separation of powers simply does not exist at the local government level." *Citizens for Reform*, 931 So.2d at 989; *Locke, supra*. The argument to the contrary simply fails to take into account the substantial structural differences between the State Government and local governmental entities. *See also United Teachers of Dade FEA/United AFT, Local 1974, AFL-CIO v. Dade County School Bd.*, 500 So.2d 508 (Fla. 1986)("Cases arising from disputes between local school boards (the legally defined 'employer,' section 447.203(2)) and teacher's bargaining representatives may produce different factual or procedural scenarios than do cases arising because of legislative action allegedly impacting unconstitutionally upon collective bargaining rights.").

II. THE REMEDY HERE WAS APPROPRIATE

The State and Amici challenge the remedy of the trial court, almost solely due to its financial impact on the State and local governments. In passing this Act

the State legislature reduced the contribution requirements from local governments, thus resulting in savings for local governments. *See* FL. Assoc. of Counties Amicus, Pg. 7-8. As the Florida Association of Counties notes, local governments handled these savings in a number of ways. *Id.* at 5-8.

Local governments can similarly handle any reimbursement in manner that best suits their particular budgetary situations. As the Florida Associations of Counties notes, the financial impacts of future contributions "can be addressed within the context of the budget process." FL. Assoc. of Counties Amicus Brief, Pg. 6. It is hard to see how the reimbursement of the funds, which by definition will occur in the future, cannot also be addressed within the context of the budget process. Similarly, the budgetary impacts of the funds devoted to the reimbursement are no different than the numerous budgetary shocks, many much more substantial than this, that have occurred over the last several years. Regardless, such budgetary impacts cannot be used to justify refusing to compensate FRS members for the violation of the Constitutional rights.

CONCLUSION

The I.U.P.A. respectfully request that this Court affirm the decision of the trial court in its entirety, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Aaron Nisenson

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