O/A 1-13-84

IN THE SUPREME COURT OF FLORIDA

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES,	:	
Petitioner,	:	Case No. 63,352
v.	:	A discretionary proceeding to review a decision of the First District Court of Appeal of the State of Florida in Case No. AF-17.
UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE,	:	
Respondent.	:	

ANSWER BRIEF OF RESPONDENT PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

The Public Employees Relations Commission, a state agency acting in the public interest rather than on behalf of any private person, organization, or entity, was created by the Legislature as an administrative instrument for assisting in the resolution of all questions, controversies, and disputes arising between public employees and public employers under Chapter 447, Part II, Florida Statutes. The Commission participates in judicial review proceedings only if it or the reviewing court determines that such participation is necessary to facilitate the reviewing court's understanding of the policy rationale and legal principles upon which the order under review was based. Fla. Admin. Code Rule 38D-11.09(1).

The Commission determined that the importance and complexity of the legal issue raised in this case jusitified the Commission's appearance as a party appellee in the proceeding before the First District Court of Appeal, and consequently filed a brief and participated in oral argument. The Commission has received all briefs filed to date in the instant review proceeding, and counsel for the Commission has discussed the case with counsel for parties whose briefs remain to be filed.

The Commission's interest in this case differs from that of the adverse parties below. The Commission's concern is that the legal principles involved in this case of first impression receive the fullest consideration, regardless of which party might seem to benefit from the application of those principles in this particular case.

The following designations will be used throughout this answer brief:

Petitioner Palm Beach Junior College Board of Trustees:
"the College";

Respondent United Faculty of Palm Beach Junior College: "United Faculty";

Respondent Public Employees Relations Commission: "the Commission";

The record on appeal: "(R 1)"; and

The College's initial brief: "(IB 1)."

The Commission submits this answer brief in response to the College's initial brief and in support of the Commission's position that the order under review should be affirmed because the First District Court of Appeal correctly interpreted the legal principles applicable to this case.

STATEMENT OF THE CASE

In accordance with Fla. R. App. P. 9.210(c), the Commission must reject substantial portions of the College's statement of the case as inaccurate and unduly argumentative. To specify the areas of disagreement would result in more confusion than clarity. The most economical and reliable method of correcting the inaccurate statements regarding the decision of the Commission below is to quote that decision in pertinent part. The Commission therefore submits the following statement of the case.

This case originated as an unfair labor practice charge filed by the United Faculty against the College alleging a refusal to bargain collectively in good faith. The parties stipulated to all material facts before the hearing officer. The Commission adopted the stipulated facts as its own and agreed with the ultimate legal conclusion recommended by the hearing officer. Among the Commission's conclusions of law were the following two paragraphs finding that the College refused to bargain:

> Inclusion in a collective bargaining agreement of a provision such as Article XXII, Section C, which operates as a waiver of the statutory right to bargain over the effect or impact upon bargaining unit employees of the exercise of management rights prior to the implementation of such management rights or decisions is not a subject over which collective bargaining negotiations are required pursuant to Section 447.309(1), Florida Statutes (1979).
>
> By insisting to and through impasse resolution proceedings pursuant to Section 447.403, Florida Statutes (Supp. 1980), upon the inclusion in any collective bargaining agreement of Article XXII, Section C, or its equivalent, Palm Beach Junior College Board of Trustees has refused to bargain collectively in good faith with the United Faculty of Palm Beach Junior College in violation of Section 447.501(1)(c), Florida Statutes (1979).

The Commission order included an extensive discussion of the appropriate remedy for this violation. The Commission's treatment of the remedy issue is here set forth in pertinent part:

> Because no final agreement has been executed, the College is under no obligation to implement any proposals which were agreed to during negotiations. Florida PBA v. State of Florida, 4 FPER ¶ 4299 (1978). It would therefore be inappropriate to order implementation of any such provisions, especially where the United Faculty has chosen not to submit such proposals for ratification by unit employees. After taking the above ordered actions, however, the College and the United Faculty should proceed in accordance with the requirements of Section 447.403, Florida Statutes (Supp. 1980), as if Article XXII, Section C, had not been included in the special master proceedings, which would have occurred in any case to resolve several other subjects which the parties were unable to agree upon.
>
> Compliance with this aspect of our remedy requires that the College offer to the United Faculty a collective bargaining agreement containing those proposals agreed to in negotiations and those provisions mandated by the legislative body of the College pursuant to Section 447.403(4)(d), excluding Article XXII, Section C. § 447.403(4)(e), Fla. Stat. (Supp. 1980). The College argues that this action is tantamount to compelling the College to agree to a collective bargaining agreement in contravention of Section 447.203(14), Florida Statutes (1979), which provides in part that "neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part." Quite clearly, our remedy does not contravene this provision because it does not require the College to agree to anything that it has not already agreed to voluntarily or has been mandated to agree to by the Board of Trustees acting pursuant to Section 447.403(4)(d). Rather, our remedy simply eliminates from the Board of Trustees' mandate a provision which the College had no right to bring unilaterally before the Board of Trustees as part of the otherwise proper impasse resolution proceedings.

United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees, 7 FPER ¶ 12300 at p. 596 (1981) (Appendix, Exhibit 1).

The College appealed the Commission's order. In a lengthy decision, the First District Court of Appeal affirmed the Commission's order. Palm Beach

Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (Fla. 1st DCA 1983) (Ervin, J.; McCord, J., concurring; Shaw, J., dissenting with opinion) (Appendix, Exhibit 2). The College then filed a notice seeking discretionary review.

STATEMENT OF THE FACTS

This case involves no disputed facts. The parties stipulated to all material facts before the hearing officer, and the Commission adopted the stipulated facts as its own. Unfortunately, the Commission must reject substantial portions of the College's statement of the facts as inaccurate and unduly argumentative. For example, the College states at one point (IB 3): "Experience teaches that a union's resulting ability to freeze the administrative process for months at a time can be the effective equivalent of a veto power. A right to act delayed, like justice delayed, can become a right denied." Such statements are drawn neither from the hearing officer's listing of stipulated facts nor from the summary of facts contained in the decisions of the Commission and the First District Court of Appeal.

The areas of disagreement are so great that to specify them would be more confusing than helpful to this Court. See Fla. R. App. P. 9.210(c). It is more economical to set forth here in full the eighteen factual stipulations recounted by the hearing officer and adopted by the Commission:

> 1. Bargaining between the UF and the Respondent began April 16, 1980.[1]
>
> 2. On June 10, 1980, as part of a package of bargaining proposals, the Respondent presented an addition to its current management prerogatives clause. The newly proposed subsection C of Article XXII provided:

1/ [Hearing officer's footnote.] I take official notice, based upon Commission records, that the UF was certified by the Commission as exclusive bargaining representative of a unit of instructional employees of the Respondent by Certification No. 147 (October 7, 1975). I also notice the Special Master's Report in Case No. SM-81-11 involving the UF and Respondent, issued October 10, 1980.

> Whenever the Employer exercises a right to (sic) privilege contractually reserved to it or retained by it, the Employer shall not be obliged to bargain collectively with respect to the effect or impact of that exercise on individual unit members or on the unit as a group, or to postpone or delay effectuation or implementation of the management decision involved for any reason other than an express limitation contained in this Agreement. (Joint Exhibit 1)

3. The UF and the Respondent reached agreement on 9.5 percent wage increase for unit members on June 10, 1980.

4. At the June 10, 1980, bargaining session, there was no discussion of the proposed Article XXII, Section C because Ms. Ann Steckler, Chief Negotiator for the UF, said she wished to consult with counsel before commenting on it.

5. Prior to October 30, 1980, neither party put any further written substitute proposals or counter-proposals on the table. However, certain alternatives to the proposed language of the Respondent were verbally proposed by the Charging Party on August 14, 1980. The following alternative proposals to Article XXII, Section C were made by the Charging Party:

a. That the Respondent's proposed Article XXII, Section C, be withdrawn;

b. That the Respondent substitute a proposal which would list the subjects which a waiver such as documented in the proposed Section would apply to;

c. That the parties negotiate on such a list to be proposed by the UF, provided that the issue be withdrawn until the parties engaged in negotiations for the 1981-82 contract;

d. That the Respondent agree that all substantive changes be submitted to the bargaining process and other changes be resolved whenever possible by consultation.[2]

2/ [Hearing officer's footnote.] The transcript of testimony, at page 8, incorrectly shows "substitute" instead of "substantive" in setting forth the stipulation on this point. The correct word is "substantive."

6. Regarding proposal (a) above, the Respondent refused to withdraw the proposal, but said it would do so if a substitute satisfactory to the Respondent could be agreed upon.

7. Regarding proposal (b) above, the Respondent declined to attempt the formulation of such a list, stating that it did not believe it could develop an adequate list.

8. As to proposal (c) above, the Respondent responded that it was willing to proceed in this manner only if the matter could be negotiated in the current set of negotiations for the 1980-81 year. The Respondent stated that it still believed that such a list was impossible to formulate.

9. Regarding proposal (d) above, the Respondent responded that the UF could attempt to spell out what was substantive, but that the Respondent still considered it impossible.

10. On June 17, 1980, because the parties had not altered their positions, impasse was declared by the UF.

11. Beginning on July 9, 1980, the services of a mediator were used but the positions of the parties did not change.

12. At a bargaining session of August 14, 1980, no further agreements were reached.

13. On August 28, 1980, Dr. Paul D. Thompson was appointed Special Master by the Public Employees Relations Commission.[3] In his Special Master Report of October 10, 1980, the Special Master recommended that the management prerogatives clause proposed by the Respondent not be included in any collective bargaining agreement.[4]

3/ [Hearing officer's footnote.] The following impasse issues were dealt with by the Special Master: salary increments; insurance coverage; weekend class assignments; retroactivity; maintenance of professional standards; and employer's (management) prerogatives.

4/ [Footnote added.] A copy of the Special Master's Report is included as Exhibit 3 in the Appendix to this answer brief. The Special Master's recommendation against inclusion of the waiver clause at issue is set forth at page 24 of the Special Master's Report.

14. On October 30, 1980, two alternative management prerogatives clauses were suggested by the Respondent. The first alternative proposal stated:

> It is clearly and unmistakably understood by the parties hereto, and agreed, that the reservation or retention of a right, or the existence of a right, under this Article or emanating from some other source, within or independent of this Agreement, comprehends, includes and encompasses the authority, without further bargaining, to act and implement, as well as the right to engage in decision making. It is assumed that decisions lawfully arrived at and which are contractually proper will be so implemented, and questions as to the effects or impacts of such implementations and consequential actions shall not be subject for mandatory bargaining during the term of the Agreement.
>
> The parties also agree, however, to meet and confer, at the request of either, although not to bargain in the legal sense, as to such impacts or effects.

The second alternative proposal stated:

> The right to take unilateral action refers to all rights described in Section A, and is not qualified by or subject to any duty to bargain over the effects or impacts of actions taken or of consequential, reasonable changes in terms or conditions of employment made in consonance with such actions.

15. On November 19, 1980, the Board of Trustees of the Respondent resolved the continuing impasse pursuant to Section 447.403. At that time the Board of Trustees unilaterally mandated that the management prerogatives clause as proposed by the Respondent on June 10, 1980, be adopted.

16. The Respondent offered a proposed contract to the UF and the unit represented by the UF which included a mandated prerogatives clause. No ratification vote has been conducted in the bargaining unit represented by the UF.

17. The Respondent has offered a contract for the 1980-81 year which would include the 9.5 percent salary increase and other resolved matters and is dependent on

the UF and unit members' acceptance of the proposed Section C, Article XXII, management prerogatives clause as proposed on June 10, 1980 and set forth above in paragraph 2.

18. No negotiations have been conducted between the parties since the Respondent's offer of a collective bargaining agreement including the Article XXII, Section C, language.

ARGUMENT

I. THERE IS NEITHER A CONSTITUTIONAL NOR A STATUTORY REQUIREMENT THAT THE COLLECTIVE BARGAINING PROCESS BE IDENTICAL FOR PUBLIC AND PRIVATE EMPLOYEES, THERE ARE MAJOR DIFFERENCES BETWEEN THE FEDERAL AND FLORIDA LEGISLATION ON THE SAME SUBJECT, AND THE WAIVER CLAUSE AT ISSUE IS NOT LIKE THE MANAGEMENT PREROGATIVES CLAUSE IN NLRB v. AMERICAN NATIONAL INSURANCE CO.; THEREFORE, JURISDICTION WAS IMPROVIDENTLY GRANTED AND THE PETITION FOR DISCRETIONARY REVIEW SHOULD BE DENIED.[5]

A. The Supreme Court has never construed the Florida Constitution as requiring that the collective bargaining process be identical for public and private employees.

As part of the constitutional revision of 1968, Article I, Section 6 of the Declaration of Rights was revised to read:

> Right to work.--The right of persons to work shall not be denied or abridged on account of membership or nonmembership 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.

The next year this Court had occasion to give initial construction to this constitutional provision in Dade County Classroom Teachers' Association v. Ryan, 225 So.2d 903 (Fla. 1969).

At issue in Ryan was the constitutionality of Section 839.221, originally enacted as Chapter 59-223, Laws of Florida. This Court held that Section 839.221 satisfied the constitutional requirements of Article I, Section 6:

5/ Argument I is presented in response to the unnumbered arguments at pages 7 through 29 of the College's initial brief. The Commission has restated the issues in order to identify more clearly the legal issues involved in subarguments A through D.

> It is apparent that Section 6 of the Declaration of Rights of the Revised Constitution is in large part a constitutional restatement of the foregoing quoted statutory provision.
>
> Section 839.221 is the current legislative enactment setting forth standards and guidelines for said Section 6. We conclude it is the governing statute spelling out the rights of public school teachers, as well as the authority of the School Board in this area, rather than F.S. Section 230.22(1), F.S.A., or any other statute. Section 839.221 (2) deals directly with the right of collective bargaining of public employees; it appears to us to conform to the language of said Section 6.

Id. at 906. Section 839.221 occupied less than one page in the statute books (see Appendix, Exhibit 4). The Court invited the Legislature to modify and expand upon Section 839.221, but clearly held that its brevity was not a constitutional infirmity:

> We do not find that Section 839.221 is contrary to said Section 6, or denies in any way the rights granted thereunder. Said statute is not immutable, however, and, like any statutory enactment, may be modified by succeeding Legislatures in the light of experience and the needs of the time.

Id. at 906. The Court approved Section 839.221 as at least providing "limited collective bargaining for and on behalf of public employees through a labor organization." Id. at 905.

Three years later this Court repeated its invitation to the Legislature with greater urgency in Dade County Classroom Teachers Association v. Legislature, 269 So.2d 684, 685 (Fla. 1972):

> The petition complains of inaction on the part of the Legislature through three legislative sessions following the decision of this Court in Dade County Classroom Teachers' Association v. Ryan, 225 So.2d 903 (Fla. 1969), in which this Court made clear that, except for the right to strike, our State Constitution guarantees to public employees the same rights of collective bargaining as are granted to private employees. We emphasized, however, that appropriate legislation setting

> out standards and guidelines and otherwise regulating "the sensitive area of labor relations between public employees and public employer" should be adopted by the Legislature.

The Legislature responded with the enactment of Chapter 74-100, Laws of Florida, codified as Chapter 447, Part II.

More recently, this Court considered the constitutionality of two provisions of Chapter 447 which removed from public employers the obligation to negotiate over pensions and other retirement matters. The two provisions were held unconstitutional:

> The two sections, as enacted, affected much more than the "scope" of collective bargaining by public employees. Their practical effect, in barring negotiations on retirement matters, was to eliminate a significant facet of the collective bargaining process. To prohibit bargaining on so important an aspect of an employment agreement is, in our judgment, an abridgment of the right to collectively bargain.

City of Tallahassee v. PERC, 410 So.2d 487, 489 (Fla. 1982). Responding to the suggestion that other sections of Chapter 447, Part II, which establish aspects of a collective bargaining process different from the process established for private employees might also be unconstitutional, the Court went on to explain:

> There is, however, a difference between the sections listed above and the phrases struck by the district court. The former regulate and limit various aspects of collective bargaining, providing an orderly procedure, and are a necessary and proper aspect of chapter 447. The provisions deleted, on the other hand, did not simply regulate a particular aspect of collective bargaining — they prohibited it entirely. Article I, section 6, permits regulation of the bargaining process but not the abridgment thereof.

Id. at 490.

The Court took the opportunity to explain its prior opinion in the Ryan case as follows:

> The opinion does not limit the rights of public employees by reference to a particular statute or in any other way qualify the same, except for the reference to strikes. Rather, it very clearly provides that public employees may collectively bargain on the same matters as may private employees. If private employees may bargain over retirement matters, then under the plain language of Ryan so too may public employees.

Id. at 490. In that portion of its opinion most relevant to the instant case, the Court discussed at length why its opinion should not be viewed by future litigants as requiring that the collective bargaining process be identical for public and private employees:

> In so holding, we do not mean to require that the collective bargaining process in the public sector be identical to that in the private sector. We recognize that differences in the two situations require variations in the procedures followed. The Ryan opinion recognized that the collective bargaining process for public employees involves many special considerations, that it is not the same as the private sector, and that rules and regulations are a necessity:
>
> > In the sensitive area of labor relations between public employees and public employer, it is requisite that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6. A delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process.
>
> Id. at 906.
>
> It would be impractical to require that collective bargaining procedures for retirement matters be identical in the public and the private sectors. We must make sure,

> however, that the constitutional right of all employees to bargain collectively is not abridged.

Id. at 490-91.

A critical premise in the College's argument for reversal in this case is that this Court's Ryan and City of Tallahassee decisions are "parity" holdings which "cannot be read except as clearly confirming the proposition as to parallel meanings" (IB 19). The College contends that the Ryan and City of Tallahassee decisions demonstrate that this Court is "committed to the proposition that the PERA [Chapter 447, Part II] absorbs and approves concepts and practices developed in the private sector under the NLRA"[6] (IB 18), and that this Court has adopted "federal labor law principles established by the federal Supreme Court in NLRB v. American National Insurance Co., [343 U.S. 395 (1952)], and ensuing federal cases" (IB 21).

The College's first premise is faulted because the College gives an unbalanced interpretation to Ryan and City of Tallahassee. The College thus loses sight of the fact that in Ryan this Court upheld the constitutionality of a statute, Section 839.221, which was a far cry from the comprehensive federal NLRA. More significantly, the College's argument discounts this Court's discussion in City of Tallahassee of why the collective bargaining process established by Chapter 447, Part II, "involves many special considerations" and "is not the same as in the private sector" regulated by the federal NLRA. See 410 So.2d at 490-91.[7]

6/ The National Labor Relations Act is codified at 29 U.S.C. §§ 151-69 (1976). The NLRA is included in its entirety as Exhibit 5 of the Appendix to this answer brief.

7/ Scholarly opinion is in accord with the conclusion of the Court in this regard. Summers, "Public Employee Bargaining: A Political Perspective,"

This Court has never held that questions requiring the interpretation and application of Chapter 447, Part II, are to be resolved by the simple application of federal precedent developed under the NLRA. Rather, such questions require the application of more complex principles of construction, as indicated by this Court in Ryan and City of Tallahassee and as set forth in the decisions of the district courts of appeal which are discussed in the immediately following Argument I-B.

> B. A Florida statute will take the same construction as a federal law on the same subject only if it is patterned after the federal law, and if that construction is harmonious with the policy of the Florida legislation.

The above-stated principle was first applied to the construction of Chapter 447, Part II, by the First District Court of Appeal in a seminal decision six years ago:

> If a Florida statute is patterned after a federal law, on the same subject, it will take the same construction in the Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Kidd v. Jacksonville, 97 Fla. 297, 120 So. 556 (1929); State ex rel. Packard v. Cook, 108 Fla. 157, 146 So. 223 (1933).

Pasco County School Board v. Florida PERC, 353 So.2d 108, 116 (Fla. 1st DCA 1977).

7/ Continued.

83 Yale L.J. 1156, 1156-58 (1974) ("Collective bargaining in public employment is different from collective bargaining in private employment") (footnote omitted); Wellington & Winter, "Structuring Collective Bargaining in Public Employment," 79 Yale L.J. 805, 806-09 (1970) (see Appendix, Exhibit 5).

The Second District Court of Appeal has adopted the same standard for construing Chapter 447, Part II, in relation to the federal NLRA, in City of Clearwater v. Lewis, 404 So.2d 1156, 1160 n. 3 (Fla. 2d DCA 1981):

> In interpreting Florida's Public Employees Labor Relations Act, decisions construing similar provisions of the National Labor Relations Act are persuasive but not binding. Pasco County School Bd. v. PERC, 353 So.2d 108, 116 (Fla. 1st DCA 1977).

See also School Board of Polk County v. Florida PERC, 399 So.2d 520, 521-22 (Fla. 2d DCA 1981).

The Third and Fifth District Courts of Appeal have similarly adopted the Pasco County rule for the construction of Chapter 447, Part II:

> Where a Florida statute is patterned after a federal law on the same subject, it will take the same construction in Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of the Florida legislation on the subject.

IBPAT v. Anderson, 401 So.2d 824, 831 (Fla. 5th DCA 1981); see also City of Orlando v. Florida PERC, No. 82-103, slip op. at 5 n. 5 (Fla. 5th DCA June 23, 1983); School Board of Dade County v. Dade Teachers Association, 421 So.2d 645, 647 (Fla. 3d DCA 1982).

There is no dissenting voice from the district courts of appeal regarding the rule of construction announced in Pasco County. Every Florida appellate court which has addressed the issue has expressly followed Pasco County. In its treatment of this question of law (IB 16-17), the College pointedly fails to cite or discuss the rule of construction which has consistently been applied by the district courts of appeal upon review of Commission decisions. The College instead relies upon cases decided prior to the enactment of Chapter 447, Part II. The more recent decisions set forth above are consistent with this Court's analysis of the differences in the collective bargaining

process in public and private employment. Therefore, in light of the Pasco County rule of construction, the question considered in the immediately following Argument I-C must be asked: Is Chapter 447, Part II, patterned after the federal NLRA in parts pertinent to the legal issue presented in this case?

C. There are major differences between Chapter 447, Part II, and the federal NLRA regarding subjects of bargaining, management prerogatives, and impasse resolution procedures.

Considered in isolation, single provisions of Chapter 447, Part II, and the NLRA which specify subjects of bargaining are practically identical. Section 447.309(1), Florida Statutes (1981), specifies "wages, hours, and terms and conditions of employment of the public employees within the bargaining unit." The relevant NLRA provision specifies "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1976). It is this isolated view which permits the College to state (IB 7):

> The Florida Public Employees Relations Act is a copy of the National Labor Relations Act, in the parts with which we are concerned.

The College's focus is too narrow.

The dispute in this case centers upon the College's legislative resolution of an impasse in collective bargaining negotiations which arose when the College insisted upon the addition of a new Section C to the management prerogatives clause from the prior collective bargaining agreement. The purpose and effect of the additional clause was to accomplish a waiver of employee bargaining rights.

Obviously relevant to this dispute are statutory provisions concerning management prerogatives and impasse resolution procedures. The NLRA is silent

with regard to management prerogatives. The subject is a matter of contract, not statute, under the NLRA. In contrast, Section 447.209 sets forth a specific list of fairly broadly conceived rights reserved to public employers:

> Public employer's rights.--It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation.

The proviso to Section 447.209 is of great significance in any comparison of Chapter 447, Part II, with the NLRA. This proviso preserves the force and effect of Section 447.401, Florida Statutes (1981), which provides in pertinent part:

> Grievance procedures.--Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties.

The NLRA contains no counterpart to Section 447.401. Thus, under the NLRA, the existence of a grievance procedure with final and binding arbitration is a matter of contract, not statute. In contrast, such a procedure is a statutory right under Chapter 447, Part II.[8] The exercise of statutory management

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8/ The Commission has held, and the First District Court of Appeal has affirmed, that an employee organization may waive the right to arbitration

rights is conditioned upon the right to grieve an alleged violation of the collective bargaining agreement resulting from the exercise of those management rights.

The NLRA is similarly silent with regard to impasse resolution procedures. In contrast, Section 447.403 provides a detailed and comprehensive scheme designed to encourage agreement through mediation [Section 447.403(1)], appointment of a special master [Section 447.403(2)], discussion by the parties of the special master's recommended decision on each disputed issue [Section 447.403(3)], a public legislative hearing [Section 447.403(4)(a)-(c)], legislative resolution of all remaining disputed issues [Section 447.403(4)(d)], and inclusion of legislatively mandated items and undisputed items together in a proposed collective bargaining agreement to be submitted for ratification. If ratification does not occur, the legislatively mandated items

> shall take effect as of the date of such legislative body's action for the remainder of the first fiscal year which was the subject of negotiations; however, the legislative body's action shall not take effect with respect to those disputed impasse issues which establish the language of contractual provisions which could have no effect in the absence of a ratified agreement, including, but not limited to, preambles, recognition clauses, and duration clauses.

The impasse resolution procedures summarized above, including the involvement of the special master to render recommendations on each disputed impasse issue, are designed

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8/ Continued.

provided in Section 447.401 and preserved by the proviso to Section 447.209. However, a certified bargaining agent cannot be compelled to waive this right through operation of impasse resolution procedures. In re AFSCME, 8 FPER ¶ 13278 (1982), aff'd, 430 So.2d 481 (Fla. 1st DCA 1983).

> with the objective of achieving a prompt, peaceful, and just settlement of disputes between the public employee organizations and the public employers.

§ 447.405, Fla. Stat. (1981). To that end, the legislative body of the public employer is charged with the duty of resolving all disputed impasse issues "in the public interest, including the interest of the public employees involved," rather than acting only in furtherance of its more narrowly conceived interest as a public employer. See City of Orlando v. IAFF, Local 1365, 384 So.2d 941 (Fla. 5th DCA 1980). In contrast, the NLRA nowhere mandates that a private employer act in the interest of the private employees involved.

The principle of in pari materia counsels that Section 447.309(1) be considered together with Sections 447.209, 447.401, and 447.403 in determining whether the College's proposed Article XXII, Section C, constituted a term or condition of employment subject to impasse resolution procedures. See Garner v. Ward, 251 So.2d 252 at 255-57 (Fla. 1971). This principle of statutory construction is especially applicable when construing a statute which is remedial, as is Chapter 447, Part II. IBPAT Local 1010 v. Anderson, 401 So.2d 824, 830 (Fla. 5th DCA 1981). When these provisions of Chapter 447, Part II, are considered together, major differences are manifest between Chapter 447, Part II, and the NLRA.

These differences in the law are useful in explaining the factual differences between the instant case and the case of NLRB v. American National Insurance Co., 343 U.S. 395 (1952), relied upon so heavily by the College. The factual differences between the two cases are set forth in the immediately following Argument I-D.

D. The waiver clause at issue in the instant case arose under different circumstances and is different from the management prerogatives clause at issue in NLRB v. American National Insurance Co.

The alleged similarity between NLRB v. American National Insurance Co., 343 U.S. 395 (1952), and the facts of the instant case constitutes a critical premise in the College's argument for reversal in the instant case. The College asserts that the two cases "are legal twins in terms of the nature of the clauses involved" (IB 9). The Commission did not concede in briefing before the First District Court of Appeal that American National established a rule contrary to the Commission decision in the case under review. The First District Court of Appeal distinguished American National briefly on the facts and at greater length on the law. Close attention to the two cases indicates that the factual differences arise in large part because of differences in the federal and Florida statutory schemes.

The management prerogatives clause as initially proposed in American National read:

> The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and the Company's decision with respect to such matters shall never be the subject of arbitration.

The clause was proposed in direct response to the union's proposal of "provisions calling for unlimited arbitration." 343 U.S. at 397. In response, the employer proposed the clause at issue, listing certain matters and "excuding such matters" from arbitration. 343 U.S. at 397. The employer later altered its proposal to read as follows:

> The right to select and hire, to promote to a better position, to discharge, demote or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration.

343 U.S. at 398. During negotiations the clause remained "an obstacle to agreement." 343 U.S. at 399.

The management prerogatives clause at issue in American National would be extremely unlikely to arise in a Florida public employment collective bargaining situation because unlimited arbitration is statutorily ensured by the joint operation of Section 447.401 and the proviso to Section 447.209 (see Argument I-C). Thus, a public employer would have little basis for resisting a contractual proposal for unlimited arbitration.

How the National Labor Relations Board or the federal courts would rule if the particular clause at issue in the instant case were to arise in the private sector is a difficult question to answer. Research by counsel for the Commission has revealed no private sector case involving a similar unspecified blanket waiver of bargaining over the effects or impact of the exercise of management rights upon all wages, hours, and terms and conditions of employment. The College concedes that the two clauses are different, characterizing the American National clause as a "listing" clause and the College's clause as a "residuary" clause (IB 24-25). The College asserts that there is no conceptual difference between the two types of clauses, and that both are sanctioned

under federal labor law (IB 25). The College cites two cases as support for this proposition (IB 25 n. 20): Texas Industries, Inc., 140 NLRB 527 (1963), and Cranston Print Works Co., 115 NLRB 537 (1956). However, both cases involve "listing" clauses, contrary to the College's assertion. In fact, the clause at issue in Texas Industries is almost a word-for-word copy of the clause at issue in American National, unlike the College's clause. Furthermore, numerous cases demonstrate that where a private employer insists upon a broad waiver of collective bargaining rights, even under circumstances where the waiver is in the form of a "listing" clause, a refusal to bargain will be found under the NLRA.[9]

When the factual differences between the management prerogatives clause at issue in American National and in the instant case (see Argument I-D) are viewed in light of the differences between the NLRA and Chapter 447, Part II (see Argument I-C), it becomes clear that neither the applicable rule of statutory construction (see Argument I-B) nor the principles of constitutional construction set forth in Ryan and City of Tallahassee (see Argument I-A) were violated in the decisions under review. Because the decisions of the Commission and the First District Court of Appeal are completely consistent with the Ryan and City of Tallahassee decisions, rather than in conflict, this Court should find that jurisdiction was improvidently granted, and should therefore deny the instant petition for discretionary review without reaching the merits.

9/ See, e.g., Carbonex Coal Co., 248 NLRB 779 (1980), aff'd, 679 F.2d 200 (10th Cir. 1982); United Contractors, Inc., 244 NLRB 72 (1979), aff'd, ___ F.2d ___ (7th Cir. 1980); Stuart Radiator Core Manufacturing Co., 173 NLRB 125 (1968); East Texas Steel Castings Co., 154 NLRB 1080 (1965); "M" System, Inc., 129 NLRB 527 (1960); Dixie Corp., 105 NLRB 390 (1953).

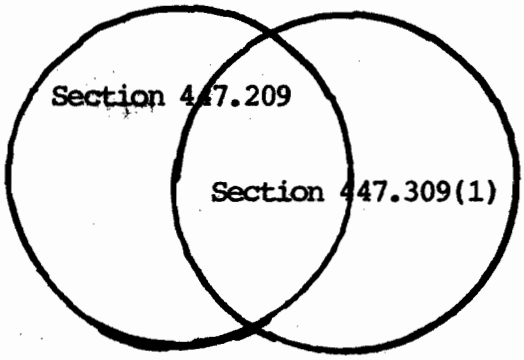
II. THE COMMISSION CORRECTLY DECIDED THAT THE COLLEGE REFUSED TO BARGAIN IN GOOD FAITH WHEN IT INSISTED AS A CONDITION TO A COLLECTIVE BARGAINING AGREEMENT THAT THE UNITED FACULTY WAIVE ITS STATUTORY RIGHT TO BARGAIN OVER THE EFFECTS OR IMPACT OF THE COLLEGE'S EXERCISE OF MANAGEMENT RIGHTS.

Appreciation of the issues in this case requires an understanding of the statutory right of employee organizations to request that the public employer engage in "effects" or "impact" bargaining. The Commission here undertakes a brief explanation of that concept as background necessary for the proper evaluation of the Commission decision under review.

The construction, interpretation and application of Sections 447.209 and 447.309(1) would be relatively uncomplicated if a bright line separated the subject matter of the two provisions:

Section 447.209 [Public employer's rights]	Section 447.309(1) [Collective bargaining]
1. determine purpose of its agencies	1. wages
2. set standards of service offered to public	2. hours
3. exercise control & discretion over organization & operations	3. terms and conditions of employment
4. direct employees	
5. take disciplinary action for proper cause	
6. relieve employees from duty	

Such is not the case. Instead, there is substantial overlap in the subject matter defined by the two provisions:



This overlap was expressly recognized by the Legislature and treated in the proviso to Section 447.209:

> However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation.

The Legislature here directed that when a management decision affects terms and conditions of employment set forth in a collective bargaining agreement, the "effects" or "impact" of the management decision remain subject to the collective bargaining process.

The same concept was treated in School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979), where the Fourth District Court of Appeal affirmed a Commission decision and held that the above rationale applied to all terms and conditions of employment, including those "not covered by an existing agreement." Id. at 731. The Court quoted from the Commission decision:

> The same policy considerations underlying the prohibition of unilateral changes during negotiations are equally applicable to unilateral changes in subjects not covered by an existing agreement. Terms and conditions not discussed by the parties in negotiations nevertheless continue to be terms and conditions of employment and, by virtue of Section 447.309(1), an employer must negotiate with the certified bargaining agent prior to changing them. The obligation to bargain imposed by Section 447.309(1), extends to all terms and conditions of employment. To conclude that terms and conditions of employment upon which the parties fail to reach agreement lose their status as such and somehow become management prerogatives leads to an absurd and fruitless result.

Id. at 731 (emphasis in original). The Court adopted as its own "the well-reasoned conclusion" of the Commission, quoting further:

> Moreover, the School Board's approach ignores the realities of the bargaining process. The obligation to bargain is bilateral--the "burden" to raise bargainable

> subjects which it desires to change is no less on the public employer than on the employee organization. The public employer cannot refrain from raising at the bargaining table subjects which it desires to change in the hope that by so doing it will be able to unilaterally alter such subjects should the employee organization fail to secure their inclusion in an agreement. Simply stated, the bargaining table is the statutorily mandated forum for accomplishing all changes in the status quo; the sole exception being legislative action pursuant to Section 447.403(4)(d). Rarely, if ever, do negotiating parties attempt to negotiate all existing terms and conditions of employment in a single agreement. Rather, such changes are accomplished gradually with both parties ordinarily content to leave some working conditions in conformity with past practice. Furthermore, it is virtually impossible for any party to abstractly identify all existing working conditions or predict new conditions which might arise during the duration of an agreement. The approach suggested by the School Board would impede rather than facilitate the collective bargaining process and the stabilization of labor relationships.
>
> It must also be noted that corollary to the argument advanced by the School Board is the proposition that if the only terms and conditions of employment are those contained in the collective bargaining agreement, then the employees are free to disregard any established policies or customary "terms and conditions of employment" which are not embodied in the agreement. Such conduct by employees would have the same potential for disharmony and instability of labor relationships as is occasioned by improper unilateral action by a public employer. When faced with a choice between a statutory interpretation which promises to frustrate the purposes of the Act and one which will advance such purposes, the latter must be chosen.

Id. at 732 (footnotes omitted).

The Palowitch decision is a cornerstone of Florida public employment collective bargaining law. The analysis has been refined by recognition of a further exception to the bargaining obligation where a change is proposed "under exigent circumstances requiring immediate action." School Board of Indian River County v. Indian River County Education Association, 373 So.2d 412 (Fla. 4th DCA 1979). Numerous appellate decisions have applied the

Palowitch rationale without dissent. See, e.g., City of Ocala v. Marion County PBA, 392 So.2d 26, 29 (Fla. 1st DCA 1980); Bradford County School Board v. Bradford County Education Association, No. XX-480 (Fla. 1st DCA 1981) (see Appendix, Exhibit 7 for copy of unpublished decision citing Palowitch). The Palowitch principle was recently restated most succinctly:

> We agree with the Commission's view that the setting of class size and minimum staffing levels are policy decisions which are incorporated in the term "standards of service to be offered to the public" which are to be unilaterally set by the public employer, pursuant to § 447.209, Florida Statutes, and thus are not mandatorily bargainable. This decision does not preclude mandatory bargaining as to the impact of the implementation of such decisions on "wages, hours, and terms and conditions of employment" when an appropriate showing of negotiable impact has been made.

Hillsborough CTA v. School Board of Hillsborough County, 423 So.2d 969, 970 (Fla. 1st DCA 1983). Accord, First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981).

The College forthrightly admits that the bargaining obligation described above is what it sought to avoid by proposing the inclusion of Article XXII, Section C, in the collective bargaining agreement (IB 2-3). It is not illegal to propose or discuss such a waiver.[10] But to allow the College to achieve this result by mandating a waiver pursuant to Section 447.403 impasse resolution procedures would be to turn Chapter 447, Part II, upon its head in frustration of the basic intent of the statute. As indicated in Palowitch and its progeny, such a result would provide a powerful incentive for a public employer to "refrain from raising at the bargaining table" proposals concerning

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10/ For an example of an illegal proposal, see Retail Clerks International Association, Local 1625 v. Schermerhorn, 373 U.S. 746 (1963) (agency shop clause requiring payment of fee to union as a condition of employment is illegal in Florida), aff'g 141 So.2d 269 (Fla. 1962).

terms and conditions of employment which it might desire to change in the future. By keeping subjects out of the collective bargaining agreement, the public employer who has legislatively mandated the waiver at issue ensures unilateral control over all excluded subjects.

The College asserts, and the United Faculty apparently disagrees (IB 28), that the waiver at issue cannot be legislatively mandated pursuant to Section 447.403(4)(d) because it falls within the proviso of Section 447.403(4)(e) ("contractual provisions which could have no effect in the absence of a ratified agreement"). The College further asserts that by operation of Section 447.403, any ratified agreement must include the clause at issue. It is on this point that the College and Judge (now Supreme Court Justice) Shaw disagree.

Judge Shaw dissented from the majority opinion below in the following regard:

> In sum, I agree with PERC and the majority that a public employer cannot be permitted to bargain to impasse over a proposed waiver of employee rights on the founded expectation that the proposed waiver may be mandated during the impasse resolution stage. I am convinced, however, that section 447.403 does not in specific terms authorize the legislative body of the public employer to mandate such a waiver and, further, assuming arguendo that the statute did authorize such action, the statute, or portion thereof, would be unconstitutional. See City of Tallahassee.

Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133, 144 (Fla. 1st DCA 1983) (Shaw, J., dissenting).

Judge Shaw's dissent was as to rationale, not result:

> Accordingly, I would hold that the management prerogatives clause in issue is a nullity in that it exceeds the statutory authority granted to the legislative body of the college: only the employees may waive their constitutional and statutory rights to bargain collectively over wages, hours, terms and conditions of employment by ratifying an agreement pursuant to section 447.309; the public

> employer may not mandate such a waiver pursuant to section 447.403.

Id. at 143.

The Commission is in full agreement with Judge Shaw's opinion insofar as it distinguished between a proposed contract clause which covers substantive terms and conditions of employment and a clause like the clause at issue here. Section 447.403(1) supports this distinction:

> Resolution of impasses.--If, after a reasonable period of negotiation concerning the terms and conditions of employment to be incorporated in a collective bargaining agreement, a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the commission.

Id. So also does the legislative history of the most recent amendment to Section 447.403.[11]

The Commission is further concerned (and it appears that Judge Shaw's opinion is in full agreement with this result) that ratification of a collective bargaining agreement not be conditioned upon inclusion of the College's proposed Article XXII, Section C. Such a result would be in derogation of the importance of achieving a written collective bargaining agreement covering

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11/ The amendment was enacted as Chapter 80-367. The Bill Summary explained that the purpose of the bill was to supercede a recent appellate court decision and thus reestablish the prior law, which was as follows:

> The implementation of the legislatively resolved issues is limited to those issues which relate to substantive terms and conditions of employment, and does not include certain types of provisions whose operation depends upon the existence of a collective bargaining agreement.

See Appendix, Exhibit 8 at p. 2. This material is properly considered as legislative history. See Sheffield-Briggs Steel Products, Inc. v. Ace Concrete Service Co., 63 So.2d 924, 926 (Fla. 1953).

terms and conditions of employment, a result which was stressed more heavily by the Florida Legislature than by the United States Congress.[12]

The lengthy opinions of the Commission and the First District Court of Appeal below discuss other reasons in support of the result reached in this case below. Thus, to recapitulate all those reasons here would serve no purpose. The Commission would take the opportunity to include as Exhibit 9 in the Appendix to this answer brief the Deerfield decisions from another public sector jurisdiction (Wisconsin) which has determined that a collective bargaining agreement could not be conditioned upon acceptance of a waiver such as that proposed by the College. The Commission's conclusion that such a waiver is not itself a wage, hour or term and condition of employment should be upheld.

12/ Compare Section 447.309(1) ("Any collective bargaining agreement reached by the negotiators shall be reduced to writing") with 29 U.S.C. § 158 (d) (obligation to bargain collectively includes "execution of a written contract incorporating any agreement reached if requested by either party") (emphasis added). See also Section 447.203(14), Fla. Stat. (1981).

III. THE COMMISSION'S DECISION WAS FOUNDED UPON EXPRESS LEGISLATIVE POLICY DIRECTIVES AND WAS WITHIN THE RANGE OF DISCRETION DELEGATED TO THE COMMISSION BY THE LEGISLATURE.[13]

The College argues at various points that in concededly basing the decision below to some degree upon express policy considerations, the Commission was involved in "usurpation of legislative prerogatives" (IB 36). The Commission will respond briefly to indicate the extent to which the Legislature has directed the Commission to construe and interpret Chapter 447, Part II, with policy considerations in mind, preferably expressed so as to be subject to judicial review.

The Public Employees Relations Commission is an independent administrative agency within the Department of Labor and Employment Security, a department within the executive branch of state government. Art. IV, § 6, Fla. Const.; § 20.171(3), Fla. Stat. (1981); § 447.205(1) and (3), Fla. Stat. (1981). As part of the executive branch of government, the Commission "has the purpose of executing the programs and policies adopted by the Legislature." § 20.02(1), Fla. Stat. (1981). As permitted by Article V, Section 1 of the Florida Constitution, the chairman and commissioners have been granted "quasi-judicial power in matters connected with the functions of their offices." This grant of quasi-judicial power does not vitiate the Commission's responsibility to fulfill its executive role.

The Commission was created for the express purpose of effectuating "the public policy of the state" set forth in Chapter 447, Part II. §§ 447.201 and

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13/ Argument III is presented in response to the unnumbered arguments at pages 30 through 43 of the College's initial brief. The Commission has restated the issue in order to identify more clearly the legal issue involved.

447.201(3), Fla. Stat. (1981). The Commission's powers and duties expressly include the power to issue an order which "prescribes law or policy" in the adjudication of an unfair labor practice case such as the instant case. § 447.207(6), Fla. Stat. (1981). And in fashioning a remedy for an unfair labor practice violation, the Legislature has directed the Commission to issue a cease and desist order and to order such positive action "as will best implement the general policies expressed in this part [Part II of Chapter 447]." § 447.503(6)(a), Fla. Stat. (1981).

The Administrative Procedure Act similarly anticipates that agencies will make policy determinations. See § 120.68(7) and (12), Fla. Stat. (1981); see generally McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977) (construing and interpreting APA as authorizing and permitting agency policy determination). In School Board of Dade County v. Dade Teachers Association, 421 So.2d 645, 647 (Fla. 3d DCA 1982), and the cases cited therein, the above principles were confirmed:

> The legislative statement of policy with respect to the Florida Public Employees Relations Act provides that PERC was created to assist in resolving public labor disputes. § 447.201, Fla. Stat. (1979). PERC has developed special expertise in dealing with labor problems and is uniquely qualified to interpret and apply the policies enunciated in Chapter 447, entitling its decisions to considerable deference by this court. City of Clearwater v. Lewis, 404 So.2d 1156 (Fla. 2d DCA 1981); Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1977).

The College argues that Chapter 447, Part II, as construed by the Commission in the instant decision, violates the nondelegation principle of Article II, Section 3 of the Florida Constitution, and is thus "a flagrant effort to usurp the legislative prerogative as well as to decide constitutional questions in derogation of the judicial prerogative" (IB 35-36). The

College does not indicate which section of Chapter 447, Part II, violates the nondelegation doctrine, nor does it indicate where in the Commission's decision a constitutional determination was made. These arguments are without merit. The Commission's decision was founded upon legislative policy directives and was within the range of discretion delegated to the Commission by the Legislature.

IV. THE REMEDY ORDERED BY THE COMMISSION WAS WITHIN THE REMEDIAL POWERS GRANTED THE COMMISSION AND WAS APPROPRIATE UNDER THE FACTUAL CIRCUMSTANCES OF THIS CASE.[14]

The Commission's statutory grant of remedial authority is a broad one:

> If, upon consideration of the record in the case, the commission finds that an unfair labor practice has been committed, it shall issue and cause to be served an order requiring the appropriate party or parties to cease and desist from the unfair labor practice and take such positive action, including reinstatement of employees with or without back pay, as will best implement the general policies expressed in this part.

§ 447.503(6)(a), Fla. Stat. (1981) (in pertinent part). This Court has previously recognized the Commission's broad remedial authority in School Board of Marion County v. PERC, 334 So.2d 582 (Fla. 1976):

> Where lesser remedies are insufficient, bargaining orders may provide a full remedy. Cf., NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

Id. at 585 (footnote omitted).

The case cited above with approval is widely recognized as a case where an extraordinary remedy was upheld. The United States Supreme Court there explained:

> In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964).

NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n. 32 (1969). The United States Supreme Court has similarly affirmed a remedial order under circumstances

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14/ Argument IV is presented in response to the argument at page 44 of the College's initial brief. The Commission has restated the issue in order to identify more clearly the legal issue involved.

where an employer failed to sign and acknowledge the existence of a collective bargaining agreement negotiated on his behalf. The employer was ordered to sign the contract, among other things, and the Court explained why this remedy was appropriate:

> The Board is not trespassing on forbidden territory when it inquires whether negotiations have produced a bargain which the employer has refused to sign and honor, particularly when the employer has refused to recognize the very existence of the contract providing for the arbitration on which he now insists. To this extent the collective contract is the Board's affair, and an effective remedy for refusal to sign is its proper business.

NLRB v. Strong, 393 U.S. 357, 361 (1969). See also School Board of Escambia County v. PERC, 350 So.2d 819, 823 (Fla. 1st DCA 1977) (Commission has authority to order that a public employer "take the positive action of instituting dues deductions at a cost which the [School] Board has previously agreed was reasonable"). See Section 447.203(14), Fla. Stat. (1981) (collective bargaining includes obligation "to execute a written contract with respect to agreements reached concerning the terms and conditions of employment").

In the instant case the dispute over Article XXII, Section C, arose late in negotiations. There is no showing in the record that the proposals, counterproposals and discussions on this question were part of a trade-off or were otherwise linked directly to any other issue in negotiations. The Special Master had this perspective on the relationship between the clause at issue and the negotiations on other issues:

> In examining the positions and exhibits presented, the Special Master feels that it was the Administration's proposed Section C to Article XXII which caused the negotiations to grind to a halt. Should the United Faculty be penalized because of this intricate proposal introduced late in the negotiations? The Special Master say "NO".

Special Master's Report at 23 (Appendix, Exhibit 3). The Special Master further opined regarding all issues upon which tentative agreement was reached, and which therefore did not go through impasse resolution procedures:

> Therefore, the Special Master feels that all issues on which there was tentative agreement upon (although, according to Mr. Hoggs' claim in his brief that these were not technically binding), prior to the 22 September hearing, stand.

Special Master's Report at 20 (Appendix, Exhibit 3).

The remedy of excision fashioned by the Commission is fully discussed in the order under review, pertinent portions of which are set forth in the statement of the case in this answer brief. For the reasons there expressed, and in light of the facts and law discussed immediately above, the remedy ordered by the Commission is appropriate and should be upheld.

CONCLUSION

For the reasons expressed in Argument I, this Court should find that jurisdiction was improvidently granted, and should therefore deny the instant petition for discretionary review without reaching the merits. If the Court decides this case on the merits, Argument I should be considered as urging the Court to decide this case with particular attention to statutory and case law developed in this jurisdiction. For the reasons discussed in Arguments II and III, and for the reasons expressed by the Commission and the First District Court of Appeal in the orders under review, those orders should be affirmed. For the reasons expressed in Argument IV and in the Commission order, the remedy fashioned by the Commission should be affirmed.

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CERTIFICATE OF SERVICE

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