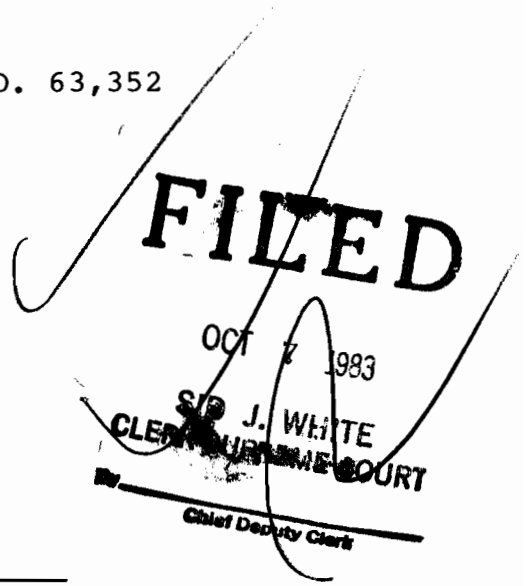
O/A 1-13-84

STATE OF FLORIDA

BEFORE THE SUPREME COURT

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES, Appellant, vs. UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE, Appellee.	:	CASE NO. 63,352



APPELLANT'S INITIAL BRIEF

Appeal Of Decision Of
The First District Court of Appeal
State Of Florida
Case No. AF-17

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STATEMENT OF THE CASE AND THE FACTS

In collective bargaining with its faculty union, the Appellant Board of Trustees insisted through impasse that any collective bargaining agreement would have to contain a clause enabling it, during the one-year term of the agreement, to exercise rights granted to it in other parts of the contract, without engaging in new bargaining over the impact of that exercise on unit employees (DCA, pp. 1-3, 14; fns. 1 and 2).[1/]

The clause in question, a new Section C. to be added to the pre-existing Article XXII, Employer Prerogatives, did not broaden the Employer's decision-making prerogatives, which continued to be the same as provided in earlier years in Sections A. and B. of Article XXII and in other places in the contract. Section C. dealt only with the matter of implementing those decisions without new bargaining:

> "Section C. Whenever the Employer exercises a right or 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

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1/ The Appellant is herein referred to as the Board, the Trustees, or the Employer; the Appellee as the Union or the U.F.; and the Public Employees Relations Commission as PERC or the Commission. "DCA" refers to the District Court of Appeal's decision and opinion; and "P.O." to PERC's order and opinion. The Florida Public Employees Relations Act (Part II, Ch. 447, Fla. Stat. (1979)) is referred to as the P.E.R.A., and the National Labor Relations Act, which similarly applies to private sector employees subject to federal labor law (29 U.S.C.A. §141 et seq.) is referred to as the N.L.R.A.

> 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." (P.O., p. 2).

The Trustees' insistence on adding Section C. to the Employer Prerogatives clause came about because of the Fourth District Court of Appeal's affirmance of PERC's decision in Palowitch v. School Board of Orange County, 3 FPER 280 (1977), aff'd, 367 So.2d 730 (Fla. 4th DCA 1979). In that case, PERC had held that an employer's right, whether created by contract or statute, to make unilateral decisions affecting "wages, hours, and terms and conditions of employment" did not carry with it the right to implement such decisions without further bargaining, at the union's request, as to the effect or impact of that implementation on employees absent a "clear and unmistakeable" waiver of the right to such further bargaining. At issue was the School Board's implementation of a decision to change from a semester system to a quinmester system, resulting in teachers who had been on 12-month contracts being assigned to 10-month contracts:

> "It cannot be doubted that under Section 447.209 the School Board was authorized to unilaterally decide to change from a two semester plus summer school system to a quinmester system, but such authority does not diminish the Board's duty under Section 447.309(1) to bargain with respect to any changes in 'wages, hours, and terms and conditions of employment' brought about by the implementation of its management decision." (3 FPER at 282).

* * *

> "The School Board also advances the argument that, by virtue of the management rights clause and the 'zipper clause' in the contract which was in effect at the time of the change in contract status, the CTA has waived its right to bargain on the subject of change in contract status. It is well-established law in other jurisdictions and under the National Labor Relations Act that any such waiver must be clear and unmistakeable." (same cite).

In the absence of such a "clear and unmistakeable" waiver, the obligation to engage in post-decision pre-implementation bargaining would include, at the union's option, the obligation to exhaust the statutory impasse resolution procedure, including consensual mediation, mandatory special master's proceedings, and a legislative hearing followed by legislative action (P.O., p. 9, last paragraph to p. 10).

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.

Upon charges filed, PERC found the Trustees guilty of a refusal to bargain collectively in good faith, in violation of §447.501(1)(c), Fla. Stat. (1979), for insisting on Section C. to and through impasse (P.O., p. 13, numerical paragraph 4).[2/]

2/ This appeal is from the affirming decision of the First District Court of Appeal (Palm Beach Jr. College Board of Trustees v. United Faculty of Palm Beach Jr. College, 425 So.2d 133 (Fla. 1st DCA 1983)).

In other words PERC, having decided in Palowitch that a decision lawfully made pursuant to a reserved or statutorily created right could not be unilaterally implemented without a waiver, decided in the present case to make such waivers unavailable to public employers, except by the grace of their unions. The bargaining employer would be permitted to ask for such a waiver, but would be required to withdraw any such proposal if the union was unwilling to negotiate about it. (P.O., p. 4, last sentence, to p. 5).

PERC arrived at this conclusion by declaring that an employer proposal calling for a waiver of impact bargaining should not be deemed a subject of mandatory collective bargaining within the statutory definition of mandatory subjects, i.e., "wages, hours, and terms and conditions of employment." (P.O., p. 6; p. 9, second paragraph).

PERC did not find that the words "wages, hours, and terms and conditions of employment" do not literally encompass such waivers. On the contrary, it conceded that the same words, as found in the N.L.R.A., do encompass impact bargaining waivers (P.O., p. 8, last paragraph).

PERC arrived at its diametrically opposed conclusion by making a pure policy determination that insistence on impact bargaining waivers had to be precluded, so that public employee unions would obey the constitutional prohibition against striking because of their increased ability to gain their demands by bargaining:

> "In interpreting the Public Employees Relations Act (PERA) and the case law, PERC establishes two significant precedential propositions of law: it is an unfair labor practice (bad faith bargaining) for management to bargain to impasse over a management prerogatives clause; and PERC has the authority to impose a collective bargaining agreement on a party as a remedy for an unfair labor practice. In its order and brief, PERC forthrightly supports those propositions on the ground that the constitutional prohibition against public employee strikes and the statutory impasse resolution procedure, section 447.403, Florida Statutes (Supp. 1980), creates an imbalance of bargaining power between the employer and employee which PERC must redress by devising a public labor policy which balances the bargaining power of public employer and employee." (DCA, Shaw, J. dissenting, pp. 15-16.
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> * * *
>
> "The most likely result of permitting such insistence (on impact bargaining waivers) would be enhancement of frustration in the bargaining process and encouragement of unions to resort to remedies not sanctioned by law." (P.O., p. 9, material in parens added).

Having so found a violation, PERC ordered the Trustees to offer the U.F. a contract to be created by the simple expedient of eliminating Article XXII, Section C. from the agreement previously offered, over the Trustees' objection that this remedy violates the statutory prohibition against compelling agreement, (P.O., pp. 11-12, 14, numerical paragraph 2(b)). The Court of Appeal affirmed this "excision" remedy without further analysis (DCA, p. 12).

In this brief, the Trustees expect to show that negotiating to and through impasse for waivers of employee bargaining rights is and always has been a common and accepted collective bargaining practice, that there is absolutely nothing in the PERA to suggest, much less mandate, a rule to the contrary, and that PERC's assumption of a prerogative to make such a decision in order to adjust a perceived "imbalance" of power" between public employers and unions amounts to a constitutionally impermissible usurpation of legislative authority.

ARGUMENT

The Decision Of The Court Below Permitting The Severe Curtailment Of Florida Public Employer Collective Bargaining Rights, As Compared With Those Of Private Employers, Directly Conflicts With This Court's Clear, Straightforward, And Repeated Holding That Florida Public Employees Have The Same Collective Bargaining Rights As Private Employees Subject To Federal Labor Laws.

This case is a classic example of legal history repeating itself. This Court, dealing with the same statutory language and in the same context, confronts an issue that the federal Supreme Court faced and resolved thirty years ago.

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

After the NLRA was passed in 1935, the National Labor Relations Board embarked upon a course of legal activism[3/] which eventually caused a Congressional reaction in the form of the Taft-Hartley amendments of 1947.

One of the Congress' greater concerns was that the Board had been interfering too much with the process of free collective

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3/ Perhaps accounted for by the fact that the NLRB had a legislative mandate to encourage and promote collective bargaining in private industry (29 U.S.C.A. §141). The Florida Public Employees Relations Commission has no such mandate and in fact is subject to the legislative admonition that it is not the intent of the Florida Legislature to promote or endorse collective bargaining by Florida's public employees (§447.201, Fla. Stat. (1980)).

bargaining, "setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make."[4/]

Congress responded by amending the NLRA so as to make it crystal clear that the duty to bargain

> "... does not compel either party to agree to a proposal or require the making of a concession ..." (29 U.S.C.A. §158(d), otherwise referred to as Section 8(d) of the NLRA).

The NLRB, however, was reluctant to yield.

In 1950, at its first post-amendment opportunity, it found American National Insurance Co. guilty of a per se violation of the duty to bargain because the company insisted in union contract negotiations that any contract would have to include a management's rights clause giving the company the right, during the term of the contract, to deal unilaterally with a number of identified conditions of employment without management's actions being subject to arbitration.[5/]

4/ NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

5/ "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 ... it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration." (NLRB v. American Nat'l Ins. Co., supra, 343 U.S. at 398.

The Board ordered American National to resume bargaining with the Union and therein to refrain from insisting upon "any management functions clause covering a condition of employment."[6/]

The Board suffered a reversal in the U.S. Court of Appeals for the Fifth Circuit, after which it petitioned for and was granted review by the U.S. Supreme Court, which affirmed the Court of Appeals.

American National and the present case are legal twins in terms of the nature of the clauses involved, the NLRB and PERC holdings, and the arguments offered by these agencies in support of those holdings.

In the present case, PERC, like the NLRB in American National, has found the Trustees guilty of a per se violation of the duty to bargain for insisting through impasse, that any contract would have to include supplemental management's rights language (Section C. or one of two alternatives (DCA, fn. 2)) assuring the Trustees the right, during the term of the contract, to deal unilaterally with a number of conditions of employment without management's actions being subject to arbitration.

6/ NLRB v. American Nat'l Ins. Co., supra, 343 U.S. at 400.

The Bad Faith Argument

In American National, the NLRB took the position that an employer's insistence on retaining unilateral control of any employment condition amounted to a refusal or failure to bargain in good faith, and that the general obligation to bargain in good faith includes a duty to bargain a "fixed standard" contract provision on every aspect of wages, hours and other working conditions at the other party's request.[7/] PERC takes the same position, contending that a Florida public employer cannot lawfully insist upon any contract provision that constitutes a "partial waiver of the statutory right to bargain," i.e., that gives the employer discretionary control of any employment condition (P.O., pp. 4-5).

7/ "It is well settled that the matters with respect to which the Respondent sought to reserve the right to take ... unilateral action, affecting, as they did, terms and conditions of employment, are proper subjects for collective bargaining. ... it can hardly be said that the Respondent's insistence on excluding these subjects from the area of collective bargaining, as a condition of agreement, ... was consistent with the good faith bargaining envisaged by the Act." (American Nat'l Ins. Co., 89 NLRB No. 185, 186, 25 LRRM 1532, 1534 (1950)).

"... the Board takes the position that employers ... 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 standard so long as he agrees to freeze a standard into a contract. Bargaining for more flexible treatment of such matters would be denied ...". (NLRB v. American Nat'l Ins. Co., supra, 343 U.S. at 408.

The Derogation Argument

The NLRB's further, and closely related, objection was that insistence on unilateral control of any condition of employment was in derogation of the union's bargaining rights.[8] PERC has used the bulk of its opinion (pp. 4-8) to make the same argument.

Assertion Of Policy-Making Power

Finally, the assumption of a prerogative to ascertain and then create the appropriate balance of power between labor and management is common to both opinions.

The NLRB thought that it had a mandate to stabilize labor-management relations by substituting good faith bargaining for industrial warfare.[9] It therefore asserted the authority to alter previously existing concepts and practices of collective bargaining,[10] and to readjust the balance of power between labor and management, by curtailing management's right to pursue a management's rights clause against the union's wishes, in order to make agreement more likely and strikes less likely. PERC expressly asserts the same prerogative, on the same justification, i.e., a mandate to assure agreement in order to

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8/ American Nat'l Ins. Co., supra, 89 NLRB at 186.

9/ American Nat'l Ins. Co., supra, 25 LRRM at 1534, fn. 7.

10/ NLRB v. American Nat'l Ins. Co., supra, 30 LRRM at 2152.

avert public employee strikes, even though they were already prohibited by law.[11/]

Answer To The "Bad Faith" Argument;
Good Faith Does Not Deny Freedom Of Contract

In rejecting the NLRB's contention that insistence upon a contract right to deal unilaterally with any condition of employment was inconsistent with the good faith required in bargaining, the federal Supreme Court stressed that bargaining parties must have freedom to decide what they will or will not agree to include in a contract, and that the law is designed to guarantee that freedom. Making specific reference to the Board's pre-Taft-Hartley efforts to dictate contract terms to employers, and the Congressional reaction in amending the statute to expressly reject any notion that bargaining parties could be compelled to agree to any proposal or, for that matter, to agree to any contract at all, the Court said:

> "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." (343 U.S. at 401-402).

11/ Discussion, pp. 4-5, infra.

The Court went on to say that the Act does seek to encourage the making of agreements, not by compelling an employer or a union to agree to a contract, or to put this in or leave that out, but by (1) protecting the employees' right to organize, and then (2) requiring the employer to bargain collectively rather than to deal individually with the employees.[12/]

The Court noted that the concept of good faith bargaining pre-dated the NLRA, and that it had always been understood as requiring that bargaining parties make every reasonable effort to come to agreement, but not as actually requiring that agreement be reached, or that any particular matter be treated or not treated in any contract that might be reached.[13/]

Thus, the rule of good faith could not be said to be breached by an employer's insistence that certain matters be left within its unilateral control via a management's rights clause.[14/]

Answer To The Derogation Argument; Right To Bargain Defined And Limited By Prior Practice

The Court's answer to the NLRB's argument that any insistence upon retaining unilateral control of any condition of employment is in derogation of the union's right to bargain on

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12/ NLRB v. American Nat'l Ins. Co., supra, 343 U.S. at 402.

13/ 343 U.S. at 402; also, H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

14/ 343 U.S. at 404.

every condition, or all conditions, of employment was that the statutory right to bargain obviously had reference to collective bargaining as commonly practiced prior to the Act, and that insistence upon management functions clauses had been common bargaining practice during that time. The Court concluded, with obvious logic, that the NLRA had been intended to absorb and approve the philosophy of bargaining as previously worked out in the shops and plants of the nation, and that there was nothing in the statute empowering the NLRB to disrupt traditional bargaining practices.[15/]

Consistent with that, the Court again noted the action of the Congress in expressly forbidding the Board to compel bargainers to concede on any proposal, as removing any lingering doubt on the matter.[16/]

Noting the NLRB's possible fear that the Court's holding might permit employers to effectively evade the duty to bargain by insisting on management's rights clauses giving management unilateral control of all or most significant employment conditions, the Court completed the picture by saying that the requirement of good faith in bargaining, while it does not preclude insistence upon management's rights clauses or unilateral control of particular employment conditions, does preclude an employer from insisting to impasse on unilateral

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15/ 343 U.S. at 408.

16/ 343 U.S. at 409.

control of so many significant employment conditions as to leave the union little or nothing of importance to bargain about. It is by this means that the "gutting" of the statute that PERC and the Fourth District Court of Appeal are concerned about (P.O., p. 8) is precluded. An employer may insist upon the right to deal unilaterally with particular conditions of employment, or groups of conditions, but if his insistence covers too much, it may serve as a basis for a finding of bad faith, i.e., that he did not approach bargaining with a sincere desire to reach agreement, or refused to engage in meaningful bargaining.[17/]

Thus, the law's fundamental concern for freedom of contract is served, and the union's legitimate interest in having employers come to the bargaining table with an incentive to bargain in good faith and reach agreement is also protected.

Answer To The "Balance Of Power" Argument;
No Such Mandate And No Such Power

Contrary to its assumption of a mandate to adjust the balance of power between labor and management, the NLRB was quickly informed that it had neither the mandate nor the power "so to disrupt collective bargaining practices."[18/] The federal Supreme Court has not been slow to repeat that admonition:

17/ 343 U.S. at 409; also see Int'l Woodworkers of America v. NLRB, 458 F.2d 852 (D.C. Cir. 1967).

18/ 343 U.S. at 408.

"... The Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." (American Ship Building v. NLRB, 380 U.S. 300, 315 (1965).

Under Florida Law, A Statute Adopted From Another Jurisdiction Is Governed By The Construction Placed Upon It, As Of The Time Of Its Enactment, By The Highest Court Of That Jurisdiction. Since The PERA, In Relevant Part, Is Adopted From The National Labor Relations Act, And Since The Commission Freely Concedes That Its Decision Would Be In Error Under That Statute, The Commission's Decision Is Presumptively Erroneous.

This Court holds that Florida Statutes adopted from other jurisdictions are governed by authoritative constructions placed upon them in those jurisdictions as of the time of their enactment by the Florida Legislature:

"A Statute adopted from another state is governed by the construction placed upon it, at the time of its enactment, by the highest court of the state from which the statute was adopted. Crane Co. v. Richardson Constr. Co., 312 F.2d 269 (5th Cir. 1963)." (State v. Aiuppa, 298 So.2d 391, 394 (Fla. 1974)).

* * *

"We have long held that when our Legislature adopts a statute from another state, we should adopt that state's judicial construction of the statute. See Blank v. Yoo Hoo of Florida Corp., 222 So.2d 420 (Fla. 1969); State ex rel. Porter v. Atkinson, 108 Fla. 325, 146 So. 581 (1933); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894)." (Flammer v. Patton, Fla. 245 So. 854, 858 (Fla. 1971); emphasis added).

The reason for this rule is crystal clear and logically sound:

> "Statutes adopted from another state may be deemed to have been adopted with the construction given to them by the courts of the state from which they were adopted. State ex rel. Porter v. Adkinson, 108 Fla. 325, 146 So. 581 (1933)(same cite)."

In other words, such constructions

> "... being before the Legislature in its adoption of such statutes, (must be seen) as reflecting the legislative intent thereof. (298 So.2d at 395, words in parens added)."

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

> "PERC admonishes against 'slavish adherence' to NLRB precedent and offers many reasons why we should consider that Florida's public sector labor policy embodied in PERA justifies PERC's decision in this case, which PERC describes as a 'correct balancing of competing public interest in accordance with Florida public sector labor policy.' We are not persuaded ...". (School Board of Polk County v. Florida Public Employees Relations Commission, 399 So.2d 520, 522 (Fla. 2d DCA 1981)).

This Court Agrees With The Federal Supreme Court On The Determinative Legal Principles

To the extent that this Court has spoken, it is clearly in agreement with the fundamental premises and propositions that led the U.S. Supreme Court to its landmark decision in NLRB v. American Nat'l Ins. Co., supra.

Certainly, this Court has unequivocally espoused the view that Article I, §6 of the Florida Constitution "absorbed and gave approval to" the concepts and practices of collective bargaining previously developed in the private sector under federal labor law. Only by conscious effort could anyone fail to take this meaning from Dade County Classroom Teachers Ass'n, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), where this Court said that Article I, §6 gives Florida public employees the "same rights of collective bargaining as are granted private employees." The tone of the Court's ensuing opinion in City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), is one of some mystification that the Ryan statement could have been misunderstood, and the Court proceeded to spell it out in even more basic terms, saying that by "private employees" it had been referring to those private employees subject to federal labor laws.

Having committed to the proposition that the PERA absorbs and approves concepts and practices developed in the private sector under the NLRA, it would logically follow that this Court subscribes to the principle of freedom of bargaining

and contracting as stated and discussed in NLRB v. American National Ins. Co., supra. This assumption was confirmed in City of Tallahassee v. PERC, supra, when this Court said that, although the City was required to negotiate on retirement benefits, neither it nor the State was under any obligation to concede to the union's demands:

> "This argument forgets that the state need not agree to any proposal for retirement benefits or the like which is actuarially unsound. All that it must do under our interpretation of article I, section 6, is negotiate on the subject." (410 So.2d 487, 491).

The significance of the last quoted sentence cannot be over-stated. It cannot be read except as clearly confirming the proposition as to parallel meanings, and applying it in a specific situation. The Court's intention that its "interpretation of article I, section 6", i.e., its parity holding in Ryan, is to serve as the touchstone for solving ensuing questions of PERA interpretation is here placed beyond successful contradiction.

The federal Supreme Court's admonition to the NLRB that its general commission to administer the NLRA did not authorize it to disrupt common and previously established collective bargaining practices would appear to be subsumed, as to PERC, in this Court's Ryan-Tallahassee recognition of the genesis, and resultant meaning, of the Article I, §6 concept of collective bargaining. Neither Article I, §6 nor the PERA was created in a

vacuum. If the language of the NLRA would not permit the NLRB to assume a policy-making prerogative, in order to impose its idea of the appropriate balance of power upon labor and management, there can be no viable argument that the language of the PERA contemplates that PERC shall have such authority.

That the PERA mandates no concessions to unions as being necessary to prevent strikes seems clear when one considers that public employee strikes were illegal in Florida long before public employee collective bargaining was permitted (Pinellas Co. Teachers Ass'n v. Board of Public Instr., 214 So.2d 34 (Fla. 1968)), and it was not in all of those years found to be necessary to "counterbalance" the denial of the right to strike. The State's ability to enforce this prohibition through normal recourse to legal processes is a historical fact.

PERC's attempted evisceration of the rights of Florida's public employers emanates from no perception of any real exigency or genuine public policy, based on any language in Chapter 447, but is an ipse dixit exercise, tied to and emanating from nothing more than the Commission's own notion of a desirable power balance.

PERC's and the Court of Appeal's assertion that federal law permits[19/] insistence on bargaining rights waivers because private employees have a right to strike is demonstrably invalid.

19/ P.O., pp. 8-9; DCA, pp. 10-11.

The federal government itself permits collective bargaining by federal employees without allowing them to strike, but it does not deny federal public employers the right to demand bargaining rights waivers (See §7(16)(b) of the Federal Service Labor-Management and Employees Relations Law, Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §71, Part III, Subpart F, §7116(b)(7)(1978)(Strikes prohibited) and Bureau of Prisons v. American Federation of Government Employees, 73 Federal Service Impasse Panel 27 (Nov. 18, 1974)(submission of and insistence upon zipper clause to impasse held, not unlawful)).

In summary, this Court, expressly and by necessary implication, has adopted as its own all of the principles and propositions that led the federal Supreme Court to the conclusion that it is entirely lawful and proper for a bargaining employer, during the term of its contract with the union, to insist through impasse upon a contract right to deal unilaterally with one or more conditions of employment, subject only to the caveat that the employer's insistence upon unilateral control of employment conditions not be so wide-ranging as to impugn its good faith.

PERC has conceded that the PBJC Trustees' conduct was lawful and proper under the federal labor law principles established by the federal Supreme Court in NLRB v. American Nat'l Ins. Co., supra, and ensuing federal cases and adopted, we respectfully submit, by this Court:

> "As previously discussed, denomination of such a waiver provision as a required subject of bargaining would permit an employer to condition the implementation of a collective bargaining agreement containing provisions governing a wide range of other mandatory subjects upon the union's agreement to waive its statutory right to bargain over the effects of management decisions during the term of the agreement. In the private sector this result has been viewed as being justified ... N.L.R.B. v. American National Insurance Co., 343 U.S. 395 (1952); Long Lake Lumber Company, 182 NLRB 435, 74 LRRM 1116 (1970)." (P.O., p. 8).

PERC's assertion of a policy reason compelling it to follow a contrary rule is obviously unfounded.

The inevitable conclusion is that the PERC decision is in error and cannot stand.

> This Court's Proviso That Bargaining Processes And Procedures Are Not Required To Be Identical Does Not Change Its Holdings That The Substantive Bargaining Rights Of Public Employees Are The Same As Those Granted Private Employees Under Federal Labor Laws.

The Union and PERC purport to see an escape from this Court's equation of public and private employee bargaining rights in its concession, in City of Tallahassee v. PERC, supra, that differences in the two situations require variations in the procedures followed (487 So.2d at 490-491). In their briefs on jurisdiction, they have misrepresented the Appellants as contending to the contrary that "there can be no differences between the mechanisms of collective bargaining for private

sector and public sector employees" (Appellee's brief, p. 4; second emphasis added) and that there is "an absolute identity of law" in the two sectors (PERC brief, p. 4). These attributions are unsupported by citations to the Appellants' brief, since the Appellants did not in fact make these contentions.

In this case, we are not dealing with processes and procedures, but with substantive bargaining rights. As this Court has said, all rules and regulations must operate "within the limits of said Section 6" of Article I of the Florida Constitution (487 So.2d at 491, quoting from Dade County Classroom Reachers Ass'n v. Ryan, supra), and that Section "straightforwardly and clearly" limits public employee bargaining rights to the rights granted to private employees under federal labor laws (City of Tallahassee v. PERC, supra, 487 So.2d at 490).

There Is No Meaningful Distinction Between The Trustees' Management's Rights Clause, And That Of American National Insurance Company.

While PERC candidly admitted that the Trustees' management's rights clause falls within the federal Supreme Court's holding in NLRB v. American Nat'l Ins. Co., supra, (P.O., p. 8, last paragraph; p. 9, last paragraph), the Court below asserted that the private sector cases, including American National, are

> "distinguishable both on their facts and on the law upon which they are decided." (DCA, p. 8).

A. The Facts

As to the facts, the Court of Appeal said that the American National and present clauses differ in that the American National clause

> "enumerated a list of matters which the employer desired to be nonarbitrable",

so that the union could look at each of those matters and, if it chose to do so,

> "bargain generally over the effect the matters enumerated in the clause might have on those conditions of employment the parties were required to bargain for collectively ..." (DCA, pp. 8-9).

It is true that the Trustees' Section C., although it referred only to the exercise of specific rights granted to the Employer in other parts of the contract, created a right to deal unilaterally in areas where the contract was silent, when read together with the following sentence of Article XXII, Section A:

> "The Employer shall have and retain, to the maximum extent permitted by law, all of the rights and privileges, whether exercised or not, that it would have had in the absence of a collective bargaining relationship, except to the extent that it has herein agreed to express limitations upon those rights and privileges."

There was, however, no dispute as to Section A. It had appeared in all of the parties' prior contracts. Moreover, it was not agreed to in a vacuum, but as one proposal in a bargaining process in which the parties negotiated a sixty-three

page contract dealing in definitive terms with all matters submitted to the process by the Union.

There is no conceptual difference between a "listing" clause and a residuary clause, and both are sanctioned, on the same rationalization, in federal labor law.[20/]

In a "listing" clause, as is plain from a reading of that involved in American National, the employer still insists upon the right, during the term of the contract, to act unilaterally in areas, such as work scheduling, layoffs, promotions, etc., that are in themselves very broad, without these decisions being subject to arbitration. Thus, the Court of Appeal's objection to a residuary clause, that it permits unilateral action as to unforeseen contigencies,[21/] does not relate to a valid distinction. Each item in a listing clause covers all contingencies, foreseen and unforeseen, that may arise in that area. Obviously, more unforeseen contingencies could arise under the American National clause, in the areas of hiring, promoting, demoting, work scheduling, etc., than under a residuary clause in a contract where each of these matters, and all matters of normal concern, were treated in definitive terms in the contract. In

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20/ See Texas Industries, Inc., 140 NLRB 527 (1963), a "residuary" case, citing NLRB v. American Nat'l Ins. Co., supra, a "listing" case. Also, Cranston Print Works Co., 115 NLRB 527, 554-555 (1956).

21/ DCA, p. 6, quoting from the Hearing Officer's Report.

point of actual fact, the American National contract was far more restrictive of impact bargaining than these parties' contract, with Section C. included, would have been. There was never any contention that the Trustees refused to treat each and every bargaining subject raised by the Union in a definitive manner in the contract. Section A. of the Employer Prerogatives clause only permitted the Trustees to make unilateral decisions as to those matters as to which the contract still remained silent. There is no contention, nor can there be any, but that the contract did definitively speak to every subject that normally appears on a bargaining checklist.

B. The Law

The Court of Appeal erred grievously in asserting a legal distinction in that the PERA, unlike the NLRA, compels agreement (DCA, p. 9), the Court's unstated proposition apparently being that insistence should not be permitted where the option to disagree is not available.

If anything in the PERA is clear, it is certainly clear that it does not compel agreement:

> "neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part." (§447.203(14)) 22/.

22/ That part otherwise provides only for compulsion on the employer, as to dues deduction and a grievance-arbitration procedure.

This language was lifted out of, and is identical to, that of the NLRA (29 U.S.C.A. §158(d)).

Judge Shaw dealt gently with this gross misconception on the part of the majority. He did not directly refer to it, but made exceedingly clear his understanding that the PERA does not compel agreement:

> "Second, the employees' lawful means to counter management's insistence on a waiver of employee rights is quite simple: they can say no." (DCA, pp. 19-20).

The majority is simply wrong. The statutory section cited, §447.403(4)(d), cannot by any means be construed as compelling agreement and, to our knowledge, no other tribunal or person has ever said that it does. The legislative action that it refers to is action to prescribe the terms of an agreement, which the employees are then free to reject, whereupon the contract terms prescribed by the legislative body take effect, but excluding

> "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." (§447.403(4)(e); emphasis added).

What then emerges is not an agreement, but a limited set of imposed terms and conditions of employment.[23/] This is precisely

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23/ PERC itself disagrees with the Court of Appeal, and holds that a union isn't even required to submit a contract offer as the result of legislative action to a ratification vote ...(continued)...

what emerges in private industry, when an employer exercises its right to act unilaterally after a bargaining impasse (NLRB v. Katz, 369 U.S. 736 (1962); Presto Casting Co., 262 NLRB No. 47 (1982)).[24/]

It follows that a management's rights clause cannot be legislatively imposed under §447.403(4)(d). Contrary to Judge Shaw's understanding (DCA, p. 20), this party has never assumed otherwise, and the Board of Trustees always and repeatedly told the UF that it realized that the management's rights clause could not be imposed by legislative action.

In summary, the Court of Appeal is entirely correct in stating that the voluntary nature of the collective bargaining process lay at the heart of the American Nat'l holding, but erred crucially in assuming that this is not true also of the PERA bargaining process.

The unions are fond of asserting that there is de facto compulsion to agree when they must accept a clause that the

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23/ ...(continued)...

(City of Winter Haven v. Teamsters Local 144, 5 FPER 191 (1979)). The UF in fact refused to allow a ratification vote on the subject contract. Judge Shaw, in light of §447.403 (4)(e), Fla. Stat., saw this as a probable violation, and the question will probably seek resolution in this Court in due course.

24/ The Court of Appeal also misunderstood the legal significance of a "take it or leave it attitude" (DCA, p. 6). Such an attitude is merely one among many factors which may be indicative of bad faith when taken at the outset of negotiations and as to the employer's total, or substantially complete, bargaining position (General Electric Co., 150 NLRB 192, 194 (1964); Memorial Consultants, Inc., 153 NLRB 115 (1965)).

employer will not abandon, or go without a contract. This, of course, is the same choice that private sector unions face, and many a private sector union has gone without a contract, regardless of the right to strike, as the result of a bargaining impasse.

We suggest that this Court will not take long to dispose of any contention that the PERA compels agreement.

The Court of Appeal's ensuing excursion through a number of federal opinions (DCA, p. 9, last paragraph through p. 10), seems to no purpose. None of the holdings described has to do with the right to insist on a mangement's rights clause; they deal with the duty to bargain, refrain from unilateral changes, etc., during contract negotiations or in the absence of such a clause, all of which we freely concede.

The Court, as PERC had done before it, eventually conceded the true basis for its decision, i.e., "the major distinction between public sector law and that in the private sector" (DCA, p. 10), which is the denial of the right to strike to public employees, and its approval of PERC's assumption of a policymaking prerogative to counterbalance that denial (DCA, pp. 10-13).

We respectfully submit that the Court's error in this approval has been conclusively demonstrated below.

PERC Has Usurped A Legislative, If Not A Constitutional, Prerogative In Deciding To Truncate Employer Bargaining Rights In Order To Give Unions Greater Bargaining Power Than They Are Given By The Language Of The PERA.

PERC concedes that the Florida Legislature, when enacting the PERA, was acutely aware that public employee unions would not have the right to strike, and that the prevention of such strikes was of the greatest legislative concern (P.O., p. 5, first full paragraph).

The Legislature manifested that concern by prohibiting strikes, and by penalizing those who might yet engage in them, in the strongest terms known to the civilized world.[25/]

The Legislature, as PERC again concedes, also followed the pattern set by other state legislatures in giving or guaranteeing public employee unions certain advantages that private sector unions do not get, or have to bargain to get (P.O., p. 5).[26/]

It is patently absurd to suggest that the Legislature, having so carefully dealt with the question of possible strikes, and having carved out and carefully provided these selected "counterbalances", intended to give PERC carte blanche to dispense others at its discretion.

25/ §§447.501(2)(e), 447.507, Fla. Stat.

26/ PERC's gratuitous assumption that nonbinding interest arbitration, dues checkoff and a binding grievance and arbitration procedure were given as tradeoffs or counter balances for denial of the right to strike is ...(continued)...

There is simply no warrant in the legislative history, or the statute as written, for such a proposition.

PERC refers to the statutory objective of protecting the public by assuring, at all times, the orderly operation of government services uninterrupted by strikes, but refers to no indication that the Legislature thought that it had insufficiently addressed that concern. It is difficult to think that the Legislature considered its treatment of the question inadequate and, being at a loss to know what else to do, decided to defer to the wisdom of Commissioners not then in being.

This is, nevertheless, precisely what the Commission would have this Court say:

> "The Florida collective bargaining law, ... was enacted in recognition of the fact that labor unrest is inimical to the public welfare and should be discouraged.
>
> * * *
>
> It is readily apparent to those familiar with the collective bargaining process that the absence of the power to compel

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26/ ...(continued)...

dubious. There is nothing in the legislative history to indicate that the Legislature thought it had to buy compliance with the Constitutional prohibition against strikes, or that it was so enamored of public employee collective bargaining as to want to help it along (§447.201 as to the neutrality statement). The Legislature's refusal to enact the PERA for years and until this Court warned that it would otherwise implement Article I, §6, is history (Dade County CTA, Inc. v. Legislature, 269 So.2d 684 (Fla. 1972)).

> an employer to make concessions in negotiations through a strike or a substitute mechanism such as binding arbitration creates a significant imbalance of bargaining power in favor of the employer. * * * It was therefore necessary for the Legislature to provide ... sufficient counterbalancing factors to ensure meaningful collective bargaining. Otherwise the disparity of bargaining power would lead to frustration and labor unrest in contravention of the primary goals of the statute." (P.O., p. 5).
>
> "The most likely result of permitting such insistence (on management rights clauses) would be enhancement of frustration in the bargaining process and encouragement of unions to resort to remedies not sanctioned by law. * * * We conclude, therefore, that a provision such as (the PBJC proposal) does not constitute a wage, hour or term and condition of employment ...". (P.O., p. 9; material in parens and emphasis supplied).

Judge Shaw, dissenting below, found that PERC, in assuming this prerogative, had taken an "unduly expansive view of its role in formulating public labor policy" (DCA, p. 23) and thought that the appropriate standard of judicial review, when the question is one of law rather than fact, should be the standard followed by the federal Supreme Court that the concept of deference to an expert tribunal should not lead to judicial inertia permitting the unauthorized assumption by an agency of major policy decisions properly made by the Legislature.[27/]

27/ Citing Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA, 1977), in which the Court below actually had adopted that standard. The federal courts do not defer to the NLRB on pure questions of law (Montgomery Ward v. NLRB, 668 F.2d 291, 298 (7th Cir. 1982)).

There can be no serious argument but that PERC's decision, redefining the traditional concept of mandatory collective bargaining so as to exclude from its scope that subject which is far and away the most significant of all to the management side, is a major policy decision. To give labor unions an otherwise nonexistent power to hamstring public employers by interposing months of onerous procedures and hearings between the authorized and lawful making of a decision and its implementation is to create a Frankenstein monster that the word "major" is too weak to describe.

Florida law is clear in denying the power of administrative agencies to make major policy decisions for the State.

In the first place, the bargaining rights of Florida public employees are established by Article I, §6 of the Florida Constitution, which this Court has interpreted as giving such employees the same bargaining rights as are enjoyed by private employees subject to federal labor laws (pp. 16-20, infra).

In deciding that the bargaining rights of Florida public employees are greater than those of private employees under federal labor law, i.e., that Florida public employees have the additional right to refuse to bargain on a management's rights clause, PERC presumes to decide a Constitutional question. This it cannot do, with or without Legislative authorization. (Carrollwood State Bank v. Lewis, 362 So.2d 110 (Fla. 1978)).

PERC does not, at any point in its decision, take cognizance of, or attempt to deal with, the fact that the Florida public employer's bargaining rights are constitutionally defined. It deals only with, and depends entirely upon, Legislative intent as discerned by the Commission. Legislative intent as this Court held in City of Tallahasee v. PERC, supra, even if accurately divined, cannot justify the abridgement of Constitutional bargaining rights.

The prohibition against public employee strikes is also expressly stated in Article I, §6. The PERA policy statement about avoiding interruptions of governmental services is, therefore, a mere restatement of a Constitutional aim. To say that PERC has the power to second-guess the Legislature by expanding upon its implementation of that Constitutional policy would again be to say that PERC can decide Constitutional questions. Indeed, the proposition that the Legislature itself has the authority to take constitutionally provided rights from one group (citizens and taxpayers represented by public agencies) in order to dilute or "counterbalance" a constitutional prohibition imposed upon another group, is most dubious. What the Constitution takes away, the Legislature may not indirectly restore.

PERC's determinations as to what is or is not needed to prevent strikes are constitutionally indistinguishable from determinations as to which geographic areas and resources are in

greatest need of protection, and both are "fundamental legislative tasks" subject to the constitutional imperative of nondelegation of legislative power (Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978)).

In any event, if the PERA were to be construed as granting PERC authority to determine what is needed and appropriate to prevent strikes by public employees, without specific legislative standards or policies to guide the agency in making such determinations, the statute would be unconstitutional as violating Article 2, §3 of the Florida Constitution. (Florida Home Builders Ass'n v. Division of Labor, Bureau of Apprenticeship, 367 So.2d 219 (Fla. 1979); Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976)).

If the Legislature, simply by restating the Constitutional policy against public employee strikes, intended that PERC should be empowered to implement that policy by whatever means might appeal to two Commissioners, with no further specifics or guidelines, the statute would provide no protection against unfairness or favoritism, and would be unconstitutional. Legislative delegations of authority must be clearly defined and limited, so that nothing is left to the unbridled discretion or whim of an administrative agency (High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977)).

Consistent with the rule that statutes will not needlessly be construed so as to be unconstitutional or of dubious

constituionality (Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981)), the conclusion must be that the Florida Legislature did not intend that PERC should expand upon its treatment of the question of possible strikes.

The line of Florida cases supporting these propositions is long, unbroken and clear (1 Fla. Jur.2d, §§24-29, and cases cited therein).

It is also held that the construction placed upon a statute by an administrative agency is not binding upon the courts (Louisville & N.R. Co. v. Speed-Parker, Inc., 103 Fla. 439, 137 So. 724 (Fla. 1931)), and the courts remain free to determine the true intent of legislation (State ex rel. Fronton Exhibition Co. v. Stein, 144 Fla. 387, 198 So. 82 (Fla. 1940)). Deference, as Judge Shaw has said, is "an aid to judicial review and a self-imposed restraint", not a straight-jacket, (DCA, p. 23).

We submit that PERC's decision represents a flagrant effort to usurp the legislative prerogative as well as to decide Constitutional questions in derogation of the judicial prerogative.

The Mischief Which Is Inherent In The Usurpation Of Legislative Prerogatives By Administrative Agencies Is Apparent Here In That PERC Has Made A Value Judgment On The Basis Of Assumptions That Are Not Based On Evidence, And Which Are Contradicted By Informed Opinion.

In the final analysis, PERC has made a policy decision based on its perception as to the balance of power between public

employers and unionized employees, and its assumption of a mandate to correct what it sees as

> "a significant imbalance in favor of the employer." (P.O., p. 5).

This perception is not based on evidence, but is assumed, as being

> "readily apparent to those familiar with the collective bargaining process." (P.O., p. 5).

This assumption and assertion are not supported by citation to any authority of any kind, and they amount to pure ipse dixit.

In our brief to the Court of Appeal, pp. 27-37, we dwelt at some length upon statistics and authorities which controvert PERC's unsupported assumption.

If one cares to look at evidence, the evidence is that the comparatively "strong" private unions, with their right to strike, have been able to attract only about 10% of Florida's private employees in almost fifty years under the NLRA, whereas the "weak" public sector unions came to represent at least 55% of all Florida public employees in five years or less (Directory of National Union and Employee Associations, 1979, Bureau of Labor Statistics, U.S. Department of Labor).

It is also a fact that private sector unions routinely agree to management's rights clauses (NLRB v. American Nat'l Ins. Co., supra, 343 U.S. at 405-406), despite their right to refuse and to strike in support of their refusal, which indicates (1) that

the ability to strike does not in fact give them the power, as PERC assumes, to resist such demands, and/or (2) that such clauses are in fact not so destructive of or offensive to employee bargaining rights as PERC thinks. One way or another, PERC has founded its decision on a false premise.

Furthermore, if the management's rights clause is as important as PERC says it is, PERC, by totally denying it to public employers has actually created an imbalance of power, as compared with private sector, in favor of public unions.

H.K. Porter Co. v. NLRB, supra, is a famous case demonstrating that private sector unions are often unable to get their way by striking or threatening to strike, so that they regularly attempt to persuade the NLRB and the federal courts to expand their bargaining rights. The federal Supreme Court's answer, as always, was that bargaining power adjustments are the proper concerns of the legislative branch:

> "... the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, ... It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficient to cope with important labor problems. But it is the job of the Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process." (397 U.S. at 109).

The duty to bargain in good faith, as we have seen, is the same in the public sector as in the private.

Any power advantage that private sector unions may gain by the right to strike is offset by the private employer's right to lock out employees in aid of its bargaining proposals and position (American Ship Building v. NLRB, 380 U.S. 300 (1965); N.L.R.B. v. Tomco Communications, Inc., 576 F.2d 871, (9th Cir. 1978)).

If anything is "readily apparent" it is that the private sector strike is a weapon of limited value. The law of supply and demand is much more efficacious. If substitute employees are in good supply, a strike will be futile. Again, the private employee's right to strike is offset by the employer's right to permanently replace him (NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, (1938)). The right to strike is further offset by the fact that strikers cannot draw unemployment compensation (Philip Carey Mfg. Co., 140 NLRB No. 90, 52 LRRM 1184 (1963); §443.101(4), Fla. Stat. (1980)). It is still again diminished by the obligation of motor carriers and common carriers to cross picket lines (Teamsters v. Grand Truck Western, 239 F.2d 851 (6th Cir. 1956), cert. den. 353 U.S. 937 (1957)).

Nor is the right to strike absolute. It is qualified by a host of legal limitations, such as the prohibition against secondary picketing (Local 761, I.U.E. v. NLRB, 366 U.S. 667, 67 L.Ed.2d 592, 81 S.Ct. 1285 (1961)).

Informed opinion contradicts PERC's unsupported assumption as to an imbalance of power. In their article, Structuring Collective Bargaining In Public Employment, 79 Yale L.J. 805, 822 (1970), Wellington and Winter question that assumption, arguing that the necessity for public employers to compete with private employers for employees, the lack of a profit motive in public employment, the risks and disadvantages associated with strikes, and the fact that unionized public employees create a large and powerful special interest group "that seems able to compete very well with other groups in the political decision-making process", all contradict the asserted comparative weakness of public employee unions. They point out that the political lobbying power of unionized public employees is frequently quite disproportionate to their numbers, and that they can also count on the political support of their unionized brethren in the private sector.

We have already noted the statutory advantages that are provided to public employee unions in the PERA. There can be no denying the significance, for instance, of mandatory dues checkoff. It was a union's effort to get checkoff without having to bargain for it that took the H.K. Porter case all the way to the federal Supreme Court.

It should also be noted that the law, apart from the PERA, gives public employees many advantages that private employees often do not have and may never get, no matter how hard

they bargain or whether they strike, such as retirement benefits, sick pay, tenure, etc.

It is, of course, a truism that public employees often have job protections, under the Administrative Procedure Act and other state and federal statutes and cases, that simply are not found in the private sector.

We are not trying to convince this Court that PERC was wrong in the value judgment underlying its major policy decision, i.e., that the PERA otherwise would create an imbalance of power, or that there is actually an imbalance favoring public employees. We say only that it was a value judgment, unsupported by evidence or investigation, and one that is seriously in doubt. If that is so, it serves to show why the Commission should be required to leave such matters to the Legislature, whose proper business it is to make value judgments and act on them, after legislative hearings or other fact investigations.

The same may be said of PERC's determination that the preservation of the management rights of public employers cannot be equated with the public interest (P.O., p. 7). Whether this is true or not, it is certainly true that

> "The public employer, as a public entity, represents the citizens and taxpayers of Florida. Their rights are worthy of protection...". (Bay County Board of Commissioners v. PERC, 365 So.2d 767 (Fla. 1st DCA 1979).

If important rights ultimately belonging to the citizens and taxpayers of Florida are to be taken away, it is the Florida Legislature, which is elected by and represents them, who should make that decision.[27]

PERC's Decision Shocks The Public Conscience In Granting Concessions To A Special Interest Group In Order To Dissuade Them From Breaking The Law.

Reduced to essentials, PERC's proposition is that public employee unions must be given greater bargaining rights than private sector employees, and the bargaining rights of public employees correspondingly diminished, in order to dissuade them from engaging in unlawful strikes in response to frustration of their bargaining objectives.

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27 The Legislature's strong concern for the management rights of public employers is manifest from §447.209, Fla. Stat., which guarantees some of them. This section is especially significant because it is unique, having no counterpart in the NLRA or, to our knowledge, in any state bargaining law. Contrary to PERC's assumption (P.O., p. 4) we do not agree that the Legislature intended the exercise of these rights be subject to impact bargaining. It may be that some or all of these rights are subject to bargaining by virtue of Article I, §6 of the Constitution as interpreted by this Court, rather than by legislative intent. For the record, and although we do not wish to pursue the question in this litigation, where it is not an issue, we also dispute PERC's assumption that the exercise of a management right is always subject to impact bargaining (P.O., p. 7, n. 6), and express the hope that the Court will not adopt that assumption. The question whether impact bargaining was intended in the absence of a separate waiver is traditionally one of contract interpretation.

The proposition that it is appropriate for PERC and the courts to make concessions to labor unions in order to bribe them to obey the law is so novel, not to say shocking, that research reveals no direct precedent.

It is, however, well settled in labor law that the law will not reward a wrongdoer for doing wrong (NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. den. 384 U.S. 972 (1966)).

We submit that the effect of PERC's decision is to permit a special interest group to extract concessions from the sovereign and its citizens under threat of reprisal, and that this Court cannot and will not tolerate that.

In Imposing A Contract Upon The Trustees To Remedy An Unfair Labor Practice, PERC Conclusively Established Its Disregard For The Legislative Prerogative.

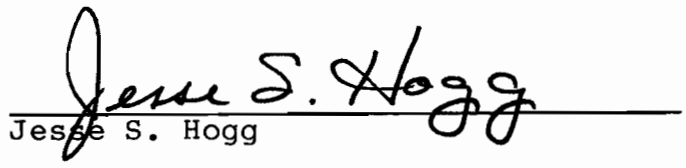
In his dissenting opinion below, Judge Shaw denied PERC's proposition of law that it has the authority to impose a collective bargaining agreement on a party as a remedy for an unfair labor prctice (DCA, pp. 15-16), as being contrary to well settled contract law, and to the statutory prohibition against compelling agreement (§447.203(14), Fla. Stat.) as the same language was construed by the federal Supreme Court in H.K. Porter Co. v. NLRB, supra. In imposing such a remedy, as Judge Shaw well said, PERC compounds its usurpation of legislative authority in redefining the definition of mandatory bargaining subjects by further assuming the authority to act as interest arbitrator, and there certainly is nothing whatsoever in the PERA to remotely suggest that this can lawfully be done. PERC here shows as little concern for the statute as it had for the conceded fact that its denial of impact bargaining waivers would give unions a power to effectively veto many management decisions, which power they could well use in an extortionate manner and to the detriment of the public interest (P.O., pp. 9-10).

We submit that such an attitude is not acceptable in any public agency.

CONCLUSION

The Appellants respectfully submit that the decision of the Court below is in error, and that it should be reversed with instructions that PERC's Order be vacated.

Respectfully submitted,



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