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Public Sector Collective Bargaining: A Labor Arbitrator's View of the Florida Constitution

Roger I. Abrams*

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Public Sector Collective Bargaining: A Labor Arbitrator's View of the Florida Constitution

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Legal scholars analyze judicial opinions from the top down. They start with the constitutional text. They examine how the courts—most likely the Supreme Court—twist and turn the words of that text to fit their notions of ordered liberty. They critique the products of this process in an effort to make the next run of cases purer.

Labor arbitrators start from the bottom and work up, finding a source of law in the practices of the shop floor, in the habits and customs of the trade, and, most importantly, in the terms of the collective bargaining agreements reached by labor and management.[1] Those agreements normally provide for arbitration of disputes that arise during their terms.[2]

In some instances, the worlds of the scholars and the arbitrators intersect. Grievance disputes in the public sector may involve issues of "external law," i.e., statutory law and administrative regulations not embodied in the provisions of the collective bargaining agreements.[3] On very rare occasions, labor arbitrators must face—or as courts often do, try to avoid facing—constitutional issues.

The Florida Constitution contains a provision that protects the right of public employees to bargain collectively.[4] The Florida Legislature enacted

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* Dean, Rutgers School of Law-Newark; Dean, Nova University School of Law (1986-1993); B.A., 1967, Cornell University; J.D., 1970, Harvard Law School. The author would like to express his appreciation to the men and women of the Nova law community for their support during his seven years as Dean of this fine institution.

1. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

2. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported that 98% of its sample contained arbitration provisions. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 51:4 (1989).

3. Roger I. Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261 (1982).

4. FLA. CONST. art. I, § 6. Article 1, section 6 states as follows:

> Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Id.

comprehensive legislation to regulate the operation of public sector labor relations.[5] These can be analyzed "from the top down," but it might be more interesting to see how the legal and constitutional issues arise in the workplace.

In 1991, the City Commission of Lake Worth, Florida decided not to fund the third year wage and merit increases for its unionized workers set forth in their collective bargaining agreements. The four unions representing the workers filed grievances protesting the City's actions. The parties arbitrated the disputes during the winter of 1992-93. Here is the last of the four arbitration opinions that were rendered.

5. Ch. 74-100, §1, 1974 Fla. Laws 134 (codified at FLA. STAT. § 447.301 (1991)).

AMERICAN ARBITRATION ASSOCIATION

In the Matter of an Arbitration	*	
	*	
- between -	*	
	*	
CITY OF LAKE WORTH	*	No. 32 300 00135 91
	*	Lieutenants - Failure to
- and -	*	Pay Increases
	*	
PALM BEACH COUNTY POLICE	*	
BENEVOLENT ASSOCIATION	*	

ARBITRATOR'S OPINION AND AWARD

Alan Fallik
For the City

Mary Jill Hanson
For the Union

June 22, 1993

Roger I. Abrams
Arbitrator

On October 28, 1991, the Palm Beach County Police Benevolent Association (Lieutenants) filed a class grievance regarding the City of Lake Worth's failure to pay wage increases in accordance with the Agreement. On November 4, 1991, the Chief of Police denied the grievance because Florida state law, section 447.309(2), "operates to make the collective bargaining agreement subject to the approval, through the medium of appropriations, of the City Commission." The Union processed the matter to the Acting City Manager, who denied the grievance. The Union has now brought the unresolved dispute to arbitration.

A hearing was held in Lake Worth, Florida, on April 29, 1993. During the course of the hearing, both parties presented the Arbitrator with oral testimony and documentary proof. A transcript was taken. Both parties filed briefs with the Arbitrator. The American Arbitration Association declared the hearing closed upon direction of the Arbitrator on June 11, 1993.

I. ISSUES

At the hearing, the parties stipulated to the following statement of the issues to be resolved:

> Did the City violate the Agreement when it failed to pay wage increases due under Article 27 for fiscal year 91-92? If so, what shall the remedy be?

II. PROVISIONS OF THE AGREEMENT AND STATE LAW

ARTICLE 1: PREAMBLE

Section 2. The purpose of this Agreement is to promote and maintain harmonious and cooperative relationships between the employer and employees, both individually and collectively, and to provide an orderly and peaceful means for resolving differences which arise concerning the interpretation or application of this agreement, and to set forth herein the agreement between the parties pertaining to wages, hours and terms and conditions of employment.

ARTICLE 4: MANAGEMENT RIGHTS

Section 3. If in the sole discretion of the Mayor or the Mayor's designee, it is determined that civil emergency conditions exist, including but not limited to riots, civil disorders, hurricane conditions, similar catastrophes, or exigencies, the provisions of this agreement may be suspended by the Mayor or the Mayor's designee during the time of the declared emergency, provided that rates and monetary fringe benefits shall not be suspended.

ARTICLE 27: PAY PLAN

Section 1. This Article establishes the wage rates to be paid to unit employees during the term of the Agreement. . . .

Section 2. Effective October 1, 1991, all Lieutenants will receive an increase of five percent (5%) over hourly rates in effect on September 30, 1991.

Section 3. Effective October 1, 1991, any Lieutenant whose performance evaluation justifies it will receive a three percent (3%) merit increase.

ARTICLE 31: GRIEVANCE PROCEDURE

In a mutual effort to provide harmonious relations between the parties of this Agreement, it is agreed and understood by both parties that there shall be a procedure in this Department for the resolution of grievances or misunderstandings between the parties arising from the application or interpretation of this Agreement. . . .

ARBITRATION REFERRAL

3. The arbitrator shall not have the power to add to, subtract from, modify, or alter the terms of the collective bargaining agreement in arriving at a decision on the issue or issues presented and shall confine his decision solely to the interpretation and application of the agreement.

4. The decision of the arbitrator shall be final and binding upon the aggrieved employee and the employer.

ARTICLE 32: SEVERABILITY CLAUSE

Section 1. If any article or section of this agreement should be found invalid, unlawful, or not enforceable, by reason of any existing or subsequently enacted Federal or State legislation or by judicial authority, all other articles and sections of this Agreement shall remain in full force and effect for the duration of this Agreement.

Section 2. In the event of the invalidation of any article or section, both the City and the PBA shall reconvene within sixty (60) days of such determination for the purpose of arriving at a mutually satisfactory replacement for such article or section.

ARTICLE 33: SAVINGS CLAUSE

This Agreement constitutes the entire agreement between the PBA and the City. . . . This Agreement will not be interpreted so as to deprive any employee of any benefits or protections granted by the laws of the State of Florida, ordinances of the City of Lake Worth, or personnel rules and regulations of the Lake Worth Civil Service Board.

FLORIDA STATE STATUTE

PUBLIC EMPLOYEES

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447.309 Collective bargaining; approval or rejection.

(1) After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. The chief executive officer or his representative and the bargaining agent or its representative shall meet at reasonable times and bargain in good faith. In conducting negotiations with the bargaining agent, the chief executive officer or his representative shall consult with, and attempt to represent the views of, the legislative body of the public

employer. Any collective bargaining agreement reached by the negotiators shall be reduced to writing, and such agreement shall be signed by the chief executive officer and the bargaining agent. Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3). However, with respect to statewide bargaining units, any agreement signed by the Governor and the bargaining agent for such a unit shall not be binding until approved by the public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3).

(2) Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

III. BACKGROUND FACTS

The Police Benevolent Association of Palm Beach County represents a bargaining unit of six Lieutenants who work for the Police Department of the City of Lake Worth.[1] In 1989, the parties agreed to a three-year collective bargaining agreement, providing for a five (5%) percent across-the-board annual increase and a three (3%) percent merit increase. The Union had wanted a one-year contract, but the City insisted on a multi-year agreement to achieve labor stability. The City Manager recommended City

[1] Lieutenant Jack Elliott Garson, the Union's representative to the Palm Beach County P.B.A., explained that the bargaining unit was established in 1988 after City Manager John Kelly told the Lieutenants that he "did not negotiate pay with his employees," unless they joined a union. The Lieutenants proceeded to do just that, form the small union that is party to the present arbitration.

Commission approval of the three-year contract for the Union police officers in order to set "the necessary labor perimeters." The City Manager explained that the three-year contract achieved the goal of "stabilizing the floundering" labor relationship.

During the spring of 1991, the Union learned that the City was preparing not to fund the third year of the negotiated wage increase for Union members and for the other unionized City employees. City Manager John Kelly sought to reopen the collective bargaining agreement with the Lieutenants. Garson refused to do so. He and other union leaders later met with Kelly. When Kelly said he would not recommend to the City that they fund the pay raises, Garson said it was "kind of a shock to me."

The entire negotiated third year pay increase for the Lieutenants bargaining unit totalled $21,000. Kelly said the choice was to renegotiate or lay off employees, because the City had just purchased new police cars. (Garson pointed out in his testimony that the wage increase for the Lieutenants equaled the cost of just one of those cars). Garson wrote to Kelly explaining why the Union would not reopen the Agreement. City Manager Kelly responded that not giving the raises "is not a matter of money." He needed to "have a tool to have the other unions give up their pay raises."

Lieutenant Robert Walton, who had negotiated the first contract between the Union and the City, testified concerning his dealings with the City during 1991. Kelly told Walton the State Legislature gave him the authority not to fund pay raises. Kelly offered options, such as reopening the Agreement, waiving the pay increase for six months, or just trusting that he would work things out. The Union was not receptive and felt intimidated. After consulting with attorneys and the PBA president, the Union rejected the option of reopening. At one afterwork meeting at the Police Department, Kelly told Walton: "If you guys leave the union, maybe we can work something out."[2]

Former City Commissioner Michael Coonerty testified that in May 1991 John Kelly notified the Commissioners of a budget problem. Kelly recommended that the Commission cut back some City services and that it not fund the contractual wage increases for unionized employees. Coonerty testified: "We knew we were in trouble." None of the Commissioners suggested not funding the contractual wage increases. It was the City Manager's idea. In an executive session, Kelly said: "There is a state law

[2] Although the lieutenants did not abandon their Union, soon the City abandoned John Kelly. He was fired in September 1991.

that specifically states that we do not have to fund a contract if there is not enough funds." The Commission acted based on Kelly's advice.

On cross-examination, Coonerty said he voted not to fund the increases "in the best interest of the City." He acknowledged he did consider the effect on collective bargaining: "I'm a politician after all!" He said this was the hardest decision he ever had to make, and "I knew it was going to hurt." He said that they had to look at the broader picture. They thought the choice was either to fund the contracts or lay off employees. He knew that the unions would never trust the City again and the union-management relationship would never be the same. He acknowledged that the City Commission could have raised taxes, but he felt that that was not in the best interest of the citizens of the City. If taxes went up, he said, it "can hurt my political career."[3]

The record includes the prior testimony and reports of Union expert, Dr. Marshall Barry.[4] In sum, that information demonstrates that the City had available other funding sources for the contractual wage increases.[5] The record also contains minutes of various City Commission meetings. After the Commission's action contested here, the City spent funds for various purposes, including a ten percent (10%) salary increase to the Acting City Manager. When the City Commission terminated City Manager John Kelly, Walton expressed his disgust when he heard the Commissioners decide to pay Kelly the severance pay required under his contract. One Commissioner said: "After all, a contract is a contract." Walton could not understand why that did not apply to the Union's contract.

Charles Z. Powers, the City's Finance Director, testified concerning the budget process which led to the decision by the City Commission not to fund the Contract increases. The Finance Department prepared work sheet forms and the budget manual, then submitted proposed budgets to the City Manager. A series of meetings were then held between the departments, the City Manager, and the Finance Department. Finally, a tentative millage was set by the end of July, workshops were held through August, public hearings were held in September, and, after a final hearing, the City Commission set

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[3] Mr. Coonerty is no longer on the Lake Worth City Commission.

[4] This is the fourth arbitration to raise that same issue. Prior cases involved firefighters represented by the I.A.F.F., rank and file police represented by the P.B.A., and utility workers represented by the I.B.E.W.

[5] It is the City's position, as shall be explained below, that the City Commission had the power simply to decide not to fund the third year of the contracts even if it had alternative funding sources.

the millage and adopted the budget. The submitted budget included the proposed increase based on the Union Agreement which was then deleted by City Commission vote.

Powers explained that as early as December 1990 or January 1991 before the budget process began, the City Manager received advice from City Attorney Alan Fallik that one option available to the City was not to fund the Union Contract increases under state law. Mr. Power testified that the City Manager was required to propose a budget that included the Contract increases, but Kelly did not want his proposal accepted. The City Manager explained to the Commission: "I had to fund those things. You don't." The City Commission did not.

IV. CONTENTIONS OF THE PARTIES

A. The Union's Argument

The City should be collaterally estopped from relitigating this issue because two prior arbitration awards involving the City have covered this precise matter. In any case, the City clearly breached the Agreement by failing to pay the contractually agreed upon wage increase, and the Arbitrator's inquiry should stop there. The Arbitrator should follow the established arbitral practice and not examine external law.

Moreover, the contract itself shows that external law does not apply. It provides that the contract is the "entire agreement," that the adoption of the Agreement "resolves all open issues for the period of the Agreement," and that Management retains only such rights as are "not officially abridged, delegated, or modified by this Agreement." The Arbitrator "should not start up the slippery slope of consideration of the interpretation and applicability of section 447.309(2)." (Union brief, p. 12).

Even applying the state statute does not help the City because the City did not comply with the provision. In the very least, the City Manager must make his initial budget submission in good faith. That clearly was not the case here. Moreover, the statute talks only of unfair labor practice liability, not contractual obligations. In any case, this was a multi-year contract that the Commission had ratified and agreed to fund. If the statute did apply, it would impair a contract in violation of both the State and Federal Constitutions. The statute, as read by the City, would also violate a Florida Constitution provision by abridging the right of public employees to bargain collectively.

"Clearly, what occurred here was the worst sort of political expediency." (Union brief, p. 24) There was no compelling governmental interest. The City did not employ the least restrictive means to accomplish its goal. The City disturbed "the delicate balance" that is the public policy in Florida. Therefore, the grievance must be granted. The Arbitrator should award back pay with interest.

B. The City's Argument

The City relies totally on Florida law which it argues supports its failure to pay the wage increase. Section 447.309(2) gives the City the "option of underfunding" the agreement. Court decisions plainly support this analysis, including the most recent supreme court decisions and a Second District Court of Appeal decision in Sarasota County School District. In that latter case, the District Court said that "[u]nfortunately" for public employees, the school board had the right not to fund the contract. As a practical matter, unfair labor practice case law must apply in grievance arbitrations or the state statute would be rendered a nullity.

The constitutional right to bargain must be balanced with the constitutional obligation of municipal bodies to act as guardians of the public funds. The City Commission here acted in two separate steps -- ratification and appropriation. Although it ratified the three-year agreement, it had the right not to appropriate the funds. "In summary, there is no logical basis and no legal authority to support an argument that the powers of a municipal legislative body regarding appropriations are more limited than those of the state legislature, even though the municipal legislative body is the same body that ratified the agreement." (City brief, p. 11). The supreme court's most recent decision does not require a contrary result. There was no impairment of contract here because state laws are a part of every Florida contract.

The Arbitrator must apply external law, as is the rule. The parties' Agreement points to the use of external law. In any case, the parties need not agree in writing to incorporate external law because they know that the law is automatically a part of every contract. The Contract allows an arbitrator to find a provision invalid using external law. "To the extent the City Commission underfunded Article 27, Pay Plan, that article became invalid" under the law. (City brief, pp. 18-19).

The three prior arbitration awards involving the City and one involving a nearby municipality were wrong. They ignored the fact that law is part of every contract. It is "most unfortunate that arbitrators see fit to deprive

public employers of fundamental rights of government and to grant public employees the unconditional right to receive funding in direct violation of law." (City brief, p. 22). This Arbitrator wrongly stated in his earlier decision that the City claims it had the right only to breach union contracts but must fulfill all other contracts with vendors. In fact, the City has the right not to fulfill any contract it wants. This Arbitrator questioned the good faith of City Manager Kelly. The statute does not require the City Manager to have acted in good faith. For all these reasons, the Arbitrator should deny the grievance.

V. DISCUSSION AND OPINION

A. Introduction

The City Commission of the City of Lake Worth, Florida, made a decision during 1991 not to appropriate the funds needed to meet its contract obligations with its unions, including the small P.B.A. Lieutenants Union. The increases were mandated under the respective binding and enforceable collective bargaining agreements. Three arbitrators, including the undersigned, have previously ruled on grievances protesting the City's action. This case completes the quartet. In the prior cases, the arbitrators ruled the City violated its contracts. As shall be explained below, the City's action here violated its Agreement as well.

In its brief, the Union argues that the Arbitrator must follow the earlier arbitration opinions and that the City is "collaterally estopped" from rearguing the issues. Arbitrators Brown, Hoffman and this Arbitrator have resolved disputes between the same employer and different unions.[6] Those opinions are of great assistance in resolving this dispute, but they are not controlling unless the parties' Agreement makes them so.

The resolution of the merits of this dispute does parallel this Arbitrator's analysis in the I.B.E.W. case. Much of the reasoning and some of the language used in that opinion is usefully applied here. The City makes many of the same arguments. It makes no pretense about its contractual

[6] Arbitrator Susan Brown's decision involving rank and file police officers was based on a collective bargaining agreement that contained many of the same provisions as this contract.

obligations. It again claims that under state law it was not required to live up to its Agreement.[7]

The Arbitrator wrote in the I.B.E.W. case that the City was claiming that it must fulfill every contract it has with every vendor, except one -- the contract with unionized employees who sell their labor to the City. Apparently, the Arbitrator was wrong. The City now retorts in its brief with one of the most breathtaking arguments ever made to this Arbitrator. The City claims that under the Florida Constitution it has the right not to honor any and all contracts it has executed simply by not appropriating the required funds, including, presumably, those contracts that have been partially performed, such as the present Agreement.[8] That would make doing business with a governmental entity a matter of roulette. Will it pay? Will it not? It depends on how its feels at the moment. That cannot possibly be the way the business of government is to be conducted in the State of Florida.[9] The Florida Constitution does not allow a municipality to create a "shell game" when dealing with its vendors.[10]

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[7] In the I.B.E.W. case, the Arbitrator termed that "a remarkable claim," and the City criticizes the use of the adjective in its current brief. It remains a "remarkable claim," however, to suggest that every contract promise with financial implications -- virtually every provision in the collective bargaining agreement -- is voidable at will by the public employer without the need to demonstrate a compelling reason.

[8] In fact, former City Commissioner Michael Coonerty who was on the Commission during 1991 stated that this was the only contract that the City had not fulfilled. The City lives up to its obligations, except when it comes to its unionized employees.

[9] If that were the case, every vendor would add a premium on to the cost of its product or service as insurance against non-payment by a government purchaser.

[10] Article VII, section 1(c) of the Florida Constitution, which provides that no money shall be drawn from the treasury except in pursuance of appropriation made by law, requires a municipality to conduct local government in a responsible manner. The money in the public treasury does not belong to the City Manager or the City Commissioners; it belongs to the City and the people of Lake Worth. It is to be used to provide the goods and services the people of Lake Worth need, including police, fire and utility services. The Florida Constitution does not allow a municipality to get something for free by not paying for what it buys. It does not allow a municipality to agree to purchase a commodity for a certain price and then

There are also some unique facts in this case that require a slightly different analysis and at least one new court decision that must be addressed. Here the uncontradicted evidence shows that the City Manager requested a reopening of the Agreement. He wanted to renegotiate the third year wage increase. The City Manager's request to renegotiate shows the City knew that the Contract must stand unless mutually amended. Otherwise, why would he bother to request further negotiations? If the City really believed it had the right under Florida law to ignore agreements with impunity, a reopening would not have been necessary.

B. Analysis of External Law

The City says the Arbitrator must apply external law and the Union insists to the contrary. That disagreement threads through this series of disputes between the City and its unions. Each arbitrator has determined that external law does not apply. Everyone agrees that an arbitrator's job is to resolve grievances in accordance with the terms of the collective bargaining agreement.

The Agreement here provides: "The arbitrator shall not have the power to add to, subtract from, modify, or alter the terms of the collective bargaining agreement in arriving at a decision on the issue or issues presented and shall confine his decision solely to the interpretation and application of the agreement." (emphasis added). The direction to the arbitrator is clear: Look "solely" at the terms of the Agreement.

There really can be no question that the Agreement required the City to pay wage increases and merit increases during its third year. The City admits as much. For good reason or bad reason or for no reason at all, the City Commission decided not to live up to those promises. There was evidence in the record from the Union expert's testimony in other proceedings that the increases could have been funded through a variety of sources without affecting services at all. The City says that is all beside the point. It could decide it did not want to pay what it promised it would pay. The City does not claim that the external law allows it to nullify contract clauses

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pay less than the agreed price. Article VII, section 1(c) requires that the formalities of government be followed so that the business of government might proceed in an orderly manner. It is not an excuse for nonpayment or underpayment.

only for good reasons. Its argument is broader than that. The City says it can decide not to fulfill its financial obligations for any reason at any time.

The basis for the City's claim is Florida Statutes section 447.309(2), quoted above, which addresses collective bargaining in the public sector. As applied to a municipality such as the City of Lake Worth, section 447.309(2) would require the City Manager to request that the City Commission appropriate money to fund the provisions of the Agreement. (The evidence shows that the City Manager John Kelly did that, although he hoped the City Commission would not follow his request and worked to make sure it would not.) The statute then says "if less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the [City Manager] on the basis of the amounts appropriated by the legislative body." Did the Florida Legislature intend to allow municipalities, such as Lake Worth, to jettison their contract promises?

The City relies on three court decisions that apply the provision. In United Faculty of Florida v. Board of Regents, 365 So. 2d 1073 (Fla. 1st Dist. Ct. App. 1979), the First District Court of Appeal denied a union request for full funding of its contract with the Board when the State Legislature only partially funded it. In State v. P.B.A., 613 So. 2d 415 (Fla. 1992), the Florida Supreme Court ruled that public employees do not have the right to demand that the State Legislature appropriate funds under a collective bargaining agreement negotiated by the Governor. Most recently, in Sarasota County School Board v. Sarasota Classified Teachers Ass'n, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993), the Second District Court of Appeals reversed a PERC decision, ruling that a school board did not commit an unfair labor practice when it failed to appropriate funds needed to cover step increases for teachers after the expiration of the collective bargaining agreement.[11]

In its brief, the City attempts to explain away the most recent Florida Supreme Court decision involving legislative underfunding of a collective bargaining agreement. In Chiles v. United Faculty of Florida, 615 So. 2d

[11] It might be argued that two of these state cases arise under a very different bargaining relationship. In the First District Court of Appeal's United Faculty of Florida case and the Florida Supreme Court's P.B.A. case, the Board of Regents and the Governor had negotiated the contracts. The only opportunity the State Legislature had to approve or disapprove the agreements was through the appropriation process. Here, by comparison, the Lake Worth City Commission had ratified the Agreement, then two years later reneged on its promise.

671 (Fla. 1993), Justice Gerald Kogan addressed "a matter of great public importance." The State Legislature had resolved a bargaining impasse by authorizing a three (3%) percent raise for various classes of public employees. Because of a projected budget shortfall, it then postponed and finally eliminated the planned pay raises. The unions representing the affected employees sued based on the constitutional protection of the right to bargain collectively contained in the Florida Constitution. The court distinguished the P.B.A. case, decided less than three months earlier, based on the fact that here "an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature." The court rejected the State's argument that public employee bargaining agreements cannot ever constitute fully binding contracts: "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." In dictum, the court said that the Legislature does have the right "to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. . . . Before that authority can be exercised, however, the legislature must demonstrate that [there are] no other reasonable alternative means of preserving its contract with public workers, either in whole or in part." The court suggested that if the employer could void a promise at will "we necessarily would be required to conclude that there was no contract here at all for lack of mutuality. . . ." The court ordered the Legislature to implement the pay raise.

The City argues that in the Chiles case appropriations were actually made for the raises in question, then postponed, while here the City Commission refused to make the appropriations required in the third year of the Agreement. That ignores the fact that the City Commission here had ratified the three-year agreement as a whole. The City and the Union then performed under that three-year Agreement (not a series of one-year agreements) for two full years before the City reneged on its promise. The City actually received a substantial part of its bargain, the extended stability in labor relations that the City Manager used as the rationale for the three-year contract demand.

As the most recent word from the supreme court, Chiles stands generally for the proposition that promises made by a legislative body are enforceable. As applied here, that means that once the City Commission ratified the three-year Agreement and enjoyed the benefits of that Agreement, it was bound to fulfill its obligations. As the supreme court said in Chiles: "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." The City cannot take advantage of that right

when it suits its purpose, and then vitiate that right without compelling reason when its decides it no longer wants to keep its word.

The recent Sarasota case relied upon by the City involved a school board, not a state instrumentality. It warrants closer attention. In that case, the collective bargaining agreement between the school board and the teachers union expired. The consistent prior practice had been for the school board to continue to pay step increases while new contracts were negotiated. This time, as a result of an extreme financial emergency,[12] the school board did not do so. PERC found this an unfair labor practice, but the Second District Court of Appeal reversed, holding that section 407.309-(2) applied after the expiration of an agreement.

The Sarasota case involved unfair labor practice liability, not liability under a contract. There, the legislative body had never promised to pay the step increases after the expiration of the agreement. By comparison, the City of Lake Worth's "legislative body" had promised pay increases.[13] There is language in Sarasota that suggests that public sector collective bargaining agreements are not as good as private sector contracts, and that public employees "unfortunately" are disfavored. This language sounds like the old, discredited cases that talked about public employment as a "privilege," revocable at will without due process, opinions that long preceded Florida's Constitutional amendment protecting public employee collective bargaining.

Collective bargaining in the public sector is certainly more complicated than its private sector counterpart. In many instances, public sector contracts are negotiated by the executive branch and later approved (or not approved) by the legislative branch. As co-equal branches, each should have its say. Once a contract is fully approved, as was the case here by the City Commission, the contract should be enforceable by its terms in arbitration.

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[12] We should remember that the City of Lake Worth does not claim a financial basis for its failure to pay the agreed raises.

[13] The Second D.C.A. states that the school board had promised payment during the term of the agreement, and it would have been required to fulfill its undertaking: "Since the agreements were fully funded during the three year period, barring any exceptional circumstances such as exigent circumstances or waiver, an unfair labor practice would have been committed if the school board had unilaterally discontinued step increases." 614 So. 2d at 1143.

The Union argues that the City cannot rely upon section 447.309(2) even if it did apply because it must be read to require the City Manager to submit an adequate budget in good faith. The Union argues that City Manager Kelly did not act in good faith and there is evidence in the record to support that claim. Unlike the record in the I.B.E.W. case, here we have the direct testimony of a former City Commissioner that City Manager Kelly in fact recommended that the Commission not fund the contractual wage increases. In executive session, Kelly said: "There is a state law that specifically states that we do not have to fund a contract if there is not enough funds." The Commission acted based on Kelly's advice.

There are no court decisions that speak directly to the issue of whether the City Manager must subjectively want and hope that the City Commission approves his proposed budget in order for a public entity to avoid unfair labor practice liability under section 407.309(2). Here the evidence points beyond subjective intent, however. The uncontradicted evidence shows that the City Manager worked actively to nullify the budget he had submitted. That may be significant under section 447.309(2) because it raises questions concerning whether the Employer fulfilled its obligation to bargain in good faith.

None of the opinions addressing on section 447.309(2) offer a definitive reading of the legislative intent, in particular with regard to contract liability as determined in arbitration. The last sentence in the section 447.309(2) paragraph does clarify the purpose of the provision, however. The statute says that the failure of the legislative body to appropriate sufficient funds "shall not constitute, or be evidence of, any unfair labor practice." The provision appears to have been designed to keep the State Public Relations Commission out of the business of second guessing the legislative judgments of local municipalities.[14] It does not

[14] The unfair labor practice cases cited by the City demonstrate this legislative judgment at work. In Martin County Educ. Ass'n v. School Board, 18 FPER para. 23167 (PERC 1992), for example, the agency that administers the statute stated that the "legislative body [has] unfettered discretion to underfund a collective bargaining agreement." (at 290). This is the case, however, only with regard to disputes within PERC's jurisdiction, that is, unfair labor practice cases. PERC is not charged with the responsibility of interpreting the parties' Agreement. Its expansive dictum cannot bind an arbitrator who does have that responsibility. It is important to focus carefully on the jobs of the respective adjudicators.

free the City from its contract obligations that might be perfected in another forum, such as arbitration.

The City argues that section 447.309(2) cannot be limited to unfair labor practice cases because otherwise it would be a nullity. If an employer is still bound by its promises, the City says, what good is it to relieve it from ULP liability? The argument ignores issues of institutional competence, allocation of decisional power, and the intent of the negotiating parties. The Legislature might have wanted to keep PERC out of intra-governmental funding disputes. It might have thought that arbitrators were better able to resolve these types of disputes. It might have allowed the parties' intentions to control with regard to the appropriate forum for resolution. In any case, the Section talks about unfair labor practice liability. That was the Legislature's plain intention, even if it did not totally free municipalities from fulfilling their promises.

As the Arbitrator stated in the I.B.E.W. case, reading section 447.309-(2) as the City suggests would make collective bargaining a cruel joke. The heart of negotiations is the wage promise. The City pressed the Union for a three-year contract. The Union wanted a one-year deal, but finally agreed to the City's demand. The length of the contract is also a crucial element in bargaining. The two provisions -- wage increases and length of the contract -- are interrelated. A three-year contract may provide the labor stability management seeks, but it creates risks for a union. It is "betting" that inflation will not render the negotiated wage increase a mirage.[15] With a one-year agreement, the union can attempt to recalibrate the wage scale annually. When the Union here agreed to the City's demand for a three-year agreement, it had good reason to trust that the quid pro quo would follow, the payment of the negotiated wage increase over the three years.[16]

If one party to the Agreement can ignore its promises for any reason or no reason at all, was there ever any real collective bargaining? We must remember that public employees enjoy the protection of a Florida Constitu-

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[15] Of course, under any contract a union must contend with unforeseen emergency situations. Financial distress might well be an excusing circumstance, but the City claims nothing of the sort here.

[16] The City suggests that, in fact, because the City decides to fund contracts on an annual basis, that the three-year agreement is really a collection of three one-year contracts. (City brief, p. 27). If that is so, then why did it insist on a single three-year contract in its negotiations with the Union? Why then did it ratify a three-year agreement?

tional provision, article I, section 6,' which expressly supports collective bargaining. Section 447.309(2) should not be read in a way that would render it subject to constitutional question. The Legislature should be presumed to have enacted a constitutional statute. There is no evidence in the record or in any available research that demonstrates that it was the State Legislature's intention to permit Constitutionally-protected collective bargaining to be destroyed by legislative bodies at the local level.[17]

C. Applicability of External Law

Although the external law on its face and as interpreted by the courts does not excuse the City's action, in order to resolve this dispute the Arbitrator need not look to external law. Nothing in the parties' Agreement requires the contract arbitrator to read, interpret and apply enacted legislation. The City argues that all state laws are part of the Agreement. Where does it say that in the Agreement? The City points to Article 4 that protects management rights. If the decision to underfund is an inherent management right, then the City does not need external law. It would have this right by contract. Obviously, this is not an inherent management function. Otherwise, the wage promise would be a sham. That could not have been what the parties intended.

The City also argues that the Agreement "specifically recognizes the possibility that portions of the agreement may be found invalid by reason of State law." (City brief, p. 1) The reference is to Article 32, section 1, that provides:

> If any article or section of this agreement should be found invalid, unlawful, or not enforceable, by reason of any existing or subsequently enacted Federal or State legislation or by judicial

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[17] The City's argument concerning the effect of section 447.309(2) is brought to the extreme towards the end of its brief when it argues that not only does this provision override the constitutional right of public employees to bargain collectively, but the City doubts that it could even waive the "right to underfund" if it wanted to. (City brief, p. 26). That means that the parties to a public sector labor relationship in Florida cannot reach a binding agreement. Even if the public employer expressly agrees not to nullify the terms of an agreement, it is incapable of keeping that promise. According to the City's argument, there can be no real public sector collective bargaining in Florida.

> authority, all other articles and sections of this Agreement shall remain in full force and effect for the duration of this Agreement.

This typical savings clause is a "shield" and not a "sword," although the City tries to use it offensively. It allows the parties to protect the integrity of their agreement were some entity to find a provision invalid. No provision of the Agreement is invalid, unlawful, or unenforceable, however.

The City does not claim the wage provision, standing alone, is illegal or invalid. After all, it paid raises under the provision for two years! The City's claim is that it has the unrestricted right to nullify the wage provision and that makes the provision invalid, unlawful, and unenforceable. That has nothing to do with the purpose of the savings clause, which does not really help the City's case. The City's argument is simply a brazen claim to unfettered, unilateral power.

A careful reading of the Agreement demonstrates that the parties did not intend to incorporate external law. The parties expressly provided in Article 4, section 3, that in case of civil emergency the Mayor may suspend the provisions of the Agreement "provided that rates and monetary fringe benefits shall not be suspended." This is the clearest evidence that the parties intended that employees would be paid in accordance with the terms of the Agreement throughout the term of the Agreement. Even in the case of a civil emergency, "rates shall not be suspended." This must mean that the City cannot suspend wage increases when there is no civil emergency.[18]

Reviewing the parties' Agreement, we can see that they knew how to cite and refer to enacted legislation and external law. Article 5 requires the City to comply with the Police Officer's Bill of Rights, "Section 112.531 et.

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[18] The City argues that this provision is inapplicable because the right to ignore certain provisions in a civil emergency is lodged in the Mayor or Mayor's designee and the "right to underfund is a right of the legislative body." (City brief, p. 25). That misses the point. The Agreement, which binds the Mayor, the City Manager and the City Commission, as well as the Union and its members, states that even in the most extraordinary domestic crises, the wage clause cannot be suspended. How then could the City Commission, which never has the power to suspend any provision of the Agreement, nullify the wage provision, when it does not even claim there is a crisis? And why would the parties even put in a provision regarding suspension of contractual provisions if the City had the inherent right to suspend any money-related provision in any case based on section 447.309(2)?

seq., Florida Statutes." Article 20 provides that the City must pay employees who are required to attend conferences "as provided in Section 112.061, Florida Statutes." Article 25 defines "the course of employment as provided by section 440.091, Florida Statutes (1987)" as the standard for payment of workers compensation. Article 35 prohibits participation in a strike and then states that the parties "agree to comply with the provisions of Florida Statutes 447.505 and Florida Statutes 447.507."

Obviously, these particular bits and pieces of external law are used in the parties' Agreement. Nowhere does the Agreement talk about the general use of external law, except in the savings clause, Article 33, where we are told that employee "benefits or protections granted by the laws of the State of Florida" are not to be deprived by any interpretations of the Agreement. The City's claimed option to negate the wage promise, of course, does not appear in the Agreement. Section 407.309(2) is not mentioned. It is appropriate to apply the interpretive maxim expressio unius est exclusio alterius, the expression of one thing is the exclusion of another.[19] Article 33 provides that the terms of the Agreement "constitute the entire agreement." The entire agreement does not include an option to negate the wage promise.

D. The Contract

The Agreement requires the payment of wages at certain rates. Nothing in the Agreement excuses that payment.[20] As a legislative body, the City Commission approved the collective bargaining agreement. That action contemplated three years of wage and merit increases. The City has not offered any reason that would justify underfunding because of a financial emergency situation, and the Arbitrator need not address such hypothetical circumstances. The Agreement is plain on its face. The wage increases should have been paid.

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[19] The parties "expressed" many statutory provisions. They should be held to have intended to exclude the operation of those not expressed, especially when their application could render the entire wage promise a nullity.

[20] Article 34 does allow for reopening of the agreement "[s]hould the people of the State of Florida approve a Constitutional Amendment which reduces the funding of local governments." That did not happen here.

Other arbitrators have reached the same result. No arbitrators have allowed employers to nullify their agreements. Arbitrator Charles Frost in City of Deerfield Beach, 98 Lab. Arb. Rep. (BNA) 1189 (1992), rejected any consideration of external law when that South Florida municipality reneged on its contract promise. As might be imagined, the City of Lake Worth argues that Frost was wrong. Frost appropriately focuses on the parties' contract, the source of his power, and finds a clear violation. Similarly, the three arbitration decisions involving the City of Lake Worth have found violations. In the January 6, 1993, unreported decision involving the City and the Palm Beach County P.B.A., Arbitrator Susan Brown rejected the City's reliance on external law, reciting the agreement's zipper and entire agreement clauses, the grievance definition, the limitation on the arbitrator's power, and other provisions. This Arbitrator, in an unreported decision involving the City and the I.B.E.W. on April 30, 1993, found a contract violation for many of the same reasons explained in this decision. Finally, Arbitrator Robert B. Hoffman in a May 7, 1993, unreported decision involving the City and the I.A.F.F., relied on the supreme court's Chiles opinion, rejected the City's reliance on a claimed right to underfund based on the management rights clause, and noted the importance of the zipper clause. He too found a contract violation in the failure to pay the wage increases.

The City argues that it is "most unfortunate that arbitrators see fit to deprive public employers of fundamental rights of government and to grant public employees the unconditional right to receive funding in direct violation of law." The arbitrators do not "deprive" parties of rights or "grant" parties rights. They read, interpret and apply contracts. It is "most unfortunate" that the City does not appreciate the binding nature of its obligations.

E. Final and Binding Decision

Although the citizens may be the ultimate judge of the actions of their elected officials, the parties have provided for a private, self-contained, and final-and-binding system for resolving disputes concerning alleged violations of their Agreement through arbitration. The Arbitrator's power is to enforce the Agreement, a binding pact between the City and the Union. The Arbitrator's power comes from the Contract and the power of his decisions depends upon fidelity to the terms of the Agreement.

One would have hoped now that the City has arbitrated and lost four virtually identical cases that it would turn its course of action towards

rebuilding its relationship with its employees and their unions. Regretfully, it is likely to continue to fight this battle in court. It persists in the belief that its word is good for as long as it wants to keep it and no longer.

The court's scope of review of an arbitrator's decision is very limited. See, e.g., City of Miami v. Aparicio, 503 So. 2d 966 (Fla. 3d Dist. Ct. App. 1987). As the Florida Supreme Court emphasized in Schnurmaching Holding, Inc. v. Noriega, 542 So. 2d 1327, 1329 (Fla. 1989), there is a need to "preserve the integrity of the arbitration process."[21] A court is in the business of enforcing promises, not allowing parties to break them.

Courts will not allow public employers to destroy the constitutionally-based right to bargain with broad claims of inherent governmental power. "The right to bargain collectively is a fundamental right and as such, it is subject to official abridgement only upon a showing of a compelling state interest." School Board of Seminole County v. Morgan, 582 So. 2d 787, 788, n.2 (Fla. 5th Dist. Ct. App. 1991) (enforcing arbitration award).

In this situation, the parties sought a decision by an arbitrator about their contract responsibilities. That is what they received. They agreed that this decision would be final and binding. No court should disturb that decision because, after all, it was the parties' bargain. Otherwise, all promises are worthless and society loses the glue of trustworthiness that holds it together.

The City of Lake Worth will undoubtedly reargue in court the same points it has made here regarding section 407.309(2). The unions will respond, explaining that it was not the intent of the State Legislature in providing legislation to foster collective bargaining to allow the public employer to renege on its promises more than halfway through a contract term. The statute must be read in a manner consistent with Florida's constitutional protection of the right of public employees to bargain collectively.

The term "to bargain collectively" has a well understood meaning. It means to give-and-take across the negotiation table, reach agreement (if you can), and then keep your promises. To read section 407.309(2) to allow the public employer to escape from its promises in the absence of the most compelling circumstances would make a mockery of collective bargaining. As Lewis Carroll wrote in Alice in Wonderland: "Everything's got a moral,

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[21] The Fifth District Court of Appeal recently relied upon and quoted at length from this opinion in a public sector labor case, enforcing an arbitrator's award. City of Mount Dora v. Central Florida P.B.A., 600 So. 2d 520 (Fla. 5th Dist. Ct. App. 1992).

if you can only find it." Here the moral is: "When you make a deal, you live by it."

The Agreement controls, and it was violated here.

VI. AWARD

The City violated the Agreement when it failed to pay wage increases due under Article 27 for fiscal year 91-92. By way of remedy, the employees should be made whole with all legal interest paid.

Roger I. Abrams
Arbitrator

Fort Lauderdale, Florida
June 22, 1993