O/A 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 FILED IN SUPPORT OF APPELLANT'S POSITION

Prepared By

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TABLE OF CITATIONS

INTRODUCTION

Hillsborough Community College appreciates the opportunity to appear as amicus curiae, and has attempted herein not to be repetitious of Appellant's brief.

ISSUE ON APPEAL

Whether a Florida Public Employer engaged in collective bargaining under Florida Statute, Chapter 447, Part II commits an unfair labor practice by proposing and pursuing to and through impasse a management prerogatives clause?

ARGUMENT

This is an amicus curiae brief filed by Hillsborough Community College in support of Appellant's position. It is our position that the decision of the First District, affirming an order of the Public Employees Relations Commission is in error and should be reversed upon review by this Court. Since the First District decision has affirmed PERC's order, and since the facts in the case were stipulated and are not at issue, amicus will address the merits of PERC's decision and holding. Specifically, amicus contends that the First District's decision which rests upon PERC's order is in error where PERC has held that it is an unfair labor practice for management to bargain to impasse over a management prerogatives clause, and has then imposed a collective bargaining agreement on management as a remedy for the unfair labor practice, under the rationale that PERC must create a public labor policy to equalize the bargaining power of the public employer and employee. PERC predicates its policy-making on its determination of an imbalance of bargaining power created by the constitutional prohibition against public employee strikes, and the impasse procedure contained in Florida Statute Sec. 447.403.

Crucial to the Commission's reasoning then is that the prohibition of the right to strike must be offset by providing the employees with additional rights which are not contained in the Florida Statutes or Constitution.

In Judge Shaw's dissenting opinion he has already noted that when an imbalance is created by the Constitution or Act, it is better addressed by the Legislature. Additionally, it should be recognized that despite the constitutional prohibition, public employees do strike, and this Court should take judicial notice of "Blue Mondays," a phenomena not unknown in the public sector. More importantly, in balancing the rights of public employers and public employees, even where the employees follow the letter of the law, and do not go out on strike, they have at their disposal the power of the press and the political machinery to garner both support and sympathy, which they wield far better than management. In redressing the imbalance PERC undertakes a policy decision without considering the true nature of the bargaining process.

PERC, and the First District's majority, have also determined that federal private labor law, which is normally recognized as persuasive and which holds that bargaining to impasse over a management rights clause is not per se an unfair labor practice, is an inappropriate model for Florida because of the non-availability of the strike as a method of impasse resolution. PERC's incomplete analysis fails to take into account many factors, some of which have been noted in Judge Shaw's dissent. In reality, public employees may enjoy far greater job security than private employees as they may have a constitutionally recognized and protected property interest in their employment which protects them from being terminated at the will of their employer. In addition to Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e, and the other statutory and

constitutional equal employment opportunity laws afforded private employees, public employees may enjoy the protection of other statutes and regulations, as for instance Section 1993, Civil Rights Act of 1971, 42 U.S.C. Sec. 1983, Title IX, Education Amendments of 1972, 20 U.S.C. Sec. 1682, Title VI, 42 u.S.C. Sec. 2000d; the Age Discrimination Act of 1975, 42 U.S.C. Sec. 6101, and the protection afforded by virtue of the Fifth and Fourteenth Amendments. This, of course, is not meant to be an exhaustive list of advantages held by public employees but it demonstrates some of the rights of public employees not discussed or considered by PERC.

This is a case of first impression in Florida. Notwithstanding the persuasiveness of federal decisions construing the National Labor Relations Act (NLRA), PERC and the First District's majority have declined to follow the United States Supreme Court decision in NLRB v. American National Insurance Company, 343 U.S. 395 (1952), reasoning that the case is not on all fours factually, and the distinction that the NLRA, unlike the PERA, "does not compel any agreement whatsoever between employees and employers." 425 So.2d at 138. These reasons are unpersuasive. The reasoning of American National is as equally applicable to public labor law as private. Congress has expressly provided that the NLRB is not to pass upon the desirability of the substantive terms of labor agreements, 343 U.S. at 404, and PERC should stand on the same footing. If harmony and balance in bargaining is the goal of the PERA, the parties to the agreement

need to be satisfied with the bargaining process as well as with the agreement itself.

Here, the Board, not the parties, has determined the propriety of a contractual clause. Like the NLRB, PERC should not sit in judgment upon the substantive terms of collective bargaining agreements. Further, and as will certainly be argued by Appellant, PERC's policy decision and the First District's opinion limiting the subjects of bargaining is in conflict with this Court's decision in Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), holding that except for the right to strike, public employees have the same rights of collective bargaining as are granted private employees, by virtue of the Constitution.

The ruling in the instant case flies directly in the face of the Ryan holding and serves to muddy the waters of public employee collective bargaining in this state. Further, in Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), this Court, in reaffirming its Ryan holding, held that since private employees have the right to collectively bargain as to retirement benefits, public employees must also. Thus, this Court has clearly held that except for the economic weapons specifically prohibited by constitution or statute, the public employee has the same rights of collective bargaining as the private employee. Attendant to these rights are corresponding responsibilities, so it follows that public employees enjoy not only the same rights as private employees, but the same responsibilities. See, Tallahassee v. PERC, supra.

Given this scenario, the holding in the instant case is inconsistent with the broader holding by this Court in Ryan and Tallahassee v. PERC, which are consistent with the law in the area of private employees. NLRB v. American National Insurance Company, supra.

Where PERC has gone too far in fashioning a remedy for the unfair labor practice is in its ordering the College Board of Trustees to rescind its action regarding the impasse and to offer the union a contract including all other negotiated provisions. PERC has cited no authority whatsoever which supports its assumption of the role of arbitrator and as noted in Judge Shaw's dissent, the legislation vesting the authority for impasse resolution in the legislative body of the public employer presumes the opposite. Again, PERC's action is contrary to the well established law in the private sector.

In finding an unfair labor practice in the instant case and in barring the legislative body of the College from mandating the inclusion of a provision waiving the public employees' right to bargain collectively, PERC seems to suggest that the legislative body is somehow biased, or skewed toward management. PERC's action in then itself taking on the role of policy maker and contract arbitrator suggests that it at least considers itself a neutral and disinterested arbitrator of the public interest, equipped to formulate the collective bargaining agreement in this case. PERC's position creates some real problems in light of this case, and in light of the precedent it establishes for all collective bargaining in the public sector.

In usurping the power of the legislative body in impasse resolution and in suggesting that it is biased toward management, PERC has ignored altogether the legislatively created processes which have been established to assure harmony and equalization of bargaining power within the public employer-employee scheme.

Many legislative bodies in this state are comprised of elected officials; one example being city commissioner for a city fire department. Where the legislative body is elected, the union has the opportunity to garner support for and elect city commissioners who support their position. Even where the legislative body is an appointed one, as in the case sub judice, with community colleges in this state, the legislative body is appointed by elected officials. PERC's perception of the legislative body as somehow biased toward management may be a misperception, or if it is true, perhaps the statutory scheme needs to be reevaluated, but by the legislature, not by PERC in the guise of policy making.

The holding of PERC and the First District's majority creates serious and difficult problems for public employers who may have the same need and concern as employers in the private sector; the need for flexibility and the ability to act with speed regarding a variety of exigencies which may arise on a daily basis. The Board of Trustees bargaining conduct in the instant case, in insisting on exercisable management rights is lawful under private sector labor law, and PERC has failed to legitimately demonstrate why the same reasoning should not apply to the public sector.

PERC's holding is inherently destructive of the bargaining process itself and is based not upon established case law or statute, but upon PERC's analysis and perception of the imbalance of power between public employers and employees, the supposed advantages of private versus public employment, the legislative body's intrinsic bias toward management, and PERC's policy decision to equalize the imbalance by itself acting as master arbitrator, despite the legislative and common law scheme.

CONCLUSION

The holding of the First District has created uncertainty in the minds of all public employers who have relied upon this Court's decisions in Dade County Classroom Teachers Association v. Ryan, supra, and Tallahassee v. PERC, supra, and NLRB case law in the federal sector. A ruling allowing insistence on management rights clauses is in keeping with this precedent and is based upon sound considerations of public policy. The decision of the First District affirming the order of PERC should be reversed.

Even if this Court declines to follow the rule of NLRB v. American National Insurance Co., Judge Shaw's scholarly dissent which holds the management prerogatives clause at issue a nullity based upon the grant of legislative authority and declining to find an unfair labor practice is the better reasoned opinion and is in conformance with this Court's prior rulings.

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 32301; 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. Fefferson 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, and Chester B. Griffin, P. O. Box 1270, Ft. Pierce, FL 33454, this 3d day of October, 1983.

Respectfully submitted,

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