OA 1-13.84

IN THE SUPREME COURT OF FLORIDA

PALM BEACH JUNIOR COLLEGE
BOARD OF TRUSTEES,

Appellant,

vs.

UNITED FACULTY OF PALM BEACH
JUNIOR COLLEGE,

Appellee.

Case No. 63,352

District Court of
Appeal, 1st District
No. AF-17

AMICUS CURIAE BRIEF

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STATEMENT OF THE FACTS

The Palm Beach Junior College Board of Trustees and United Faculty of Palm Beach Junior College were engaged in contract negotiations when Palm Beach Junior College Board of Trustees offered a management rights clause as a subject for negotiation.

This clause and two others presented by the Board of Trustees were rejected by United Faculty. United Faculty offered no alternatives but declared an impasse on this subject.

Palm Beach Junior College included the management rights clause in the contract to be presented to the members of United Faculty for ratification. United Faculty refused to submit the contract to the members for vote.

Thereafter, United Faculty filed an unfair labor practice charge against Palm Beach Junior College.

STATEMENT OF THE CASE

The Public Employees Relations Commission (PERC) found that Palm Beach Junior College Board of Trustees had committed an unfair labor practice by including in a collective bargaining agreement a management's rights clause. PERC ordered Palm Beach Junior College Board of Trustees to cease and desist from insisting to and through impasse resolution proceedings the inclusion in any collective bargaining agreement of the management's rights clause or its equivalent and to offer the United Faculty a collective bargaining agreement which includes the provisions agreed to by the parties in negotiations and those provisions mandated by the Board of Trustees pursuant to § 447.403(4)(d) Florida Statutes (Supp. 1980) excluding the management rights clause.

Upon appeal, the First District Court of Appeal, in a two to one decision, affirmed the decision of PERC. It is this decision of the First District Court of Appeal that is sought to be reviewed here.

ARGUMENT

UNDER PART II OF CHAPTER 447, FLORIDA STATUTES, DOES A FLORIDA PUBLIC EMPLOYER COMMIT AN UNFAIR LABOR PRACTICE BY PROPOSING AND PURSUING TO AND THROUGH A BARGAINING IMPASSE A MANAGEMENT RIGHTS OR PREROGATIVES CONTRACT PROVISION UNDER WHICH THE EMPLOYER WOULD BE EMPOWERED, WITHOUT FURTHER BARGAINING DURING THE TERM OF THE PROPOSED CONTRACT, TO MAKE AND IMPLEMENT DECISIONS ON SUBJECTS NOT COVERED IN THE CONTRACT?

The question on appeal must be answered in the negative.

Florida Statute 447.403 provides for the resolution of impasses that occur after a reasonable period of negotiation concerning the terms and conditions of employment. The only question then becomes whether or not the management rights clause is concerned with the terms and conditions of employment, being therefore a mandatory subject of bargaining and triggering the provisions of Florida Statute 447.403.

This questions has been answered by no less an authority than the United States Supreme Court in National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952) which held that these clauses were a mandatory subject of bargaining. In finding that these management rights clauses were not unlawful, the Supreme Court also importantly noted that this was common collective bargaining practice. The importance of such clauses is very apparent to a private business concern. Such clauses are even more important to a

community college which very often is working under legislative or agency mandated time constraints.

The effect of such a management rights clause is to require the bargaining agent for the employees to raise any issues as to terms and conditions of employment wished to be negotiated at the time of the contract talks or wait until the next contract talks to raise the issue. This allows management to make managerial decisions not covered in the contract without first making a legal decision as to whether or not the management action would have an effect on the terms and conditions of employment so as to require bargaining and then, if so, to bargain with the union. This issue so concerns the terms and conditions of employment that even without the United States Supreme Court precedent, logic would dictate such an issue be a mandatory subject of bargaining.

In its Order, however, the Public Employees Relations Commission (PERC), in a bit of non sequetur reasoning, decided that since public employees do not have the right to strike, a management's rights clause is not concerned with the terms and conditions of employment. This decision of PERC is disturbing for a number of reasons.

PERC has clearly over-stepped its bounds in overruling the United States Supreme Court decision and has done so with such a lack of sound judicial reasoning or

logic as to make any student of the law wince. The precedent PERC is setting would seem to allow a complete disregard to the entire body of labor law because public employees have not been given the right to strike. This would mean, of course, that a public employer could no longer rely on well established law in the private sector to determine what is and what isn't an unfair labor practice. Any attorney advising a public employer that a certain proposed action would not normally constitute an unfair labor practice must add the caveat: "but because the public employees have not been given the right to strike by the Legislature what you propose may constitute an unfair labor practice". This, of course, would greatly hamper the smooth and efficient operation of employer-employee relations in the public sector. One of the great gifts of stare decisis, certainty of the law, will no longer be available to public employers.

PERC may have a right to criticize (rightly or wrongly) the Florida Legislature for not giving public employees enough weapons to counteract the prohibition on striking. However, PERC has no right to change the law because of this preceived disparity. It is not up to PERC to legislate its own laws to correct whatever

inadequacies it preceives in the legislative enactments.

What is disturbing about the majority opinion of the First District Court of Appeal under review here is the seeming eagerness with which that panel wishes to absolve itself of interpreting the law and leaving it up to PERC to interpret the applicable statutes and make public policy decisions. This deference afforded PERC resulted in the affirmance of a decision that was not well founded in logic or judicial reasoning nor even providing a legal remedy.

As PERC has ordered the Palm Beach Junior College Board of Trustees to offer the United Faculty a collective bargaining agreement which includes those provisions agreed to by the parties in negotiations and those provisions mandated by the Board of Trustees pursuant to § 447.403(4)(d) Florida Statutes (Supp. 1980) excluding Article XXII, Section C, PERC has indeed ordered an agreement to be offered to one party to the contract without allowing ratification by the other.

Florida Statute 447.309 is very clear that even if a bargaining agreement has been reached by the negotiators and signed by the chief executive officer and the bargaining agent, the agreement is not binding on the public employer until such agreement has been ratified by the public

employer and by the public employees who are members of the bargaining unit. Under Subsection 4 of that Statute, if the agreement is not ratified by the public employer, the agreement is returned to the chief executive officer and the employee organization for further negotiations.

As the public employer has the absolute right to reject any unratified agreement, PERC cannot arbitrarily impose a contract, the terms of which arose during the course of negotiation which included a provision beneficial to management that has been deleted. PERC, for instance, does not know if the negotiator for Palm Beach Junior College would have been able to make the wage concessions in the negotiations if the college would thereafter have to operate without the benefit of a management's rights clause. Therefore, even if PERC were correct in its finding of an unfair labor practice, the remedy proposed is legally incorrect.

CONCLUSION

Since a management's rights clause affects the terms and conditions of employment, Palm Beach Junior College Board of Trustees had a right to bargain that issue to impasse which triggers various portions of Chapter 447 of the Florida Statutes. The finding by PERC of an unfair labor practice in this regard is totally without merit and, in effect, overrules a United States Supreme Court decision. The majority opinion of the First District Court of Appeal, in affirming the conclusions of law and order of PERC, is in error and should be reversed with a finding that Palm Beach Junior College Board of Trustees committed no unfair labor practice and that, in any event, PERC had no legal authority to impose the terms of a collective bargaining agreement on one party without being ratified.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served, via United States first class mail, upon JESSE S. HOGG, ESQ., HOGG, ALLEN, RYCE, NORTON & BLUE, P.A., 121 Majorca Avenue, Third Floor, Coral Gables, FL 33134; C. ANTHONY CLEVELAND, ESQ., General Counsel, FEA/United, 208 West Pensacola St., Tallahassee, FL 32301; and CHARLES F. McCLAMMA, ESQ., Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, FL 32301; HONORABLE RAYMOND E. RHODES, Clerk, Supreme Court Building, Tallahassee, FL 32301; W. REYNOLDS ALLEN, ESQ., 609 W. Horatio St., Tampa, FL 33606; RICHARD F. TRISMEN, ESQ., Baker & Hostetler, P. O. Box 1660, Winter Park, FL 32790; RICHARDS, NODINE, GILKEY, FITE, MEYER & THOMPSON, 1253 Park St., Clearwater, FL 33516; LORENZ, LUNGSTRUM & HEFLIN, P. O. Box 1706, Ft. Walton Beach, FL 32549; MATHENY & BREWER, P.O. Box 6526, Titusville, FL 32780; HARLLEE, PORGES, BAILEY & DURKIN, 1205 Manatee Ave. West, Bradenton, FL 33505; MARIAN P. McCULLOCH, ESQ., 1200 Freedom Federal Bldg., 220 Madison St., Tampa, FL 33602; RICHARD WAYNE GRANT, ESQ., 209 N. Jefferson St., Marianna, FL 32446; COFFMAN, COLEMAN, HENLEY & ANDREWS, P.O. Box 40089, Jacksonville, FL 32203; J. ROBERT McCLURE, JR., ESQ., P.O. Drawer 190, Tallahassee, FL 32302, this 28 day of September, 1983.

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