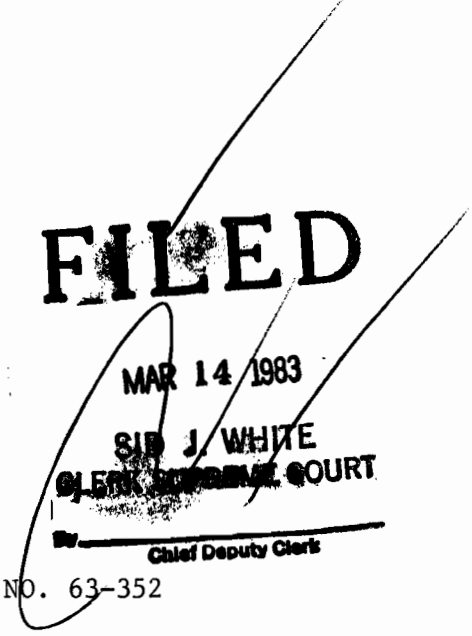
STATE OF FLORIDA

BEFORE THE SUPREME COURT



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

PETITIONER/APPELLANT'S

BRIEF ON JURISDICTION

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

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CITATION OF AUTHORITIES

I.

INTRODUCTORY STATEMENT

The Appellant District Board of Trustees respectfully petitions this Honorable Court to exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal (Honorable Leander Shaw, Judge, dissenting) in its Case No. AF-17, Palm Beach Junior College Board of Trustees, Appellant vs. United Faculty of Palm Beach Junior College, Appellee (Appendix, pp. 1-23).

In support of this petition, the Appellant states:

A. That the District Court of Appeal has expressly construed a provision of the state constitution, namely Article I, Section 6 thereof, as permitting the Public Employees Relations Commission to severely curtail the collective bargaining rights of all of Florida's state agencies and other public employers, as compared to the rights of private industry employers operating under identical statutory language, not because of any meaning or intent ascertained from the words of the Florida statute, but as a pure determination of state labor policy, made and announced for the stated purpose of giving labor unions more power than they would otherwise have. Rule 9.030(a)(2)(A)(ii), Fla.R.App.P.

B. That the decision of the District Court of Appeal expressly[1] and directly conflicts with this Court's decisions in Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969) and City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487 (Fla. 1981), on the same question of law, i.e., whether Article I, Section 6 of the state constitution confers greater collective bargaining rights on Florida public employees and unions representing them than are conferred on private industry employees under federal labor law, the Court of Appeal having held that the Public Employees Relations Commission has the power to fashion and confer upon public employees such additional rights as it considers necessary to give them such power as it deems appropriate. Rule 9.030 (a)(2)(A)(iv), Fla.R.App.P.

1/ It appears that the word "expressly", as used in Rule 9.030(a)(2)(A)(iv) Fla.R.App.P., does not require that the Court of Appeal recognize that its decision may be in such conflict, so long as the Court of Appeal, as we will show, has discussed the issue sufficiently to permit a clear determination of conflict. (England & Williams, Florida Appellate Reform One Year Later, 9 FSU L.Rev. 221, 240, 241-242 (1981)).

II.

NATURE OF THE CASE

The Appellant Board of Trustees, acting as public employer under the Florida Public Employees Relations Act (Part II, Chapter 447, Florida Statutes (1979)), in collective bargaining negotiations with the Appellee United Faculty[2/], insisted through impasse that any collective bargaining agreement would have to contain a management rights or prerogatives clause under which the Board would be able, during the one-year term of the agreement, to deal unilaterally with matters as to which the contract remained silent (D.C.A., pp. 1-3, 14; fns. 1 and 2).

The Public Employees Relations Commission found this insistence to be unlawful as a failure or refusal to bargain in good faith as required by §447.501(1)(a)(c), Fla. Stat. (1979), although conceding that the same conduct by an employer would be wholly lawful and proper in the private sector under federal labor law.[3/]

The Board did not insist upon retaining unilateral control over any particular or given subject or matter, and its clause would

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2/ For simplicity and convenience, the Appellant is hereinafter referred to as the Board, the Appellee as the Union, and the Public Employees Relations Commission as PERC. D.C.A. refers to the District Court of Appeal's decision, P.D. refers to PERC's Order and decision, both of which are in the Appendix.

3/ "In the private sector this result has been viewed as being justified because the union is free to use its economic weapons, including the strike, to counter the employer's attempt to extract a waiver. N.L.R.B. v. American National Life Insurance Co., 343 U.S. 395, 30 LRRM 2147 (1952); Long Lake Lumber Company, 182 NLRB 435, 74 LRRM 1116 (1970)." (P.D., p. 8, last paragraph).

only cover residual matters, i.e., those as to which neither party had chosen to propose contract language during negotiations (D.C.A., fns. 1 and 2).

Neither did the Board attempt at any time to mandate an agreement containing its clause. At the end of the statutory impasse resolution procedure, when acting as legislative body to hear the dispute and take action under §447.403, Fla. Stat. (1979), the Board decided that its clause should be contained in the agreement to be proffered to the parties, but the Union, of course, remained free to reject the agreement or contract, as Judge Shaw pointed out in his dissenting opinion.[4/]

The Board did not at any time attempt to unilaterally establish any agreement. The Board has not, at any time or in any forum, asserted or suggested that it has the right to do that. The Board has always acknowledged, and now acknowledges, that no agreement can come into being without the consent of the Union. In the event that the contract prescribed by a legislative body is rejected, certain of its constitutent terms take effect, not as parts of an agreement, but by operation of law, §447.403(4)(e), Fla. Stat. (1979). However, those terms which inherently and by their nature require agreement do not take effect: "... however, the legislative body's action shall not take effect with respect to those disputed impasse issues which ... could have no effect in the absence of a ratified agreement, ..." (§447.4034)

4/ Appendix, D.C.A., p. 19, last paragraph to p. 20.

(e), Fla. Stat. (1979)). The Board has always conceded that a management's rights clause is of this nature.

PERC did not base its holding upon any difference between the federal labor law[5/] and the Florida Public Employees Relations Act. Indeed, the pertinent language in the two statutes, defining the area of mandatory bargaining, is virtually identical.[6/]

Having no basis for its decision in the language of the PERA, PERC based it, "forthrightly" as Judge Shaw stated,[7/] upon pure policy considerations (P.D., p. 9).

PERC did not find that the Board's proposed clause was a non-mandatory subject for bargaining within the meaning of the PERA, and therefore that the Board's insistence upon it through impasse was an unfair labor practice. It found, as a matter of public policy, that Florida public employers should not have the right to insist upon management prerogatives clauses, and the clause therefore became a non-mandatory subject for bargaining, enabling the conclusion that an unfair labor practice was committed. This distinction is of obvious significance.

The District Court of Appeal affirmed PERC on all points (D.C.A., p. 2).

This may well be the most significant decision to be rendered since the PERA came into being. In one stroke, and without any real reliance on legislative direction, it establishes a new balance of power

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5/ PERC decision, Order 81U-251 (1981), Appendix, pp. 24-38.

6/ See §447.309, Fla. Stat. (1979) and 29 U.S.C. §158(d).

7/ Appendix, pp. 15-23.

between the public employers and represented taxpayers of the State of Florida on the one hand, and public unions and represented employees on the other. As PERC conceded (P.D., p. 9, last paragraph, to p. 10) this decision will subject every unionized public employer to round after round of negotiations and impasse resolution proceedings at the will of any representing union that rejects employer actions not specifically foreseen and provided for in the master contract, with the enormous drain on the public coffers that this would entail. As Judge Shaw observed:

> "It is irrational and counterproductive to exclude such issues from collective bargaining on the master contract and to deal with them on an ad hoc basis as they arise. To do so thwarts the public interest in efficient management of government resources and furnishes a seed bed for continuing labor/management disharmony." (D.C.A., pp. 18-19).

The U.S. Supreme Court had said essentially the same thing thirty years ago in N.L.R.B. v. American National Insurance Co., supra, 8/ with reference to the private sector, and it is plain that the public employer will suffer far more than the private by a rule which outlaws the traditional management's rights clause, since the public employer, unlike the private employer, must go through an extended impasse resolution procedure before it can act after a bargaining impasse.

The decision gives unions what amounts to a "pocket veto" which will normally be effective for a period of months. It is naive to suggest that they will not use it.

8/ 343 U.S. 395, 30 LRRM 2147, 2151-2152 (1952).

III.

ARGUMENT

In Dade County Classroom Teachers Ass'n, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), this Court held, with exquisite simplicity and clarity, that Article I, Section 6 of the constitution gave Florida public employees the "same rights of collective bargaining as are granted private employees". In City of Tallahassee v. PERC, 410 So.2d 847 (Fla. 1981), the Court reiterated that holding to make it plain that it had meant what it had said in the Ryan case, and further specified that the comparison employees in the private sector are those subject to "federal labor laws". Although these cases and their plain rule of parity were vigorously urged before both lower tribunals, neither saw fit to address the obvious conflict in terms.

If anything can be clear, it seems clear that the Court of Appeal--PERC holding that PERC is free to create and destroy important rights at will in order to address some power imbalance that its members happen to perceive,[9/] flies directly in the face of this Court's stated and reiterated conclusion that it is the constitution which is the source of all bargaining rights and the formula which is constitutionally established is that of parity in public and private sectors.

9/ As Judge Shaw further observed, this perception is itself a pure assumption, a value judgment reflecting nothing but the personal opinions of the PERC Commissioners. It is wholly unsupported by any statistics or other hard evidence, and, as Judge Shaw stated, there is very persuasive evidence and informed opinion to the contrary (D.C.A., p. 16, last paragraph through p. 18). The fact that upwards of 55% of Florida's public employees had joined unions before this decision came out seems supportive of Judge Shaw's opinion. Only about 12% of Florida private employees belong to unions, Bain and Spritzer, Industrial Relations in the South, Labor Law Journal, pp. 536-550, 538 (August, 1981).

It is patently impossible to diminish the rights of one of two parties to bargaining without enlarging the rights of the other, and this Court has clearly held that the rule of parity is constitutional and not subject to readjustment at will by an administrative agency.

The management's rights clause has always been by far the most important of all contract clauses to management. It simply is not possible to outlaw it as a mandatory bargaining subject and leave the Ryan rule with meaning.

The plain and admitted fact here is that PERC has arrogated unto itself the right and power to make major policy decisions for the State of Florida in the area of labor relations, and to do so without any ascertainable legislative direction. Both PERC and the Court of Appeal have referred only to PERC's general authority to administer the PERA as its statutory predicate in this case (D.C.A., p. 5).

Judge Shaw argued for the federal rule under which the courts will not concede to administrative agencies the authority to make major policy decisions (D.C.A., p. 16), and thought that the Court of Appeal had subscribed to that rule in Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1977).

We submit that this Court has in fact and in effect subscribed to that rule in such cases as Florida State Racing Commission v. McLaughlin, 102 So.2d 574, 576 (Fla. 1958):

> "Administrative construction of a statute, ... and other extraneous matters are properly considered only in the construction of a statute of doubtful meaning."

and

", ... such departmental construction cannot take from the judiciary the duty to declare what the law is." L.B. Price Mercantile Co. v. Gay, 44 So.2d 87, 90 (Fla. 1950).

If an administrative interpretation deserves consideration only where the statutory language is of doubtful meaning, it would seem a fortiori that it certainly is entitled to no weight, much less a binding deference, when it does not even purport to construe any language at all.

The Court of Appeal's majority opinion contains other assertions of law which we seriously dispute, and many of which Judge Shaw has already disputed.

IV.

CONCLUSION

With knowledge that this Court received 1,500 or more petitions such as this each year, we earnestly submit that this case is classically derserving of acceptance for review. We note that the Court apparently accepts a much larger percentage of cases involving a constitutional issue than the approximately 13% that it accepts of all petitions filed.[10/] Certainly, the possible financial impact of this decision in every village and corner of Florida threatens to be enormous. As Judge Shaw stated in his conclusion, the decision raises multiple concerns and "creates serious future problems". (D.C.A., p. 23).

If not finally resolved in this Court in this case, it seems a certainty that the issue will come back through other districts, since

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10/ See, Florida Appellate Reform One Year Later, supra, n. 1.

every negotiating management must face it, and the apparent conflicts with this Court's opinions render it most unlikely that all will defer to the First District.

We respectfully submit that the Court should exercise its discretion and review this decision.

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V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner/Appellant's Brief on Jurisdiction was served, via United States first class mail, postage prepaid, this 11th day of March, 1983, upon:

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