O/A 1-13-84

IN THE SUPREME COURT OF FLORIDA

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES, Petitioner, v. UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE, Respondent.	Case No. 63,352 District Court of Appeal 1st District No. AF-17

BRIEF IN SUPPORT OF PETITIONER EDISON COMMUNITY COLLEGE AS AMICUS CURIAE

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STATEMENT OF INTEREST[1]

Edison Community College (hereinafter "Edison") is a Florida public employer with collective bargaining rights and obligations. At a February 25, 1983 meeting of the Community/Junior College President's Council, members in attendance voted unanimously to recommend that the individual institutions support Palm Beach Junior College (hereinafter "Palm Beach") in its efforts to persuade the Supreme Court of the State of Florida to accept the instant appeal.

Edison's interest in this issue is prompted by several factors. We respectfully submit that collective bargaining proposals over management rights articles and related provisions were and remain common to Palm Beach, Edison, and other public employers throughout Florida. Our immediate concern is not only does it appear that the Public Employees Relations Commission (hereinafter "PERC") has made an unwarranted departure from nearly 50 years of private sector precedent in ruling that a public employer cannot bargain to impasse over management rights and related provisions, but that PERC exceeded its statutory authority

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[1] In the interest of brevity, rather than restating the case, Edison Community College incorporates by reference the Statement of the Case set forth by Petitioner Palm Beach Junior College Board of Trustees.

by offering the union a wage increase as part of the remedy. Moreover, the rulings below create great confusion and uncertainty in the collective bargaining process. These factors make it clear that unless the First District Court of Appeal's affirmance of PERC is reversed, a myriad of impasse proceedings can be expected and the give-and-take process of collective bargaining undermined. Finally, as noted by Justice Shaw in his dissent:

> PERC has misperceived the nature of the problem, misconstrued the applicable law, and, consequently, devised a new law which not only does not adequately address the true problem, but which, as a side effect, creates serious future problems.

425 So.2d at 144.

It is for all of these reasons that Edison files this brief urging this Court to reverse the decision of the majority, and adopt the dissent of Justice Shaw in the lower court.[2]

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[2]Justice Shaw's dissent can be found at 425 So.2d at 140-145.

STATEMENT OF THE FACTS

Edison is in agreement with the facts set forth by Judge Ervin in the lower court. 425 So.2d at 134-135. In particular, it is undisputed that "as part of a package of bargaining proposals [including a 9-1/2% wage increase], Palm Beach presented to the union a management prerogatives clause, which was rejected by its bargaining representative the following week, and an impasse was declared [by the union]." 425 So.2d at 135 (emphasis added). While Palm Beach refused to withdraw its management prerogatives article, it did propose two alternative clauses on October 30, 1980, "but the parties were again unable to reach agreement." Id. Thereafter, following the procedures set forth in §447.403(4), Fla. Stat. (Supp. 1980), the Board of Trustees of Palm Beach Junior College mandated:

> [A] contract which included the management prerogatives clause originally proposed by Palm Beach. This contract, with salary increases and other terms the parties had tentatively agreed upon during bargaining, was . . . offered to [the union] for a ratification vote in accordance with Section 447.403(4)(e). [The union] declined to sign the contract or to submit it to the members for a vote; instead it filed an unfair labor practice charge with PERC.

425 So.2d at 136.

Thereafter, following a hearing and Hearing Officer's Recommended Order, PERC concluded in its Order of July 10, 1981, that by insisting to and through impasse resolution upon its management prerogatives clause, Palm Beach had refused to bargain collectively in good faith. PERC ordered Palm Beach, inter alia:

> [T]o offer the United Faculty a collective bargaining agreement which includes those provisions agreed to by the parties in negotiations and those provisions mandated by the Board of Trustees pursuant to §447.403(4)(d), Florida Statutes (Supp. 1980), excluding [the management prerogatives clause]. [3]

7 FPER at 597 (emphasis added).

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[3]Only tentative agreement was reached in collective bargaining because no final, complete agreement was ever reached. The practical effect of the PERC decision gave the union the option of deciding whether it wanted a 9-1/2% wage increase, among other benefits, without Palm Beach's management prerogatives section, or returning to collective bargaining over such matters. Thus, PERC dictated the substantive terms of the contract. Despite acknowledging that "this case presented an important issue of first impression", PERC steadfastly refused to allow Palm Beach an opportunity to negotiate such new developments. The record reveals that Palm Beach strenuously objected, and pointed out that such a remedy was tantamount to imposing a collective bargaining agreement in contravention of §447.203(14), Florida Statutes (1981), which provides in part that "neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part".

ARGUMENT SUMMARY

A. THE DECISION OF THE FIRST DISTRICT MAJORITY ABRIDGES THE PUBLIC EMPLOYER RIGHT TO BARGAIN OVER MANAGEMENT PREROGATIVES AND CORRESPONDINGLY EXPANDS THE POWER OF PERC TO DICTATE SUBSTANTIVE TERMS OF A COLLECTIVE BARGAINING AGREEMENT.

B. THE DECISION OF THE FIRST DISTRICT MAJORITY UNNECESSARILY TRAMMELS THE INTERESTS OF PUBLIC EMPLOYERS AND UNDERMINES THE COLLECTIVE BARGAINING PROCESS.

INTRODUCTION

Collective bargaining essentially is a voluntary process. Once an employee organization is certified as the exclusive representative for a designated unit of employees, the parties are only obligated to engage in "good faith bargaining" which means, inter alia, "the willingness of both parties . . . to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord." §447.203(17), Fla. Stat. (1981). Even the definition of "collective bargaining" as set forth in the Public Employees Relations Act, as amended (hereinafter "PERA"), specifies "that 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), Fla. Stat (1981). A similar

provision is found in the National Labor Relations Act.[4]

In interpreting the private sector counterpart, the United States Supreme Court ruled in NLRB v. American National Insurance Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952), that:

> [I]t is equally clear that the [National Labor Relations] Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

343 U.S. at 404.

The same reasoning and result should be followed by Florida with regard to bargaining rights and responsibilities arising under PERA.

A. THE DECISION OF THE FIRST DISTRICT MAJORITY ABRIDGES THE PUBLIC EMPLOYER RIGHT TO BARGAIN OVER MANAGEMENT PREROGATIVES AND CORRESPONDINGLY EXPANDS THE POWER OF PERC TO DICTATE SUBSTANTIVE TERMS OF A COLLECTIVE BARGAINING AGREEMENT.

In City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981), this Court determined that public employees have the right to negotiate upon retirement matters, reasoning

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[4]Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §§151 et seq., provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession". 29 U.S.C. §158(d).

that "to prohibit bargaining on so important an aspect of an employment agreement is, in our judgment, an abridgement of the right to collectively bargain." 410 So.2d at 489.[5] The Court further reasoned that since private employees have the right to collectively bargain as to retirement benefits, public employees must also be afforded the same opportunity.

Now this Court is faced with the question as to whether management rights should be afforded the same dignity as retirement benefits. If public employers are not allowed to bargain effectively to and through impasse over management rights provisions, then, paraphrasing the words of this Court in City of Tallahassee, it constitutes an "abridgement of the right to collectively bargain".

In City of Tallahassee, supra, this Court greatly emphasized the fact that private sector employees have the right to bargain over retirement matters; therefore, public employees should have the same right. Applying this same rationale to public employers, since private employers have the right to bargain concerning management rights, public

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[5] In Dade County Classroom Teachers' Ass'n., Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), the Supreme Court of Florida construed Article I, Section 6 of the Florida Constitution as granting Florida public employees the same bargaining rights as are granted private employees, with the exception of the right to strike.

employers should likewise have that same right. With regard to the importance of management rights, the United States Supreme Court repeatedly has held that bargaining to impasse over management rights provisions is not per se an unfair labor practice.[6] Thus, the employer has no obligation to abandon its intentions or to agree with union proposals on such vital issues. In our setting, the mere existence of the statutory management rights provision found at §447.209, Fla. Stat., does not abridge Palm Beach's right to seek agreement on more specific or favorable language.

The Palm Beach decision below not only circumscribes public employer rights to bargain effectively, but illegally expands PERC's authority to impose a remedy and create a contract never mutually agreed upon by the parties. Here the 9-1/2% wage increase arose within a package offer which included a management prerogatives clause. A package deal is defined as "an offer or agreement making acceptance of one item dependent upon acceptance of another." Webster's New Collegiate Dictionary (1981). This definition equally applies in a collective bargaining context. Thus, when a party such as Palm Beach makes a package proposal during collective bargaining negotiations, it is in effect offering

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[6]See NLRB v. American National Insurance Co., supra.

the entire package *in toto* or else the offer is withdrawn and the parties will go back to provision by provision bargaining. In the instant case, the union rejected the management prerogatives proposal, yet liked, *inter alia*, the 9-1/2% wage increase offer.[7] As emphasized by Justice Shaw in his dissent:

> [I]n establishing the precedent that PERC's power to remedy an unfair labor practice includes the power to dictate the substantive terms of a contract to a party, PERC is acting *ultra vires*. Nothing in PERA even suggests that PERC has the authority to act as an Interest Arbitrator; indeed the legislative decision to vest the authority for impasse resolution in the legislative body of the public employer suggests the contrary. The legislature could have tasked PERC with the responsibility and authority under Section 447.403 to act as an Interest Arbitrator in resolving bargaining impasses; it chose not to do so. PERC's assumption of that role in the guise of policy making is contrary to statute and case law.

425 So.2d at 144.

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[7]The record is devoid of any criticism or finding of wrongdoing by Palm Beach in the use of such package proposal bargaining. In *Winn Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343 (5th Cir. 1978), the court ruled that no private sector unfair labor practice arose where the employer insisted on a package proposal which required the union to accept the entire package or return to provision by provision bargaining.

Pursuant to §447.309(4) of PERA, any agreement which is neither ratified by the public employer nor approved by a majority of voting employees in the bargaining unit shall be returned for further negotiation. In the instant case, Palm Beach was deprived of its statutory right to further negotiate. The parties, not PERC, should resolve this matter.

B. THE DECISION OF THE FIRST DISTRICT MAJORITY UNNECESSARILY TRAMMELS THE INTERESTS OF PUBLIC EMPLOYERS AND UNDERMINES THE COLLECTIVE BARGAINING PROCESS.

The initial message of the majority opinion is "that a public employer commits an unfair labor practice by bargaining to impasse its proposal to include within a collective bargaining agreement a management prerogatives clause." 425 So.2d at 135. Since a union may declare impasse any time after a reasonable period of negotiations pursuant to §447.403(1), Fla. Stat., public employers face a Hobson's choice: raise proposals to clarify management prerogatives and risk an unfair labor practice and PERC imposed agreement; or simply remain silent on such matters until exigent circumstances demand immediate resolution? Either choice represents an inefficient management of government resources. Consequently,

the lower court's approach is unsound from a practical as well as a legal standpoint.

Rather, as Justice Shaw emphasized in his dissent, "management should be encouraged to raise these issues during these negotiations, not penalized for doing so." 425 So.2d at 142. PERC must acknowledge that it has repeatedly approved management rights provisions[8] and related clauses which modify existing statutory language.[9] As in private sector negotiations, parties must feel free to make proposals, packages, concessions, and modifications on matters of mutual concern. However, we respectfully submit that Palm Beach undermines effective collective bargaining negotiations by imposing PERC as "interest arbitrator".

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[8]See Fed'n of Public Employees v. City of Pompano Beach, 9 FPER ¶14111 (1983) (union completely waived right to bargain over impact where the collective bargaining agreement contained a management rights and zipper clause); Professional Fire Fighters of Gainesville, Local 2157 v. City of Gainesville, 7 FPER ¶12325 (1981) (union waived right to bargain by agreeing to management rights provision); United Faculty of Florida v. Edison Community College, 7 FPER ¶12188 (1981) (union waived right to bargain over special program contracts).

[9]In Re American Fed'n of State County and Municipal Employees, Local 1363, 8 FPER ¶13278 (1982) (parties may agree to exclude from the §447.401 grievance procedure particular wages, hours, and terms and conditions of employment). In Re Boynton Beach, 7 FPER ¶12090 (1981) (interest arbitration clause was a waiver to the right to reject special master's recommendation).

The lower court's decision is so vague and ambiguous that both public employers and unions no longer know what their collective bargaining rights and obligations are and what type of conduct is unlawful. For example, does the public employer commit an unfair labor practice by making an alternative proposal of withdrawing a management rights clause in exchange for a lower salary increase? Must the public employer drop all of its so called "permissive" proposals immediately upon the union's declaration of impasse? Can a union selectively reject all but the economic inducements in a public employer's package proposal with the knowledge that PERC may mandate such benefits? These questions should be resolved in the negative. We respectfully submit that in view of this Court's decision in Dade County Classroom Teachers' Ass'n. v. Ryan, supra, City of Tallahassee v. PERC, supra, and nearly 50 years of private sector law, the lower court's decision should be reversed.

CONCLUSION

This Court should follow Justice Shaw's dissent by refusing to expand the power of PERC to dictate substantive terms of a collective bargaining agreement. We respectfully

request that this Court hold that public employers have a right to insist upon inclusion of a management prerogatives clause to and through impasse.

RESPECTFULLY SUBMITTED this 7th day of October, 1983.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States first-class mail this 7th day of October, 1983, upon JESSE S. HOGG, ESQ., HOGG, ALLEN, RYCE, NORTON & BLUE, P.A., 121 Majorca Avenue, Third Floor, Coral Gables, Florida 33134; C. ANTHONY CLEVELAND, ESQ., General Counsel, FEA/United, 208 West Pensacola Street, Tallahassee, Florida 32301; CHARLES F. McCLAMMA, ESQ., Public Employee Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301; W. REYNOLDS ALLEN, ESQ., 609 W. Horatio Street, Tampa, Florida 33606; RICHARD F. TRISMEN, ESQ., BAKER & HOSTETLER, Post Office Box 1660, Winter Park, Florida 32790; RICHARDS, NODINE, GILKEY, FITE, MEYER & THOMPSON, 1253 Park Street, Clearwater, Florida 33516; LORENZ, LUNGSTRUM & HEFLIN, Post Office Box 1706, Ft. Walton Beach, Florida 32549; MATHENY & BREWER, Post Office Box 6526, Titusville, Florida 32780; HARLLEE, PORGES, BAILEY & DURKIN, 1205 Manatee Avenue, West, Bradenton, Florida 33505; MARIAN P. McCULLOUCH, ESQ., 1200 Freedom Federal Bldg., 220 Madison Street, Tampa, Florida 33602; RICHARD WAYNE GRANT, ESQ., 209 N. Jefferson Street, Marianna, Florida 32446; NEILL, GRIFFIN, JEFFRIES & LLOYD, Post Office Box 1270, Ft. Pierce, Florida 33450; and J. ROBERT McCLURE, JR., ESQ., Post Office Drawer 190, Tallahassee, Florida 32302.

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