O/A 1-13-83

STATE OF FLORIDA

BEFORE THE SUPREME COURT

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES,

Petitioner/Appellant,

vs. CASE NO. 63,352

UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE,

Respondent/Appellee.

AMICUS BRIEF OF

DISTRICT BOARD OF TRUSTEES OF

TALLAHASSEE COMMUNITY COLLEGE

Appeal of Decision of
The First District Court of Appeal,
State of Florida
425 So.2d 133
(Rehearing Denied Feb. 4, 1983.)

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INTRODUCTION

The District Board of Trustees of Tallahassee Community College (hereinafter referred to as the "District Board of Trustees") files this brief as amicus curiae and urges reversal of the First District Court of Appeal's decision and remand to the Public Employee Relations Commission with instructions to dismiss the unfair labor practice charge which initiated this litigation.

The Statement of the Case and of Facts as contained within the briefs of the parties set squarely before this Court that issue which creates great concern to this amicus and that is the scope of authority which the Public Employee Relations Commission has arrogated to itself to dictate the terms of a collective bargaining agreement and the effect of the judicial approval gained from the appellate court's decision.

The second question of great importance to those public bodies and labor organizations involved in the public collective bargaining process is the scope of judicial review of the decisions of administrative bodies and the distortion of the principle of a preferential deference to such agencies because of a presumed expertise enjoyed by those appointed to such bodies, when such expertise may be woefully inadequate or totally non-existent.

The third point to be discussed by this amicus is the argument below that the absence of the right to strike by

public employees is a constitutional grant of the authority to PERC to write the terms of the contract through the guise of remedying an unfair labor practice committed by an employer. We suggest this argument is without merit.

Each of these issues will be discussed seriatim.

I. DOES THE PUBLIC EMPLOYEE RELATIONS COMMISSION HAVE THE AUTHORITY TO WRITE A COLLECTIVE BARGAINING CONTRACT FOR PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES?

If this Honorable Court should give even perfunctory approval to PERC's self-proclaimed role as the arbiter and judge of what constitutes appropriate terms and conditions of a collective bargaining agreement, then the goal of achieving meaningful and stable relationships between public employers and employee bargaining agents will be severely crippled.

The first error that PERC has made has been to decide what subjects of bargaining should be classified as "mandatory" i.e., restricted to wages, hours and working conditions or those deemed "permissive" i.e., all others, and thereafter dictate differing legal consequences when there is bargaining to impasse.

The erroneous assumption of dividing subjects of bargaining into sometimes arbitrary categories is the inability of the agency to acknowledge the importance of the issue on the bargaining table to the proposing party. Collective bargaining is a fluid process, changing with the effects of economics,

goals, efficiency, management, productivity and philosophy. A previous bargaining overture on a low-priority item may become the most controversial issue at the next round of negotiations and it may not fit neatly into an administratively perceived "mandatory" area of wages, hours or working conditions. It may be critical - but if it is not "mandatory", its validity is lost under the mechanical PERC analysis of topics by classification of what is meaningful and what is not.

The factual context of this case ably demonstrates the deficiency of such a robotic approach of what is a mandatory or a permissive subject of bargaining with the consequence of an unfair labor practice remedy that edits the contract. Clearly, Palm Beach wanted a management rights clause that would avoid the effect of School Board of Orange County v. Palowitch, 367 So.2d 730 (4th DCA 1979) which is a misleading decision and should be restricted to its facts. It may be true, as Palowitch suggests, that parties are incapable of negotiating a contract that cannot anticipate every vagary of change during its term . . . but that is the responsibility of bargaining. That is what collective bargaining is all about. Neither employers nor unions should be plagued with months of intensive bargaining, conclude a contract, and then be met by demands from management staff or bargaining unit employees for interim changes because certain items on the "shopping list" were overlooked.

Therefore, the management rights clause upon which Palm Beach insisted was not bad faith bargaining, nor did it continue to be so after it was "imposed" upon the union by the Board of Trustees. The union could say "no", or more practically, the union could have continued to negotiate to compress the scope of management action. Because the union did not press its own list of restrictions, nor provide language in the remainder of the contract to protect its interests, there is now a trend in Florida law which encourages unions to bargain over safety and health, bulletin boards, union visitation rights, physical examinations and the color of the walls in the school or lunch-room. Unions can now leave to PERC, through the unfair labor practice process, the liberty to write contract terms for hourly rates or annual salaries, vacations, holidays, overtime, sick leave, pension plans, merit bonuses, job classifications and the oft-referenced "bottom of the line items" that constitute the nuts and bolts of hard bargaining.

To suggest that the Palm Beach management rights clause derogates from the union's duty to protect employee rights misses the entire point of what the collective bargaining process envisions and the purpose it was designed to serve. Unions are not restricted to whom they use as their bargaining representatives. Management has no monopoly over the employment of sophisticated labor lawyers. Florida has recognized the rights of teachers to bargain collectively since 1959,

FSA 839.221 (Chap. 59-223); see Dade County Classroom Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969).

This equality of bargaining expertise belies the unfortunate statement articulated in the Hearing Officer's report to the effect:

> "But to the extent that unforeseen contingencies arise, insisting that no bargaining take place to resolve such unforeseen contingencies represents a lack of good faith in the negotiating process." 425 So.2d 137 (emphasis supplied).

This observation is encapsulated within its own compassion. But it's not the theory or practice of collective bargaining. It discourages the hard work of the parties reaching finality, working with specific language and negotiating across the wide spectrum of bargaining topics. And, here, with the imprimatur of the appellate court, PERC has now determined that it will make judgments as to how the contract will read, given the opportunity provided by a charge of a refusal to bargain in good faith.

The dichotomy of "mandatory" and "permissive" bargaining subjects was dealt with in N.L.R.B. vs. Wooster Division of Borg-Warner Corporation, 356 U.S. 342, 78 S.Ct. 718 (1958) where the Supreme Court held, 5-4, that an employer's insistence upon excluding the International Union from the recognition clause of the contract and insisting upon a pre-strike vote by the employees as to the employer's last offer was a refusal

to bargain. The employer was clearly wrong on the recognition issue since the International Union had been certified by the NLRB as the bargaining representative. However, the majority held that each proposal was lawful in itself but the company could not insist upon them as a condition of agreement, notwithstanding the conclusion that the company had bargained in good faith, and the parties had concluded a contract.

A strong dissent was written by Justice Harlan in which he stated,

> "I fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it." 356 U.S. at 351.

The Board's remedy was to require further bargaining by the parties and to desist from refusing to acknowledge the International Union as the certified bargaining agent, which the law clearly requires.

However, the NLRB then took the next "logical" step which was to fashion as a remedy for an employer's refusal to bargain the requirement that the employer agree to a "checkoff" provision, proposed by the union, whereby union dues would be deducted from the pay of bargaining unit employees, clearly a non-mandatory subject of bargaining. The Supreme Court denied enforcement of this remedy as a clear overreaching of the Board's authority, H. K. Porter Company v. N.L.R.B., 397 U.S.

99, 90 S.Ct. 821 (1970). Justice Frankfurter, for the majority, wrote:

> "In reaching its decision the Court of Appeals relied extensively on the equally important policy of the Act that workers' rights to collective bargaining are to be secured. In this case the court apparently felt that the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most important demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace that the Act is designed to further. But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process." 397 U.S. 108-109.

To the suggestion that impasse resolution puts public employees in a weak bargaining position because there is no balancing right to strike, we have discussed this issue in Point III, infra. Two additional observations must be made: (1) As Justice Frankfurter said, this is a matter to be left to the legislature, and (2) it is the responsibility of the

public bodies to manage. Section 240.319(n) places the burden upon the Board of Trustees of each community college to "provide . . . compensation, including salaries and fringe benefits, and other conditions of employment" for its employees, coupled with its obligation to bargain collectively when dealing with a certified labor organization.

Finally, as indicated previously, it takes two sides to reach impasse. The union is free to avoid that stalemate by vigorous prosecution of its bargaining rights.

II. THE STANDARD WHICH THE DISTRICT COURT USED TO REVIEW PERC'S ORDER WAS INCORRECT

The standard of review utilized by the District Court was erroneous, and therefore that Court's decision should be overturned. The District Court, in reviewing PERC's interpretation of PERA, accorded "substantial deference" to the administrative agency, and required that appellant show that the agency's decision was either "clearly erroneous" or "unreasonable" before the Court would overturn the decision. Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (1st DCA) at 136. Such a standard of review was incorrectly applied to PERC's interpretation of Florida law.

The proper scope of review which should be applied to an administrative agency's interpretation of law is that standard set out in Pasco County School Board v. Florida Public

Employees Relation Commission, 353 So.2d 108 (Fla. 1st DCA, 1977). In Pasco County, the court deferred to PERC's factual determinations, but instituted a wholesale review of PERC's legal conclusions. Although an administrative agency, such as PERC, is especially suited to establish the facts involved in a controversy, courts should not defer to agencies' legal conclusions in the same manner as they defer to factual determinations. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions . . . ." American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, 85 S.Ct. 955, 967 (1965).

The National Labor Relations Board has existed for almost fifty years. Its members are subject to intense scrutiny by Congress, and it is a rare appointment that escapes without a bruising debate concerned with the appointees' qualifications. It has consisted of lawyers, professors and newspaper reporters. As indicated in H. K. Porter, supra, the courts have become overly sensitive to attempts by the Board to invade the legislative field.

PERC is a relatively new agency and has neither the history nor the years of seeking a justiciable accommodation of the rights of the public employees or public employers. Therefore, greater caution should be exercised in judicial review of this agency's orders, lest Florida develop a body of

decisional law that thwarts the intent of the legislative scheme in balancing the interests of the first client to be served . . . the tax-paying public.

III. DOES THE ABSENCE OF THE RIGHT TO STRIKE BY A PUBLIC EMPLOYEE LABOR ORGANIZATION PROSCRIBE THE RIGHT OF FREE COLLECTIVE BARGAINING?

Notwithstanding the theatrical appeal that a public employees union, denied the right to strike under Article I, Section 6 of the Florida Constitution, is thereby strategically impoverished in the power struggle at the bargaining table, the argument has little currency in the statutory scheme of public sector negotiations.

Public employee unions have never had the right to strike under Florida law. However, public employees never had the right to require a public employer to bargain collectively and obtain dispute resolution until the constitutional revision of 1968.

In Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (S.Ct. 1946), Justice Sebring held that Chapter 447 of the Florida Statutes was not intended to establish rights and obligations for public employees and public employers. The term "employees" applied only to persons working in the private sector who were not then covered under the Labor Management Relations Act, as amended, 1947.

Notwithstanding this construction of Chapter 447, the Legislature refused to modify the statute until it enacted the Public Employees Relations Act of 1974. What PERA did was not to remove the economic sanction of a strike theretofore enjoyed by public employees, but it did provide a certification process by which employees could require public employers to sit down and bargain, Ryan, supra, which was not a legal obligation previously imposed upon this group. Although some public employers had voluntarily undergone collective bargaining with unions, there was no legal coercion to do so.

Public employees have long enjoyed statutory protection under career service regulations, civil service laws, and local ordinances that never applied to private employees who were subject to layoff, suspension or termination without recourse. The stability of governmental entities and the inherent commitment to serve the public is an economic advantage and a basic obligation that a public employee accepts, not under a threat of impressment or involuntary servitude, but as a unilateral decision to accept the employment in the first instance.

While private sector decisions may not fit comfortably into all of the parameters of public sector bargaining, PERC and some courts have indulged in a curious selection process of what law shall be used to accomplish what appears to be a desirable conclusion of the moment. No one seems to acknowledge that the strike weapon is designed to destroy the business of

the employer. While it may be employed during the private negotiations when the contract has expired, the public union has the balancing thrust of forced resolution of disputes through statutory recourse for which there is little interest in the private sector. To further highlight the lack of contrast between the strike in the private and public sectors, the public employer cannot use a shutdown of its operations to exert economic pressure, or a lockout, against the public employee group.

The right to strike during the contract term may be and normally is waived by the union in exchange for the non-militant resolution of disputes through the grievance and arbitration procedure. In Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (S.Ct. 1957), the Supreme Court stated, "Plainly the agreement to arbitrate the grievance disputes is the quid pro quo for an agreement not to strike." 353 U.S. at 451.

The provisions of F.S. §447.401 clearly dictate that the public employer and the union shall negotiate a grievance procedure with a terminal step of arbitration. There is no choice. Therefore, the Legislature has already provided public unions with rights to arbitration that is not required of private employers who eschew arbitration in favor of gambling on a union's unwillingness to strike.

Therefore, the argument that loss of the right to strike creates such an imbalance that PERC must protect employee rights through unfair labor practice procedures is neither predicated in history, fact or law and the justification for this distortion done to the collective bargaining process must be rejected by this Court once and for all.

CONCLUSION

This amicus does not contend that public employers can dictate a collective bargaining agreement by impasse resolution and preempt a certified bargaining agent's right to negotiate. Were this so, there would be no collective bargaining and this clearly contravenes the law. It would appear the union's action in filing the charge with PERC and PERC's order and remedy were premature and this case should be either remanded for the entry of an order requiring additional bargaining or dismissal. However, for the reasons advanced in this brief, this Court should direct PERC to limit its authority to that prescribed and intended by the statute and fashion its remedies in compliance with that mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. mail, upon Jesse S. Hogg, Esq., 121 Majorca Ave., Third Floor, Coral Gables, FL 33134; C. Anthony Cleveland, Esq., General Counsel, 208 W. Pensacola St., Tallahassee, FL 32301; Charles F. McClamma, Esq., PERC, 2600 Blair Stone Road, Suite 300, Tallahassee, FL 32301; Honorable Raymond E. Rhodes, Clerk, Supreme Court Building, Tallahassee, FL 33606; W. Reynolds Allen, Esq., 609 W. Horatio St., Tampa, FL 33606; Richard F. Trismen, Esq., 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; Richard Wayne Grant, Esq., 209 N. Jefferson St., Marianna, FL 32446; Coffman, Coleman, Henley & Andrews, P.O. Box 40089, Jacksonville, FL 32203; Marian P. McCulloch, Esq., Greene, Mann, Rowe, Stanton, Mastry & Burton, 220 Madison St., Suite 1200, Tampa, FL 33602; and Chester B. Griffin, P.O. Box 1270, Ft. Pierce, FL 33454, this 5th day of October, 1983.

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