O|A 1-13-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES, Petitioner, v. UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE, Respondent.	)	CASE NO. 63,352

ANSWER BRIEF OF UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE

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STATEMENT OF THE CASE[1]

On December 10, 1980, UF filed the unfair labor practice charge that began this litigation. A hearing was held on February 10, 1980 before a PERC hearing officer. At the hearing, the facts contained in the Statement of Facts below, were stipulated by the parties. On March 26, 1981, the hearing officer filed his recommended order (Appendix to this brief, p. 141, cited hereinafter, as U.F.App. 141) concluding that the College had committed an unfair labor practice. PERC's order of June 10, 1981 accepted the recommended order in most respects. The College appealed to the First District Court of Appeal, which affirmed PERC's order, then-Judge Shaw dissenting, on December 30, 1982. The First District opinion is reported at 425 So.2d 133 (Fla. 1st DCA 1982). This Court accepted jurisdiction on September 13, 1983.

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[1] The College's Statement of the Case and the Facts contains so much argument it would be impractical to specify every area of disagreement as required by Rule of App. Proc. 9.210(c). Instead, UF provides here its own narrative of the procedural history of the case, and in the next section UF reproduces the PERC Hearing Officer's findings, as stipulated by the parties.

STATEMENT OF THE FACTS

1. Bargaining between United Faculty of Palm Beach Junior College (UF) and Palm Beach Junior College (the College) began April 16, 1980.

2. On June 10, 1980, as part of a package of bargaining proposals, the College presented an addition to its current management prerogatives clause. The newly proposed subsection C of Article XXII provided:

> 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.

3. The UF and the College reached agreement on a 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 College 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 College's proposed Article XXII, Section C, be withdrawn;

b. That the College 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 1981-1982 contract;

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

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

7. Regarding proposal (b) above, the College 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 College 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 College stated that it still believed that such a list was impossible to formulate.

9. Regarding proposal (d) above, the College responded that the UF could attempt to spell out what was substantive, but that the College 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. In his Special Master Report of October 10, 1980, the Special Master recommended that the management prerogatives clause proposed by the College not be included in any collective bargaining agreement.

14. On October 30, 1980, two alternative management prerogatives clauses were suggested by the College. 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 rights 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 College 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 College on June 10, 1980, be adopted.

16. The College 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 UF.

17. The College 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 College's offer of a collective bargaining agreement including the Article XXII, Section C, language.

ARGUMENT

I. PERC'S DECISION IS CONSISTENT WITH ARTICLE I SECTION 6, FLORIDA CONSTITUTION.

The College has sought jurisdiction in this Court based on its contention that the decision below infringes on rights of the College protected by article I section 6 of the Florida Constitution. Argument as to this position may be found at page 18 and page 34 of the College's Initial Brief. The College construes this Court's statement in Dade County Classroom Teachers' Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), repeated in City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), that article I, section 6 grants public employees the same rights of collective bargaining as are granted to private employees, to mean that it would be unconstitutional for the Florida legislature, or PERC, to be in any way more protective of employee bargaining rights than are the federal courts in applying federal labor law. The College explicitly states that, "public employer's bargaining rights are constitutionally defined." College Initial Brief p. 34.

However, article I, section 6 establishes the collective bargaining rights of employees, not employers:

> The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.

This Court did not rule in Ryan or in City of Tallahassee that article I section 6 in any way defines the rights of employers in collective bargaining. Rather, article I section 6 establishes the minimum collective bargaining rights that employees must have and may not be denied. To the extent that the Public Employees Relations Act (Ch. 447, Part II, Fla. Stat.) gives public employees in Florida rights that the National Labor Relations Act does not give, article I, section 6 simply has nothing to say.[2]

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[2] We do not concede that PERC's decision in this case was inconsistent with federal law. See below, Point III. However, certain provisions of Florida's collective bargaining statute do give employee rights not provided by the NLRA. One example that is pertinent to the discussion of federal law below, is the right of Florida employees to arbitration of grievances, section 447.401, Fla. Stat. Employees subject to NLRA jurisdiction do not have a statutory right to grievance arbitration, and if they get arbitration at all, they must get it through negotiation.

II. THE FLORIDA PUBLIC EMPLOYEES RELATIONS ACT NEED NOT BE CONSTRUED TO COINCIDE WITH FEDERAL LABOR LAW.

The College asserts that Florida's collective bargaining law was adopted from the National Labor Relations Act, and therefore construction of Florida's law must follow the interpretation given the NLRA by federal courts. However, the legislative history of Florida's law does not support the conclusion that the law was adopted from the NLRA.

The major research and drafting work that led to enactment of Florida's Public Employees Relations Act (PERA) (Ch. 74-100, Laws of Fla.) was done by the House Committee on Labor and Industry, over three years before PERA was enacted. The product of the Labor and Industry Committee's work may be seen in its report, Collective Bargaining in Public Employment (September 1970) (U.F.App. 1). The Labor and Industry report contains House Bill 3556, U.F.App. 39, which was introduced by Labor and Industry on April 8, 1970 (House Journal p. 81), and referred to the Appropriations Committee, where it died. The efforts of the Labor and Industry Committee were not in vain, however, since, after that committee had ceased to exist, the House Commerce Committee took over its work and submitted, on May 11, 1973, House Bill 2028, which was mainly drawn from the Labor and Industry draft. See House Journal, May 11, 1973, p. 529; HB 2028, U.F.App. 91. House Bill 2028, with some amendments, became Ch. 74-100, Laws of Florida.

The Labor and Industry report makes it quite clear that the focus of the persons who created Florida's collective bargaining law was not the NLRA. Rather, those persons were primarily interested in the treatment of collective bargaining for public employees by other states.

The Labor and Industry report contains a state by state analysis of other states' public employee bargaining laws. (U.F.App. 11). The report notes that in 1959, Wisconsin became the first state to enact public employee relations legislation. (U.F.App. 11). The report's principal reference to federal law relates to presidential executive orders extending bargaining rights to government employees. (U.F.App. 11).

Section by section committee notes on the Labor and Industry proposed legislation may be found at U.F.App. 52. The committee notes refer in only one place to the NLRA, U.F.App. 45-46. The notes state that the first draft of the definition of "supervisory employee" to be excluded from bargaining was taken verbatim from the NLRA, but that, based on opposition to that draft, the definition was amended to give PERC authority to make exceptions to the definition. This definition was taken out altogether before the bill became law.

The Legislature's lack of interest in the NLRA and the attention it paid to public employee legislation of other states is corroborated by an examination of the surviving records of the House Labor and Industry, Manpower and Development, and

Commerce Committees. Labor and Industry collective bargaining records are kept by the Department of State in its Archives department, Gray Building, Tallahassee, and may be found in Cartons 7 and 218 of Series 19 and Carton 308 of Series 18. Commerce Committee and Manpower and Development Committee collective bargaining records are now kept at the House Committee on Retirement, Personnel and Collective Bargaining, House Office Building, Room 306. Both sets of records contain numerous public employee collective bargaining bills and statutes from other states. The Commerce Committee files contain numerous annual reports of the Wisconsin Employment Relations Commission. None of the files, however, contains even one copy of the NLRA.

The College may suggest that the use of the words, "terms and conditions of employment," in PERA (section 447.203(14), Fla. Stat.), evidences an intent to adopt NLRA construction of those terms. Such an inference, however, would be unwarranted. Those words and insignificant variations of those words are commonly used in public employee collective bargaining laws. See, e.g., Deering's California Codes, Government §3542.2:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment...

Deering's California Codes, Government §3562(q):

> For purposes of the University of California only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment....

General Statutes of Connecticut, section 7-468:

> [Municipal e]mployees shall have...the right...to bargain collectively...on questions of wages, hours and other conditions of employment...

Delaware Code Annotated, Title 19, section 1301(3):

> "[Public e]mployment relations" means matters concerning wages, salaries, hours, vacations, sick leave, grievance procedures and other terms and conditions of employment.

Maine Revised Statutes Annotated, Title 26 §965(1)(c):

> "Collective bargaining" means...To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession...

These are just a few of the state laws studied by the legislature in creating PERA. Apparently, no conclusion may be drawn from the use of the phrase, "terms and conditions of employment" that the language was taken from the NLRA rather than from any of the state statutes using the same term. The Wisconsin law also contains similar language:

> "Collective bargaining" means the...obligation...to meet and confer...with respect to wages, hours and conditions of employment.... The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession.

Wisconsin Statutes Annotated, §111.70(1)(d). As noted above, the Labor and Industry Committee had observed that Wisconsin was the first state to enact a public employee bargaining law, and the Commerce Committee had collected copies of Wisconsin Employment Relations Commission reports. In reaching its decision below, PERC relied on a ruling of the Wisconsin Employment Relations Commission. The legislative history suggests that PERC may well have acted more appropriately by relying on a Wisconsin ruling than it would have if it had followed a contrary federal interpretation of the NLRA.

This is not to say that federal labor law precedents may not be instructive and useful in interpreting Florida law. However, the absolute requirement of precise identification between Florida and federal law sought by the College is not supported by PERA's history.

III. PERC'S DECISION IS CONSISTENT WITH FEDERAL LABOR LAW.

Virtually the entire argument of the College depends on its assertion that PERC's decision below is inconsistent with NLRB v. American National Insurance Co., 343 U.S. 395 (1952). Certain language in PERC's decision suggests that PERC itself may have thought its holding contradicted American National. However, the Hearing Officer's cogent Recommended Order and the majority opinion of the First District Court both found the proposed waiver in this case distinguishable from the management rights proposal in American National. UF contends that there are important differences between this case and American National, which make clear the lack of conflict between the two decisions.

In American National, the union had proposed a grievance procedure calling for unlimited arbitration. The employer counter-offered with a clause that would have made "the right to select, hire, promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work" the sole prerogative of the company, and would have excluded company decisions in those areas from arbitration. 343 U.S. at 397 fn. 2. American National's proposed clause must be considered in two parts. The first makes decisions in the designated areas the sole prerogative of management. The second prevents grievances arising out of the interpretation of that clause from being taken to arbitration. (A later

management version of the clause would have expressly authorized grievances regarding management decisions taken pursuant to the clause, but would have limited review to top management officials, excluding the possibility of arbitration.)

The part of American National's proposal that prevents certain contract grievances from being arbitrated would be illegal under Florida law. Section 447.401, Fla. Stat. (1981) requires that public employment collective bargaining agreements must contain grievance procedures that end in binding arbitration. PERC has applied section 447.401 in accordance with its unambiguous meaning, i.e., that no party to bargaining may insist on the exclusion of any aspect of the contract from arbitration. Orange County Classroom Teachers Association, 7 FPER ¶12179 (1981), U.F.App. 125.

The first part of the American National management rights clause, on the other hand, would have been perfectly acceptable under Florida law. The first part of the clause simply designates certain areas of decisions as being within management's discretion. As PERC ruled in Orange County CTA,

> Thus, while an employer may certainly insist upon contractual language which, in its opinion, does not subject certain "management decisions" to the review of an arbitrator through the grievance procedure, it may not insist that any dispute over the meaning of the contractual language itself be exempted from operation of the grievance procedure.

7 FPER ¶12179 at 402. U.F.App. 127. See also Communication Workers of America, 4 FPER ¶4135 (1978), U.F.App. 128, where PERC held that neither the obligation to bargain about discharge and discipline nor the requirement of grievance arbitration meant that employers had to agree to contract language that would in fact give a discharged employee any issue to arbitrate about. Thus, unlike the NLRB in the order on appeal in American National, PERC does not require employers to agree to a fixed standard for any condition of employment raised in negotiations.

> [The NLRB] takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. An employer would be permitted to bargain as to the content of the standards so long as he agrees to freeze a standard into a contract.

American National, 343 U.S. at 408. PERC has taken no such position. Orange County CTA and Communications Workers of America make it clear that public employers in Florida are free to insist to impasse on contract language that gives management sole discretion in designated areas.[3]

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[3] The College does concede, however, that insistence by an employer on discretion in too many areas of employee concern could well be taken as evidence of bad faith. College Initial Brief p. 15. See, e.g. Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952).

The management rights clause insisted on by the College in this case did not grant the College discretion to act in particular areas. Rather, as its brief straightforwardly states, what the College sought was UF's complete waiver of its statutory right to collectively bargain over the effects of management decisions. The right of unions to bargain about the impact on employees of management decisions, whether or not a contract is in effect, is well established under both Florida and federal law. See Palowitch v. School Board of Orange County, 2 FPER 280 (1977), U.F.App. 131, aff'd, 367 So.2d 730 (Fla. 4th DCA 1979); NLRB v. First National Maintenance Corp., 452 U.S. 666 (1981). The difference between a blanket bargaining waiver allowing unilateral management action, with effects on employees that cannot be anticipated, and a provision giving discretion to management in certain designated areas, can be seen from Professor Cox's early analysis:

> It is hard to believe that anyone experienced in the ways of collective bargaining would describe as an "immaterial circumstance" the difference between (a) taking unilateral action without consulting the bargaining representative on matters concerning which it may wish to bargain and (b) negotiating in good faith for the union's agreement to a contract provision granting management the power to act unilaterally in defined areas. The historical differences are obvious: the one has been a "union-busting" tactic, the other has been an accepted part of collective bargaining.

Cox and Dunlop, Regulation of Collective Bargaining by the NLRB, 63 Harvard L. Rev. 389, 420 (1950).

The PERC Hearing Officer in this case recognized that employers may insist on language giving the right to unilaterally change specific aspects of the conditions of employment. 7 FPER ¶12300 at p. 601; U.F.App. 144. The position of the College in this case, however, the Hearing Officer saw as being quite different:

> [U]nder the guise of a management rights clause, the [College] here seeks to turn back the clock to the pre-Chapter 447, pre-collective bargaining status quo, i.e., that management enjoy full control over wages, hours, terms and conditions of employment, except to the extent it agrees to share this control with employees. In order to achieve this control following the Commission and Fourth District Court of Appeal decisions in such cases as Palowitch and Indian River [4 FPER ¶4262 (1978), U.F.App. 147; aff'd, 373 So.2d 412 (Fla. 4th DCA 1979)], a blanket waiver of employees' right to negotiate changes in wages, hours, terms, and conditions of employment must be obtained from the employee representative--in essence, an abdication of employees' Section 447.301 right.

7 FPER ¶12300 at p. 601; U.F.App. 144.

These differences from the issue in American National make it apparent that the College's reliance on that case is misplaced. Also misplaced is the College's reliance on three post American National NLRB cases, Texas Industries, Inc., 140 NLRB 527 (1963); Cranston Print Works Co., 115 NLRB 537 (1956), and Long Lake Lumber Co., 182 NLRB 435 (1970). None of these cases involved insistence on a waiver of impact bargaining.

Neither did any of these cases, contrary to the College's contentions, involve insistence on an open-ended (or as the College calls it, residuary) exclusion from arbitration. Texas Industries involved a proposal that required management to exercise its responsibility in a fair and just manner, and, like American National, limited to certain designated subjects the issues to be excluded from arbitration. In Cranston Print Works, the Board ruled for the employer because there was no evidence management had insisted on the disputed language to impasse. In Long Lake Lumber, there was no exclusion from the grievance procedure, and the NLRB specifically stated that bargaining over the effects of management decisions would be available despite the clause.

Furthermore, the approach to bargaining subjects found in American National may not be taken to be current law. As noted in a leading treatise:

> American National was the Court's last major decision on bargaining subjects prior to its holding in NLRB v. Borg-Warner Corp., the decision which established the distinction between manadatory and permissive bargaining subjects--the distinction which governs the law of bargaining subjects today.

1 The Developing Labor Law 761 (C. Morris, 2nd Ed. 1983). In NLRB v. Borg-Warner Corp., 365 U.S. 342 (1958), six years after American National, the Supreme Court accepted the NLRB position that bargaining subjects concerning wages, hours and other terms and conditions of employment are mandatory, while other subjects

are only permissive. Insisting to impasse on an issue that is only permissive, the Supreme Court held, is a per se refusal to bargain.

Because the mandatory-permissive distinction had not yet been accepted when American National was decided, the Court there never considered whether or not management rights clauses are mandatory subjects of bargaining. Rather, the Court noted that:

> Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements.

343 U.S. at 408-409, and held that:

> The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

343 U.S. at 409. The actual basis for the Court's decision appears to have been a rejection of the NLRB's authority to find a bargaining violation absent a finding of bad faith (i.e. subjective desire to not reach agreement) so long as there is bargaining at all. That this was the basis for American National, and that Borg-Warner was thus inconsistent with American National, was recognized by the four disserting judges in Borg-Warner. Justice Harlan, writing for the dissenters, stated:

> The decision of this Court in 1952 in [American National] was fully in accord with this legislative background in holding that the Board lacked power to order an employer to cease bargaining over a particular clause

> because such bargaining under the Board's view, entirely apart from a showing of bad faith, constituted per se an unfair labor practice.

356 U.S. at 356.

> It is true that the disputed clause in [American National] related to matters which concededly were "terms and conditions of employment," but the broad rationale of the Court's opinion undercuts an attempt to distinguish the case on any such ground. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements.... The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case" [quoting American National].

365 U.S. at 357. It should be noted that while the fact that the management rights clause related to matters which were conditions of employment was conceded, it was not conceded or decided in American National that the clause itself was a term or condition of employment. Thus Justice Harlan is completely correct in his contention that Borg-Warner cannot be reconciled with American National. Because Borg-Warner has prevailed, and survived,[4] this Court must hesitate to base its decision in this case on the superceded holding of American National.

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[4] See e.g. NLRB v. Sheet Metal Workers Local 38, 575 F.2d 394, 397 (2nd Cir. 1978):

> A party violates the duty to bargain collectively if it insists, as a precondition to reaching an agreement, on inclusion of a provision concerning a non-mandatory subject for bargaining, that is, a subject other than the mandatory issues of wages, hours, and other terms and conditions of employment. NLRB v. Borg-Warner Corp.

A federal case that offers more current guidance as to how the federal courts might rule in a case like this one is NLRB v. Sheet Metal Workers Local 38, 575 F.2d 394 (2nd Cir. 1978). There the union insisted to impasse on an interest arbitration clause, i.e. a clause requiring that future disagreements on terms and conditions of employment be submitted to a binding decision by a third party. In upholding the employer's contention that interest arbitration is a permissive, not a mandatory subject, the court commented on the basis for determining whether a subject is mandatory or permissive.

> An issue is mandatory only if it settles an aspect of the relationship between the employer and the employees. Further, it must have more than a speculative and insubstantial impact on that relationship.

575 F.2d at 397. The court explained that interest arbitration is not a mandatory subject because:

> The impact of interest arbitration on the relationship between the employer and the employees is also too speculative to qualify it as a mandatory subject. An interest arbitration clause determines the procedure by which wages, hours and terms and conditions of employment under a subsequent contract may be established, if the union and the employer cannot agree. However, it is impossible to predict what issues will be submitted to interest arbitration, or whether the panel will be able to reach a decision, or, above all, what it will decide.

575 F.2d at 398. The same factors are present with the managements rights clause at issue in this case. That clause would not itself have settled any conditions of employment, and it is impossible to predict what management rights the College would exercise pursuant to the clause and what conditions of employment the exercise of those rights would affect. What the union proposal in Sheet Metal Workers and the College proposal here have in common, is that both deal not with conditions of employment, but rather with the process by which terms of employment will be decided, and both proposals seek to deny the other party that participation in the process of deciding terms of employment that the statutory scheme provides. Like the union proposal in Sheet Metal Workers, the management proposal here should be considered a non-mandatory subject of bargaining.

IV. PERC CORRECTLY INTERPRETED FLORIDA'S COLLECTIVE BARGAINING LAW.[5]

PERC was called upon in this case to determine whether the waiver of a certified bargaining agent's right to engage in collective bargaining about the effects of management decisions or conditions of employment is itself a term or condition of employment, and thus a mandatory subject of bargaining. That determination was necessary in order to decide whether the College committed an unfair labor practice by insisting that UF waive its impact bargaining rights, and by imposing the waiver pursuant to the impasse procedure of section 447.403.[6]

In affirming PERC's decision, the First District majority stated that:

> The standard to be applied on review of the construction of a statute that an agency is charged to enforce is ordinarily to accord substantial deference to it and decline to overturn it, except for the most cogent reasons, or unless clearly erroneous, unreasonable, or in conflict with some provision of the state's constitution or the plain intent of the statute.

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[5] If this Court should conclude that PERC's decision did not violate article I, section 6, Fla. Const., and is not inconsistent with this Court's rulings in Dade County Classroom Teachers Assn. v. Ryan and City of Tallahassee v. PERC, then the only issues on which the College sought jurisdiction in this Court will have been resolved against the College. In that event, UF would suggest that the Court may wish to reconsider its decision accepting jurisdiction, and not reach the issues addressed in the remainder of this brief.

[6] For a concise description of the 447.403 impasse procedure, see House Committee on Retirement, Personnel and Collective Bargaining, Bill Summary, House Bill 1655, April 23, 1980, U.F.App. 151.

Palm Beach Junior College v. United Faculty, 425 So.2d 133, 136 (Fla. 1st DCA 1982). The District Court's standard of review is consistent with many rulings of this Court. See e.g., Fort Pierce Utilities Authority v. Public Service Commission, 388 So.2d 1031 (Fla. 1980):

> We are buttressed in our conclusion by the principle that administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous.

388 So.2d at 1035. UF contends that the "clearly erroneous" standard is the proper scope of review in this case. However, UF believes that even a completely fresh look by this Court at the issue PERC decided would yield the conclusion that PERC has correctly interpreted the law.

Section 447.203(14), Fla. Stat. defines collective bargaining as peformance of the mutual obligation to negotiate concerning, "terms and conditions of employment." The College has not challenged PERC's ruling that it is a prohibited refusal to bargain for an employer or union to insist to the point of impasse on a proposal that falls outside of "terms and conditions of employment." Thus the statutory question is whether an impact bargaining waiver is a term or condition of employment. Several factors support PERC's conclusion that such a waiver is not a condition of employment.

First, a common sense reading of the words, "terms and conditions of employment," does not suggest a meaning that includes the bargaining process itself. The words may be inherently vague, but it would certainly not be a natural reading to say that the partial waiver of bargaining by a union is a term or condition of employment. As PERC observed in its order below:

> [T]o summarily reject the concept of mandatory negotiations over the effects on employee working conditions of management decisions prior to implementation is to reject the concept of collective bargaining itself.

7 FPER ¶12300 at p. 595. U.F.App. 138.

Second, the right the College sought to have UF waive is "an essential element in the legislative scheme of meaningful collective bargaining for public employees." 7 FPER ¶12300 at 595; U.F.App. 138. Waiver of the right to bargain about changes in terms and conditions of employment would leave an extremely restricted remnant of collective bargaining. PERC sensibly considered that such a drastic surrender of important rights ought to be truly voluntary. The result of the College's reading of the statute would be the power of employers to hold up all compensation in order to pressure unions into giving up some or all of the right to bargain. In this case, the College made the granting of agreed upon 9.5% salary increases conditional on union waiver of its rights. If the waiver were held to be a term

or condition of employment that an employer may insist upon, then nothing would prevent future employers from demanding deep pay cuts, even theoretically the cessation of salary altogether, as the price for a union's retaining its statutory bargaining rights. As PERC wrote in its order below:

> To make such a provision a mandatory subject of bargaining under our statutory scheme would be inconsistent with this principle of voluntary relinquishment.

7 FPER ¶12300 at p. 595. U.F.App. 138.

Third, consideration of the impasse resolution procedure of section 447.403(4), Fla. Stat. confirms the wisdom of PERC's decision. Section 447.403(4) provides that if, following non-binding arbitration by a special master, an employer and union are still at impasse over mandatory subjects of bargaining, then the governing body of the employer has the right to impose its resolution of the disputed issues. In this case the College thus imposed the "waiver" by UF of impact bargaining.

Taking its cue apparently from then-Judge Shaw, dissenting below, the College now asserts that its imposition of the waiver could not have taken place without a vote of employees ratifying a contract that included both agreed and

imposed matters.[7] Judge Shaw took the position that imposition of the waiver by the College could not take effect, absent ratification by employees, without infringing on the employees' constitutional right to collective bargaining. 425 So.2d at 143. Section 447.403 provides that the employer's action imposing its terms does take effect without employee ratification. However, Judge Shaw suggests that the bargaining waiver may be seen as being like a preamble or a duration clause, language that can have no effect without a ratified agreement. Such language does not go into effect unless there is a contract. Section 447.403(4)(e).

UF questions whether the College's proposed impact bargaining wavier is the sort of language that was intended by the phrase "provisions which could have no effect in the absence of a ratified agreement." Section 447.403(4)(e). If the waiver is not within that phrase, then PERC's conclusion that the waiver is a non-mandatory bargaining subject is necessary to save the statute's constitutionality. Otherwise, as suggested by Judge Shaw, employers could unilaterally take away collective bargaining rights.

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[7] The College states, at p. 28 of its Initial Brief, that it has "always and repeatedly" told UF that it realized its waiver clause could not be imposed. In fact, the clause was imposed, and UF denies that the College ever informed it the clause could not be imposed. Neither did the College ever tell UF that the clause would not go into effect without ratification by employees, until the College took that position in its brief to this Court.

If, on the other hand, the impact bargaining waiver is a provision, like a preamble, that can have no meaning without a ratified agreement, this supports PERC's conclusion that the waiver is not a term or condition of employment. Indeed, there is some indication in the legislative history of Ch. 80-367, Laws of Florida, the law that created the language of section 447.403(4) about preamble and duration clauses, that the legislature understood the preamble, duration clause type of language not to include "terms and conditions of employment." See House Committee on Retirement, Personnel and Collective Bargaining, Bill Summary, House Bill 1655 (April 23, 1980) U.F.App. 152:

> If the complete agreement, including the agreed-upon issues, the accepted special master recommendations and the legislatively resolved issues, is not ratified by the employees in the bargaining unit, the employer is required to implement the legislatively resolved terms and conditions of employment.... The implementation of the legislatively resolved issues is limited to those issues which related to substantive terms and conditions of employment....

(emphasis added). The College's position that the waiver, like a preamble, could not go into effect absent a ratified agreement, may well be inconsistent with the College position that the waiver is a term or condition of employment.

Fourth, PERC took proper account of the policies underlying the collective bargaining law. The College portrays PERC

as having bestowed a gift upon public employee unions in order to compensate them for the constitutional and statutory prohibitions against strikes, or, even more insidiously, as having ruled for UF in order to bribe it to obey the law. However, the College has misread PERC's order. What PERC actually did was construe the statute with an eye to the policies underlying the law in order to assure that its interpretation conformed to the legislative intent. If there was a trade-off whereby public employees were given a collective bargaining framework in the hopes that collective negotiation would divert the frustration that had sometimes formerly led to illegal strikes, such a trade-off was engineered by the legislature in enacting the Public Employees Relations Act. PERC only observed that allowing the College to insist on the union's bargaining waiver would greatly cut down on the scope of bargaining. If UF had accepted the waiver, the College could then, without negotiations, have unilaterally changed working conditions in a myriad of unanticipatable ways. But the premise of the law is that harmony is best achieved when employees have a right to discuss their concerns with management and insist that management attempt to reach a resolution both sides can agree to. PERC properly took into account the policy of the law, in reaching a decision that preserved the statutory scheme.

Finally, it should not be ignored that PERC's order followed the only decision of another jurisdiction on the same point. As discussed above, American National and the other cases cited by the College did not deal with a waiver of the right to bargain about the effects on employees of management decisions. In Wisconsin, however, the Wisconsin Employment Relations Commission has considered a management clause, worded differently, but which would have had the same effect as the College proposal here. Deerfield Education Association v. Deerfield Community School District, 2 NPER 51-11023 (WERC 1980) aff'd Deerfield Community School District v. WERC, 3 NPER 51-12029 (Wis. Cir. Ct. 1981), U.F.App. 155. The Wisconsin Commission stated:

> [The District's proposal] would permit the District to unilaterally implement matters affecting wages, hours and conditions of employment which were not covered by the existing collective bargaining agreement....

U.F.App. 162.

> [W]e conclude that the proposed blanket waiver, as worded, while not prohibited in the sense that it would be violative of the law, is a permissive rather than mandatory subject of bargaining.

U.F.App. 163.

V. THE REMEDY ORDERED BY PERC[8] SHOULD BE AFFIRMED WITHOUT MODIFICATION.

The source of PERC's authority to remedy unfair labor practices is section 447.503(6)(a), which provides:

> If...the commission finds that an unfair labor practice has been committed, it shall issue...an order requiring the appropriate party...to cease and desist from the unfair labor practice and take such positive action...as will best implement the general policies expressed in this part.

This provision gives PERC explicit authority to consider general statutory policy in designing a remedy. PERC ordered the College to offer UF the contract, implementation of which the College had delayed by its insistence on UF's waiver of bargaining rights. PERC explained that

> If, as the College requests, we were to allow it a further opportunity to negotiate an alternative "impact" bargaining waiver provision, we would be allowing the College to do precisely that which we have just condemned: to unilaterally prevent the execution of a final agreement until agreement is reached on a permissive subject of negotiations.

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[8] This appeal does not concern merely abstract technical questions of labor law. The 9.5% salary increase for college faculty agreed to by the College and UF has never been paid due to the pendency of this litigation. After PERC ordered the College to offer UF a contract containing agreed items, including a 9.5% salary increase, and items mandated by the College, with the exception of the waiver, UF and the College entered into an escrow agreement. U.F.App. 168. All money for the 9.5% increase went into the fund, instead of to the professors, to protect the College's interests in the event that PERC's decision would be reversed on appeal. The account now contains over $500,000. U.F.App. 170-171. Thus the decision of this Court will have an immediate, significant, economic impact for College employees.

7 FPER ¶12300 at p. 596, U.F.App. 139.

The College has not contended that the remedy PERC ordered does not "implement the general policies expressed" in the law. Rather, the College relies on one federal case to suggest that PERC has exceeded its authority. In H. K. Porter v. NLRB, 397 U.S. 99 (1970), the employer had refused to agree to a union dues check-off, with the intent, it was found, to frustrate the making of an agreement. The NLRB remedied the unfair labor practice by ordering the employer to agree to a check-off provision, and this was overturned by the Supreme Court.

H. K. Porter does not govern here. The NLRB ordered H. K. Porter to agree to something the company had not previously accepted. PERC has done no such thing. The College has not been ordered to agree to any proposal. PERC has merely ordered the College to implement its earlier agreement, without the clause the College illegally tried to impose.

CONCLUSION

PERC's decision is consistent with the Florida Constitution, with federal labor law, with the legislative intent and policy of the law PERC was created to administer, and with the decision of the one other tribunal that has considered the same issue. PERC's decision may be disturbed only if clearly erroneous, and no showing has been made that PERC's ruling was erroneous at all. PERC's order should be affirmed without modification.

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