

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA**

FLORIDA EDUCATION ASSOCIATION, et al.,

Plaintiffs,

v.

Case No. 2018-CA-1446

DONNA MAGGERT POOLE, as Chair and
Commissioner of the Florida Public Employees Relations
Commission, **JAMES BAX**, as Commissioner of the
Florida Public Employees Relations Commission, and
CURT KISER, as Commissioner of the Florida Public
Employees Relations Commission,

Defendants.

_____ /

**MOTION FOR SUMMARY JUDGMENT AS TO COUNT II
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, seek summary judgment as to Count II of their complaint because there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law. The grounds on which this motion is based, and substantial matters of law to be argued, are set forth below.

I. LEGAL BACKGROUND

Article I, section 6, Florida Constitution provides:

SECTION 6. 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.

Art. I, § 6, Fla. Const. The first sentence of this provision “bestows on the workingman a right to join or not join a labor union, as he sees fit, without jeopardizing his job.” *Schermerhorn v. Local 1625 of the Retail Clerks Int’l Ass’n*, 141 So. 2d 269, 272 (Fla. 1962), *aff’d*, 84 S. Ct. 219 (1963). The intent of this provision is to “leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union.” *Id.* at 273 (emphasis in original). The second and third sentences of this section grant public employees a fundamental constitutional right to engage in collective bargaining to the same extent as private employees, with the exception of the right to strike. *City of Tallahassee v. Pub. Emps. Relations Comm’n*, 410 So. 2d 487, 490-91 (Fla. 1981); *Hillsborough Cnty. Gov’t Emps. Ass’n v. Hillsborough Cnty. Aviation Auth.*, 522 So. 2d 358, 362 (Fla. 1988). The intention of these provisions is to grant the right of *effective* collective bargaining. *Hillsborough County*, 522 So. 2d at 362 (emphasis in original).

Article I, section 6 has been implemented by Part II of Chapter 447, Florida Statutes.

§ 447.201, Fla. Stat. (2018).¹ The “Statement of policy” for this part provides:

The public policy of this state, and the purpose of [Part II of Chapter 447], is to provide statutory implementation of s. 6, Art. I of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationship between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.

Id. Pursuant to this part, the right of public employees to engage in collective bargaining is implemented through the creation, certification, and regulation of employee organizations which engage in collective bargaining with the public employer on the public employees’ behalf.

¹ All citations to Florida Statutes are to the 2018 version unless otherwise specified.

Every employee organization seeking to become a certified bargaining agent for public employees must first register with the Public Employee Relations Commission (PERC). § 447.305, Fla. Stat. The organization must complete an application and provide basic information about the organization including its officers, fees, financial statement, constitution and bylaws. *Id.* § 447.305(1). Registrations are valid for one year and are renewed upon submission of updated information regarding the organization, its financials, and a registration fee. *Id.* § 447.305(2).

Once registered, an employee organization can be designated by PERC as the certified bargaining agent for public employees of a bargaining unit in one of two ways: a petition for voluntary recognition or a petition for certification. In a petition for voluntary recognition, the employee organization requests recognition by the public employer based upon a showing that a majority of employees in the proposed bargaining unit select the organization as their representative for purposes of collective bargaining. If the employer is satisfied as to the majority status of the organization and the appropriateness of the unit, it must recognize the organization as the certified bargaining unit. No election is held. The organization then petitions PERC for recognition, and PERC must certify the unit in the absence of inclusion of any prohibited categories of employees. § 447.307(1), Fla. Stat.

A petition for certification, on the other hand, may be filed with PERC based upon a showing that at least 30 percent of the employees in the proposed unit desire the organization to be their representative for purposes of collective bargaining. If a petition for certification is deemed sufficient, PERC orders an election to be held—paid for equally by the parties—in which all bargaining unit members may vote by secret ballot. Any other registered employee organization may intervene in the proceeding and participate in the election if it produces

statements by at least 10 percent of the employees in the proposed unit indicating that they desire to be represented by the intervening organization for purposes of collective bargaining. An employee organization that receives a majority of votes of the employees in the unit voting in the election must be certified by PERC as the exclusive collective bargaining representative of all employees in the unit. *Id.* § 447.307(2),(3).

A certified bargaining agent must then bargain collectively with the public employer *on behalf of the employees within the bargaining unit* regarding their wages, hours, and terms and conditions of employment. § 447.309(1), Fla. Stat. This means that the certified bargaining agent represents all members of the bargaining unit, whether or not they have chosen to become members of the employee organization by paying dues.² The parties may enter a collective bargaining agreement for up to three years, subject to ratification by the employer and a majority of the employees voting in the bargaining unit, and sufficient appropriations by the applicable legislative body. *Id.* § 447.309(1)-(5).

Once an employee organization is certified as the exclusive collective bargaining representative of a bargaining unit of public employees, it remains certified unless and until it is displaced by a rival organization through a certification petition, or its certification is suspended or revoked. No new petition for election or petition to revoke a certification covering any of the employees in the bargaining unit may be filed within 12 months of the certification. Furthermore, if a collective bargaining agreement is in effect, a petition for certification may only be filed between 150 and 90 days before the expiration of the agreement. *Id.* §§ 447.307(3)(d), 447.308(1).

² Bargaining unit members who do not join the union and therefore reap the benefits of union representation but do not bear any of the cost thereof are referred to as “free riders.” *Schermerhorn*, 141 So. 2d at 273.

The primary way a certification may be revoked is through a petition filed by employees who no longer desire the certified bargaining agent to represent them. Such employees may file a petition for revocation signed by at least 30 percent of the employees of the unit stating that they no longer desire to be represented by the certified bargaining agent for purposes of collective bargaining. *Id.* § 447.308. If the petition is deemed sufficient, PERC orders an election in which all bargaining unit members may vote by secret ballot. If a majority of the employees voting in the election vote against the continuation of representation by the certified bargaining agent, the certification of the employee organization as the exclusive bargaining agent is revoked. *Id.*

An employee organization's certification as bargaining agent may also be suspended or revoked by PERC for the organization's participation in a strike against a public employer. §§ 447.505, 447.507(6), Fla. Stat.

The foregoing procedures regarding representation of employees for purposes of collective bargaining are the same for all classes of public employees in Florida.

II. HB 7055'S RECERTIFICATION REQUIREMENT

During the 2018 legislative session, the Florida Legislature passed House Bill 7055, "An act relating to education," which was approved by the Governor. The Secretary of State subsequently designated HB 7055 as Chapter 2018-6, Laws of Florida.

Section 33 of Chapter 2018-6, Laws of Florida, amended subsection 1012.2315(4), Florida Statutes, which is entitled "Collective Bargaining."³ Ch. 2018-6, § 33, Laws of Fla. This 2018 amendment created paragraph (c) under subsection 1012.2315(4), Florida Statutes,

³ Prior to the adoption of Chapter 2018-6, Laws of Florida, section 1012.2315 contained one subsection related to collective bargaining which provided in full: "Notwithstanding provisions of chapter 447 relating to district school board collective bargaining, collective bargaining provisions may not preclude a school district from providing incentives to high-quality teachers and assigning such teachers to low-performing schools." § 1012.2315(4), Fla. Stat. (2017).

which imposed new requirements for organizations that have been selected by and certified as bargaining agents for a single class of public employees—“instructional personnel”—to maintain their certification. § 1012.2315(4)(c), Fla. Stat. (“Recertification Requirement”). “Instructional personnel” are defined as K-12 staff members who provide direct instructional services and direct support in the learning process of students. § 1012.01(2), Fla. Stat.

As a result of the Recertification Requirement, all certified bargaining agents for units of instructional personnel must now include in their applications for registration renewal (a) the number of employees in the bargaining unit who are eligible for representation by the employee organization; and (b) the number of employees who are represented by the employee organization, specifying the number of members who pay dues and the number of members who do not pay dues. § 1012.2315(4)(c)1, Fla. Stat. For certified bargaining agents for all public employees other than instructional personnel, this information is not public and is available only to members of the organization. § 447.07, Fla. Stat.

Also as a result of the Recertification Requirement, a certified bargaining agent for a unit of instructional personnel whose dues-paying membership is less than 50 percent of the employees in the unit eligible for representation must then, within one month of applying for renewal, petition PERC pursuant to subsections 447.307(2) and (3), Florida Statutes, for recertification as the exclusive representative of all employees in the unit. A certified bargaining agent that does not comply with this requirement will have its certification revoked. *Id.* § 1012.2315(4)(c)2. This obligation to petition for certification is triggered regardless of whether or not a valid collective bargaining agreement is in effect or when such agreement is scheduled to expire, and is in conflict with the provision applicable to all other certified

bargaining agents which limits the filing of a petition for certification to between 150 and 90 days before the agreement's expiration date. *Id.* § 447.307(3)(d).

Thus, in order to maintain its certification as the certified bargaining agent for a unit of instructional personnel, one whose dues-paying membership is less than 50 percent must petition for certification in the same manner and meet the same requirements as one who has never been certified. This includes collecting statements from at least 30 percent of the unit's employees indicating the desire to be represented by the petitioner for purposes of collective bargaining, the possibility of another organization seeking to intervene in the election, and conducting (and paying its share of) an election in which a majority of the employees in the unit voting in the election must vote to select the petitioner as their collective bargaining representative. §§ 447.307(2),(3), 1012.2315(4)(c)2, Fla. Stat. Although not clearly articulated, it is apparent from the new law as a whole that its intent is for a petitioner which does not secure a majority vote in the election to lose its certification as the exclusive bargaining agent for the unit. Unless a rival organization is certified in its stead, this would mean that the public employees in the unit would no longer have a representative to engage in collective bargaining on their behalf with the public employer. § 447.309, Fla. Stat. (only a certified bargaining agent can engage in collective bargaining with a public employer).

The Recertification Requirement applies only to certified bargaining agents for instructional personnel in Florida's K-12 schools. Certified bargaining agents for all other units of public and private employees in Florida are not required to report any information regarding their membership levels as part of their registration renewal, are not required to petition for recertification if their membership levels fall below a certain level, and are not required to

conduct an election in order to be recertified as the exclusive collective bargaining representative based solely upon dues-paying membership falling below a certain level.

III. COUNT II – EQUAL PROTECTION

Plaintiffs in this action include: (a) individual instructional personnel from throughout the state of Florida, including both members and non-members of the employee organizations (unions) that are certified as the bargaining agents for the units of instructional personnel to which the individual plaintiffs belong; (b) several local unions within the state certified as bargaining agents for instructional personnel; (c) their local leaders; and (d) their statewide advocacy organization. (Complaint ¶¶ 6-11). The individual member plaintiffs wish for their unions to continue to represent them for purposes of collective bargaining regardless of the percentage of employees within the bargaining unit who are dues-paying members. (*Id.* ¶ 10). The individual non-member plaintiffs also wish to continue to be represented by the union certified as the representative of the bargaining unit of instructional personnel to which they belong, but they do not wish to become dues-paying members of the union. (*Id.* ¶ 11). The local unions bring this action on their own behalf as well as on behalf of their members; the statewide organization brings the action on behalf of its members. (*Id.* ¶¶ 6-8). *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) (association has standing to bring suit as representative of its members).

In Count II of the Complaint, Plaintiffs allege that the Recertification Requirement burdens their right to effective collective bargaining under article I, section 6 of the Florida Constitution, and applies only to instructional personnel in violation of their right to equal protection under article I, section 2, Florida Constitution. (Complaint ¶¶ 25-31).

IV. ARGUMENT⁴

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Where the determination of a lawsuit depends upon the legal effect of a written instrument, the question at issue is essentially one of law only and determinable by entry of summary judgment. *Id.* at 131.

Plaintiffs allege the Recertification Requirement is facially unconstitutional, that is, that no set of circumstances exists under which the statute would be valid. *Florida Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). The determination of a statute's constitutionality is a question of law. *Id.* "A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards." *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) (internal citation omitted).

Article I, section 2 of the Florida Constitution guarantees all citizens equal protection under the law:

Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights

Art. I, § 2, Fla. Const. This guarantee "is essentially a direction that all persons similarly situated should be treated alike." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 341 (Fla. 2013) (internal citations omitted). Indeed, "the Constitution neither knows nor tolerates classes among citizens," which

⁴ Plaintiffs acknowledge that section 2.2 of this Court's "Policies, Procedures and Preferences" requires a motion for summary judgment to contain a short concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. However, Plaintiffs do not include such a statement herein because they contend that this motion raises only pure matters of law.

provides “assurance that the law remains neutral where the rights of persons are at stake.” *Id.* (internal quotations and citations omitted).

A statute challenged on equal protection grounds that does not affect a fundamental right or protected class must only bear some rational relationship to a legitimate state purpose. *Id.* However, when a statute implicates a fundamental right, it must pass strict scrutiny. *E.g., State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) (“strict scrutiny is applicable here because fundamental rights are implicated by the juvenile curfew ordinances”); *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 898 (Fla. 2018) (describing previous determination that while statute implicated fundamental rights, it satisfied strict scrutiny). Statutes that cannot survive this heightened scrutiny are invalid. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987) (statute prohibiting non-citizens from becoming business agents for public employee unions facially violated equal protection under federal and Florida constitutions).

It is well-settled under Florida law that the right to engage in collective bargaining under article I, section 6 is a fundamental right. *E.g., Hillsborough Cnty.*, 522 So. 2d at 362 (“The right to bargain collectively is, as a part of the state constitution’s declaration of rights, a fundamental right.”); *Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (“The right to bargain collectively is a “fundamental right.”); *Headley v. City of Miami*, 215 So. 3d 1, 8 (Fla. 2017) (“We have long recognized the right to bargain collectively . . .”).

It is also beyond dispute that the Recertification Requirement implicates Plaintiffs’ fundamental right to collective bargaining under article I, section 6. “Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use or enjoyment of that right.” *Schermerhorn*, 141 So. 2d at 276; *Hillsborough*

Cnty., 522 So. 2d at 362 (“Any restriction on the right to collective bargaining must necessarily violate article I, section 6 of the Florida Constitution.”). As set forth above, the Recertification Requirement imposes numerous burdens upon instructional employees, but no other category of public employees, who wish to continue to be represented by an employee organization for purposes of collective bargaining. The organization which they have selected and has been certified as their collective bargaining agent must report its membership levels annually, and if below 50 percent, it must collect statements of support from 30 percent of the bargaining unit, submit to (and pay its share of) an election, potentially including an intervening organization. If it fails to earn a favorable vote of 50 percent of the voting employees, it faces decertification. This will leave the employees of the unit with no collective bargaining representative. (*See infra* pp. 5-7). Even if the organization is not decertified, the employees in the bargaining unit are burdened by their chosen representative having to redirect its resources from collective bargaining activities in order to ensure it meets a certain membership level every year. These are significant burdens upon Plaintiffs’ right to effective collective bargaining. *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) (“[I]n order to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is *absolutely* impossible to surmount, only one which is significantly difficult.”) (emphasis in original).

The Recertification Requirement also burdens the rights of non-members to be free riders. The right to reap the benefits of union representation without having to bear the associated costs is protected by article I, section 6 of the Florida Constitution. *Schermerhorn*, 141 So. 2d at 273. Yet by using membership levels as a trigger for requiring a re-certification petition and an election which puts their chosen representative’s certification at risk, non-members are compelled to join the union in order to ensure their uninterrupted representation for

purposes of collective bargaining. This result is “repugnant to the provisions of section 6 because it would require non-union employees to purchase a right which the Constitution gives them.” *Florida Education Ass’n/United v. Pub. Emps. Relations Comm’n*, 346 So. 2d 551, 552 (Fla. 1st DCA 1977) (holding rule requiring non-union public employees to pay a pro rata share of bargaining costs violated article I, section 6).

To withstand strict scrutiny, a law that implicates a fundamental right must be necessary to promote a compelling governmental interest and narrowly tailored to advance that interest. *E.g., State v. J.P.*, 907 So. 2d at 1110. Assuming for purposes of argument that ensuring that a majority of employees in a bargaining unit wish for a certified bargaining agent to continue to represent the employees is a compelling state interest, then it is equally compelling for all units of public employees and not just instructional personnel. This interest does not justify application of the Recertification Requirement to instructional personnel only. *United Faculty of Florida, Local 1847 v. Bd. of Regents*, 417 So. 2d 1055, 1059 (Fla. 1st DCA 1982) (rejecting board’s concern about injecting collective bargaining into student-teacher relationship as compelling interest for prohibiting collective bargaining by graduate assistants, because this same concern existed in its bargaining with other university system units), *clarified by* 423 So. 2d 429 (Fla. 1st DCA 1982).

Moreover, the Recertification Requirement is demonstrably not the least restrictive means of advancing the government’s interest in ensuring majority support for the organization. Under strict scrutiny, “the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way and must not restrict a person’s rights any more than absolutely necessary.” *Mitchell*, 786 So. 2d at 527. Use of membership levels to trigger an obligation to recertify is an affirmatively *ineffective* way of determining whether a majority of

represented employees continue to support a certified bargaining agent, because public employees have a constitutional right *not* to join the union while still enjoying the benefits of representation for purposes of collective bargaining. Thus the level of union membership is not indicative of the level of support for the union by members of the bargaining unit. *See generally Pac. Coast Supply, LLC v. Nat'l Labor Relations Bd.*, 801 F.3d 321, 327 (D.C. Cir. 2015) (discussing “well-settled law” that “[w]hether a union has majority support turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of a particular union”) (internal quotations and citation omitted). This is precisely why the law already provides a mechanism for revocation of certification based upon a petition by employees who no longer wish for their certified bargaining agent to represent them. § 447.308, Fla. Stat. *This* existing legal mechanism is the least restrictive means of ensuring that a certified bargaining agent continues to enjoy the support of a majority of employees in the bargaining unit.

Because there are no genuine issues of material fact, and it is clear as a matter of law that the Recertification Requirement implicates Plaintiffs’ fundamental rights to effective collective bargaining under article I, section 6, treats instructional personnel differently than all other classes of public employees, does not support a compelling state interest, and is not narrowly tailored to advance such interest, the Recertification Requirement presents a total and fatal conflict with Plaintiffs’ right to equal protection under article I, section 2 of the Florida Constitution and Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, Plaintiffs respectfully request that this Court enter final judgment in their favor as to Count II, declare that the Recertification Requirement violates article I, section 2 of the Florida Constitution by burdening their fundamental right to collective bargaining under

article I, section 6 in a way that is different than other classes of public employees without a compelling state interest to do so, and order such further relief as the Court deems appropriate.

Respectfully submitted,

s/ Lynn C. Hearn

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following by email on this 21st day of March, 2019, via the Florida Courts e-filing Portal to Blaine H. Winship, Blaine.Winship@myfloridalegal.com, Special Counsel, Office of the Attorney General, Civil Litigation, The Capitol - PL 01, Tallahassee, FL 32399-1050.

s/ Lynn C. Hearn

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