O/A 1-13-84

IN THE SUPREME COURT OF FLORIDA

PALM BEACH JUNIOR COLLEGE,
BOARD OF TRUSTEES,

Petitioner,

vs.

UNITED FACULTY OF PALM BEACH
JUNIOR COLLEGE,

Respondent.

_____/

CASE NO. 63, 352
DISTRICT COURT OF APPEAL
1st DISTRICT NO. AF-17

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S POSITION

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STATEMENT OF THE CASE

The Board of Trustees of Valencia Community College hereby adopts the statement of the case contained in the Petitioner's Initial Brief.

STATEMENT OF THE FACTS

The Board of Trustees of Valencia Community College hereby adopts the statement of the facts as contained in Petitioner's Brief.

ARGUMENT

INTRODUCTION

In its decision below, which was affirmed by the First District Court of Appeal, the Public Employees Relations Commission ("PERC"), in a case of first impression, established two untenable propositions of law. The first of these is that a management rights clause is not a mandatory subject of bargaining, and therefore, it is per se an unfair labor practice for public employers to bargain to impasse over such a clause. The second is that PERC has the authority to impose a collective bargaining agreement on the parties as a remedy for an unfair labor practice. The basis for PERC's decision is that both conclusions are necessary to cure an imbalance in bargaining power between public employees and public employers due to the Florida constitutional prohibition against public employee strikes contained in Article I, Section 6, and the statutory impasse resolution procedure contained in Section 447.403, Florida Statutes. Germane to PERC's decision is the philosophy that the strike prohibition must be counterbalanced by the creation of employee bargaining rights not found in the Florida Constitution or statutes, nor in the precedent of federal or state labor relations case law.

The majority of the First District Court of Appeal agreed with PERC's decision on the broad premise that the Court should accord substantial deference to PERC's interpretation of the statute and decline to overturn it, except for the most

cogent reasons, or unless clearly erroneous, unreasonable, or in conflict with some provision of the state constitution or the plain intent of the statute. However, Amicus submits that in this instance, where an administrative agency has, as a matter of first impression, made a major policy decision on a question of law without relying on definitive statutory language, the appropriate standard of review is the broader one enunciated in Pasco County School Board v. PERC, 353 So. 2d 108, 116 (Fla. 1st DCA 1977) and in NLRB v. Brown, 380 U.S. 278 (1965).

In the alternative, there are "cogent reasons" to hold PERC's decision erroneous, unreasonable and in conflict with the provisions and intent of the statute and the constitution.

I. PERC AND THE FIRST DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT A MANAGEMENT RIGHTS CLAUSE IS NOT A MANDATORY SUBJECT OF BARGAINING.

First, if in fact an imbalance exists in the bargaining power between public employees and public employers, the problem is one which should be addressed either by amendment of the Florida Constitution or by legislative action amending the Public Employee Relations Act ("PERA"). Neither PERA itself nor the precedential case law supports the authority of PERC to make such far reaching policy judgments, especially in light of the statutory warning against the presumption that the Florida Legislature encourages public employee collective bargaining. See, §447.201, Fla. Stat.

Secondly, PERC refused to follow federal private labor relations precedent as established in National Labor Relations Board v. American National Insurance Co., 343 U.S. 395 (1952), and concludes rather that management rights clauses are not mandatory bargaining subjects. This conclusion is not founded upon a rational analysis of the statutory language or relevant case law but rather upon the political and policy rational of equalizing bargaining power. PERC reasons that since one of the parties is deprived of "meaningful economic weaponry," a long standing custom and practice in labor relations is justifiably ignored.

At first blush, this lopsided logic has a certain equitable appeal. However, PERC's analysis of the impact of the constitutional strike prohibition is an intellectually dishonest characterization of the true nature of the differences, or lack thereof, between public and private labor law. In its myopic focus on the lack of economic weapons available to public employees vis-a-vis private employees, PERC conveniently ignores the concurrent disadvantage to public employers vis-a-vis private employers. While public employees may not have access to the strike weapon, public employers are likewise precluded from use of economic weapons available to private employers, such as lock-outs, lay-offs and in the most extreme circumstances, plant closures. Thus in terms of economic weaponry, the parties actually stand on equal ground.

PERC also fails to consider that the strike weapon has not proven to be a significant union defense to management rights clauses. As Petitioner demonstrates in its brief, private employers regularly obtain such clauses in collective bargaining agreements regardless of private employees strike capacity.

Moreover, public employees often enjoy a much greater degree of job security even without collective bargaining agreements than do private employees (e.g. tenured faculty members of public schools and universities).

Thus, through this shroud of "fairness," the more discerning eye perceives PERC's thumb pressed down on the employees' side of the scale in direct contradiction to PERC's assertion that the Florida law was not enacted for the benefit of unions or employers (PERC order, at 5).

PERC notes in its order that it was necessary for the legislature to provide sufficient counter-balancing factors to ensure meaningful collective bargaining, a broad scope of bargaining subjects being one of those factors. (PERC order, at 5). PERC cites no statutory provision nor bit of legislative history to support this conclusion. More importantly, PERC implies that requiring bargaining over management rights clauses somehow narrows the scope of bargaining. This is an impractical conclusion. A management rights clause necessarily involves bargaining on a broad range of topics. The only difference between PERC's position and that of Petitioner and Amicus is the timing of that bargaining.

Again, PERC lacks authority to so blatently usurp the role of the legislature. The legislature drafted and enacted PERA with full knowledge and endorsement of the strike prohibition. See, §447.201(4), .505 - .506, Fla. Stat. Yet the legislature made no counter-balancing provision for broader bargaining rights than those contained in the National Labor Relations Act ("NLRA") which the language of PERA tracks. Rather, the legislature chose to strengthen that prohibition by providing specific remedies for its violation. See, §447.507, Fla. Stat. Clearly, PERC acts not only without authority in this matter, but in direct contravention of legislative language and intent.

The rule of American National, permitting employers to insist upon a reasonable degree of management freedom, after negotiating specific language to cover any and all union concerns, serves a legitimate management need, which translates in the Florida public sector, to a compelling public need.

The Supreme Court recognized this need in First National Maintenance Corp. v. N.L.R.B., 452 U.S. 670 (1981):

> Management must be free from the constraints of the bargaining process to the extent essential to the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability

> of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

First National was a private sector case, where the employer would not have to go through a protracted impasse resolution procedure before taking action, but would merely have to bargain in good faith in order to become eligible to act. The public employer, such as Amicus, likewise has a legitimate need for flexibility and the ability to act with reasonable speed with reference to a myriad of exigencies which are just as real as any private business exigency. The need to assign work, make and implement schedules which change from term to term and after each registration period (classes may have to be dropped or added), transfer people from campus to campus or building to building in each of the four yearly terms, none of which is predictable as to enrollment or subject demands, to go forward with new programs to meet community needs or requests, to hire and assign new instructors, to promote others, and to terminate or retire instructors are just a few needs that college administrations must address routinely and during a union contract term. Decisions must be made almost daily affecting employment interests. Examples are treatment of requests for paid and unpaid leave, selection of candidates for sabbaticals, and regulation of the use of facilities. The list is endless, and a union, under the Commission's decision, can preclude the Board from insisting upon the resolution of any such question during contract bargaining. It can

limit the contract to the subjects chosen by it, and can thereafter preclude the college from acting in any other area for as long as five or six months, far longer than could have been the case in First National, by prolonging bargaining and the impasse resolution procedure as much as possible.

PERC's reaction is to say that the employer can avoid delay by acceding to whatever position is taken by the union, a special interest representative (Order, p. 9-10). Here, the legislative scheme is turned upside down; instead of bargaining followed by legislative action to resolve disagreements, we are apparently to have bargaining followed by union action to mandate a resolution on pain of protracted delay. Where is this written in PERA?

This Court should carefully consider the impact both on the financing and efficiency of public employer operations before glibly following suit in affirming PERC's order. Management rights is certainly within the plain language of Section 447.309(1) Fla. Stat. and especially touches the heart of one of the espoused purposes of PERA: ". . . to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." §447.201, Fla. Stat.

Thus, it is apparent that not only is PERC's policy basis for its order unfounded, but there are overriding policy considerations which should dictate that PERC follow case precedent and the statutory language of PERA.

In its affirmance, the First District Court of Appeal found that there was competent substantial evidence and legal foundation for PERC's holding that insistence to impasse on a management rights clause is an unfair labor practice. This conclusion begs the bigger question and is only logical if: (1) we concede that the proper standard of review was applied and (2) PERC's classification of management rights clauses as non-mandatory, because of the strike prohibition, is acceptable.

Amicus has already submitted that the standard of review in this case was improper.

Amicus now submits that the non-mandatory classification is in error. First, PERC unlawfully amends the Florida Constitution. In Dade County Classroom Teachers Association v. Ryan, 225 So. 2d 903 (Fla. 1969) and again in City of Tallahassee v. Public Employees Relations Commission, 410 So. 2d 487 (Fla. 1981), the Florida Supreme Court held that except for the right to strike, public employees have the same bargaining rights as private employees by virtue of Article I, Section 6 of the Florida Constitution. Obviously then the rule of Ryan and City of Tallahassee created rights for public employers as well. If the bargaining rights of public employees are the same as those of private employees, they can be no greater than those of private employees. It follows that PERC has no authority to abridge the constitutional bargaining rights of Florida public employers by expanding the reciprocal bargaining rights of public employees.

PERC does not, at any point in its decision, take cognizance of, or attempt to deal with, the fact that Florida public employers' bargaining rights are also constitutionally defined. It deals only with, and depends entirely upon, legislative intent as discerned by PERC. Legislative intent as this Court held in City of Tallahassee v. Public Employees Relations Commission, 393 So. 2d 1147 (Fla. 1st DCA 1981), even if accurately divined, cannot alone justify the abridgement of constitutional bargaining rights.

The Supreme Court of Florida has made it clear beyond question that Florida statutes adopted from other jurisdictions are governed by authoritative constructions placed upon them in those jurisdictions as of the time of their enactment by the Florida Legislature. See, State v. Aiuppa, 298 So. 2d 391, 394 (Fla. 1974). The provisions of PERA defining the scope of bargaining subjects are identical to those contained in the NLRA. See, Ch. 447, Fla. Stat.; 29 U.S.C. §141, et seq. Thus, decisions construing the NLRA are equally applicable to PERA. Pasco County School Board v. PERC, 353 So. 2d 108, 116 (Fla. 1st D.C.A. 1977).

PERC's decision flies in the face of the precedent established in American National that under the National Labor Relations Act, bargaining to impasse over a management prerogatives clause is not per se an unfair labor practice since management rights are a mandatory subject of bargaining. PERC's only basis for departure from the American National holding is its

"counter-balance the strike prohibition" rational. Since PERC has no power to make such a judgment, it has clearly exceeded its authority in attempting to remove the subject of management's rights from the definition of mandatory bargaining subjects provided in the Florida Constitution, as applied by this Court, in order to effectuate a power balancing formula of its own. Indeed, the American National Court's admonition to the NLRB that it was without power to disrupt collective bargaining practices, which have evolved in this country's labor movement is equally applicable to PERC. American National at 408.

This is not the first case in which PERC has sought to circumvent this rule by professing to discern in the PERA some legislative intent allowing it to strike a balance between competing interests in accordance with its own precepts:

> PERC admonishes against "slavish adherence" to NLRB precedent and offers many reasons why we should consider that Florida's public sector labor policy embodied in PERA justifies PERC's decision in this case, which PERC describes as a "correct balancing of competing public interest in accordance with Florida public sector labor policy." (School Board of Polk County v. Florida Public Employees Relations Commission, 399 So. 2d 520, 522 (Fla. 2d DCA 1981)).

However, neither the Second District Court of Appeal cited above, nor the First District Court of Appeal cited below, have been easily persuaded of the existence of such policy, and have declined to permit PERC to make unauthorized policy decisions on that rational:

> . . . courts should not "slip into . . . judicial inertia which results in the unauthorized assumption by an agency of major policy decisions . . . ." American Ship Bldg. v. Labor Board, 380 U.S. at 318, 85 S.Ct. at 967. (Pasco County School Board v. Florida Public Employees Relations Commission, 353 So. 2d 108, 116).

That PERC's decision in the instant case is a major policy decision is undeniable. (DCA op. at 13). Thus, even if the rights involved were not constitutional, PERC's interpretation of Section 447.203(14), Fla. Stat. would necessarily be in error under the rules of American National Insurance, Ryan and City of Tallahassee.

The First District Court of Appeal cited with favor PERC's bogus policy reasons for its decision. However, the court added insult to injury by tossing in three superficial arguments of its own.

It first attempts to distinguish American National on factual grounds. Finding the management rights clause in American National to be different in form from that presented in the instant case, the court concludes American National is inapplicable. The implication being that a specific management rights clause is acceptable but a general one is not. The error of this approach is that neither the courts nor PERC has the authority to determine the substance of the terms of the contract. American National, supra, at 404.

The court goes on to bolster its illogical departure from precedent with citations to numerous inapplicable federal

cases (D.C.A. op. at 9-10). None of the cited cases deal with bargaining over a management rights clause. The cited cases deal rather with management's refusal to bargain over impact decisions where the collective bargaining agreement did not contain a management rights clause. The American National Court stated that the NLRB had no authority to determine the desirability of the substantive terms of a collective bargaining agreement. PERC also has no such authority. The District Court by its affirmance on such specious grounds is permitting PERC, not the parties to draft the agreement.

Finally, the District Court, although conceding that federal case law is persuasive authority, asserts a right to reject that precedent when the two acts follow divergent courses. In addition to the right to strike, the court finds divergence in that the NLRA does not compel any agreement between the parties, whereas PERA does. Unfortunately for us, the majority of the court fails to reveal the basis for this serendipidous conclusion, but as Judge (now Justice) Shaw pointed out in his dissent, this conclusion has no basis. (D.C.A. Op. Shaw, J., dissenting, at 20-21).

Contrary to the District Court's implication, the impasse procedure of Section 447.403(4)(d), Fla. Stat. does not permit the legislative body to compel agreement but merely to prescribe the contents of the agreement which the parties are then free to accept or reject. The legislative body of the public employer has no authority to implement a management's

rights provision. Section 447.203(14), Fla. Stat. clearly states that neither party shall be compelled to agree. Such is the statutory scheme designed by the legislature and neither PERC nor the courts have the power to amend PERA to achieve some independent goal.

II. PERC MAY NOT REMEDY AN UNFAIR LABOR PRACTICE BY COMPELLING AN AGREEMENT BETWEEN THE PARTIES.

By forcing management to offer the union a contract as agreed upon to the point of impasse, sans the management rights clause, PERC has grossly overstepped its authority. Preliminary negotiations and tentative agreement, without ratification as required by statute, do not make a contract. As noted before, PERC has no authority to dictate the substantive terms of the agreement. It is the parties, not the regulatory agency, which should draft the contract. In so doing, PERC violates the very prohibition asserted above against the legislative body. At least the legislative body acted pursuant to express legislative authority in PERA. As Justice Shaw pointed out, PERC's assumption of this task on policy grounds is contrary to statute and case law. (DCA op. at 23). The most PERC's authority would permit it to do in these circumstances is to send the parties back to the bargaining table.

Furthermore, such a remedy ignores the practical aspects of the negotiation process in that it is unlikely that many of the public employer's bargaining concessions would have

been made absent the requirement of the management rights clause as a quid pro quo. The remedy of forcing the parties to sign a contract imposed by PERC, has no precedent in the law and is clearly erroneous, even assuming the finding of an unfair labor practice was proper.

CONCLUSION

PERC's decision and the First District Court's affirmance has no sound basis in law, either constitutional, statutory or decisional, nor in public policy. The decisions are, in fact, in direct derogation of the Florida Constitution, Chapter 447, Part II, Fla. Stat. and well established labor relations policy and practice. Amicus respectfully requests this Court to reverse the decision of the First District Court of Appeal and find that no unfair labor practice was committed and that PERC is without authority to impose an agreement on the parties.

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, Florida 33134; C. ANTHONY CLEVELAND, ESQ., General Counsel, FEA/United, 208 West Pensacola Street, Tallahassee, Florida 32301; CHARLES F. McCLAMMA, ESQ., Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301; HONORABLE RAYMOND E. RHODES, Clerk, Supreme Court Building, Tallahassee, Florida 32301; W. REYNOLDS ALLEN, ESQ., 609 W. Horatio Street, Tampa, Florida 33606; RICHARDS, NODINE, GILKEY, FITE, MEYER & THOMPSON, 1253 Park Street, Clearwater, Florida 33516; LORENZ, LUNGSTRUM & HEFLIN, P. O. Box 1706, Ft. Walton Beach, Florida 32549; MATHENY & BREWER, P. O. Box 6526, Titusville, Florida 32780; HARLLEE, PORGES, BAILEY & DURKIN, 1205 Manatee Avenue West, Bradenton, Florida 33505; MARIAN P. McCULLOCH, ESQ., 1200 Freedom Federal Building, 220 Madison Street, Tampa, Florida 33602; RICHARD WAYNE GRANT, ESQ., 209 N. Jefferson Street, Marianna, Florida 32446; COFFMAN, COLEMAN, HENLEY & ANDREWS, P. O. Box 40089, Jacksonville, Florida 32203; J. ROBERT McCLURE, JR., ESQ., P. O. Drawer 190, Tallahassee, Florida 32302; and CHESTER B. GRIFFIN, ESQ., NEILL GRIFFIN JEFFRIES & LLOYD,

Chartered, P. O. Box 1270, Fort Pierce, Florida 33454, this 10 day of October, 1983.

Rosemary O'Shea

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