IN THE SUPREME COURT OF FLORIDA

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES, Appellant, vs. **UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE,** Appellee.	Case No. 63,352 District Court of Appeal, First District No. AF-17

BRIEF FOR
THE FLORIDA TEACHING PROFESSION - NATIONAL EDUCATION ASSOCIATION

AMICUS CURIAE

PAMELA L. COOPER
OFFICE OF GENERAL COUNSEL
FLORIDA TEACHING PROFESSION-
NATIONAL EDUCATION ASSOCIATION
213 South Adams Street
Tallahassee, Florida 32301
(904)222-4702

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STATEMENT OF INTEREST

The Florida Teaching Profession - National Education Association (hereinafter referred to as "FTP-NEA" or the "Association") has requested participation as amicus curiae in support of the Appellee because the affirmance of the District Court of Appeal decision below is of paramount importance to the organization and the teachers it represents.

The FTP-NEA is an employee organization representing teachers and other educational employees within the State of Florida. The organization currently represents approximately 60,000 teachers at the higher education, elementary and high school levels for collective bargaining purposes.

One of the primary aims of the Association is to protect the integrity of the collective bargaining process and to assure that the constitutional and statutory collective bargaining rights of its members are not abrogated nor encroached upon in any fashion. To this end, the FTP-NEA has endeavored to participate in numerous cases where these values were at stake.

The instant case presents an issue of critical concern to the public employees of this state. The Appellant urges this Court to treat the contractual proposal in question as purely a "management rights" clause and to rule in accordance with this representation. However, to examine this proposal in such

a narrow manner is not only a distortion of the language contained in the proposal but in addition is a subterfuge for the employer's ultimate purpose of thwarting the gains made by public employees in collective bargaining negotiations since the inception of the Public Employees Relation Act (PERA).

The Appellants have contrived an argument which seeks to create the appearance that the failure to overturn the First District Court of Appeal's affirmance of PERC would undermine the collective bargaining process. While such a specious argument may trigger an emotional response, it is in reality merely an artifice to disguise the fact that the employer seeks to use the impasse procedures to circumvent the rights of public employees and to remove impact bargaining issues from the scope of collective bargaining. From the Association's point of view, the employer is tampering with the inherent rights of public employees to bargain over the impact of management decisions.

It is the position of FTP-NEA that to permit the public employer to pursue this course of action would be inimical to the collective bargaining process and the public policy of Florida to promote harmonious labor relations.

For these reasons, the FTP-NEA files this brief urging this Court to affirm the decision of the First District Court of Appeal.

STATEMENT OF THE FACTS

FTP-NEA concurs with and specifically incorporates and adopts the Appellee's STATEMENT OF THE FACTS.

STATEMENT OF THE CASE

FTP-NEA specifically incorporates and adopts the STATEMENT OF THE CASE as written by the Appellee.

ARGUMENT

THE DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING PERC'S FINAL ORDER FINDING THAT THE EMPLOYER'S INSISTENCE UPON THE INCLUSION OF A WAIVER CLAUSE THROUGH IMPASSE CONSTITUTED AN UNFAIR LABOR PRACTICE

The Appellant and the numerous amici in support of the Appellant's position would have this Court believe that nothing less than a complete reversal of the First District Court of Appeal's opinion would obviate a perceived abridgement of the collective bargaining rights of the public employer. Moreover, they purport that the authority from the private sector

recognizes the propriety of insisting upon a managements rights proposal to impasse.[1] While these contentions raise a certain superficial plausibility, they will not bear the weight of reliance which the Appellant places upon them when viewed within the parameters of PERA and the unique proposal in question. Where, as here, the employer presents a proposal that the employee organization waive all impact bargaining rights or else forego all other rights enjoyed by public employees, it is ludicrous to expect that the public policy favoring harmonious labor relations will be furthered.

From the outset it is noted that the crucial issue before this Court is not simply whether it is an unfair labor practice for management to bargain to impasse over a management's prerogative clause. (See Judge Shaw's dissenting opinion at pg. 15). Rather, the question is whether management, in this instance, can insist to impasse upon an all encompassing waiver of public employee impact bargaining rights and thereafter through legislative action impose such a clause. The First District Court of Appeal and PERC rejected the employer's myopic view of the issue and correctly held that management may not invoke the impasse procedure on a non-mandatory subject of bargaining to the detriment of the public employees.

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[1] National Labor Relations Board v. American National Insurance, 343 U.S. 395 (1952).

The collective bargaining process in Florida is designed to foster the constitutional and statutory mandate of harmonious labor relations. To this end, the respective parties are unrestrained in offering proposals on any legal subject prior to impasse. First National Maintenance Corporation v. National Labor Relations Board, 49 U.S.L.W. 4769 (June 22, 1981). However, the Florida Legislature in enacting PERA defined the parameters of those subjects which must be bargained.

Section 447.203(14), Florida Statutes (1979) defines collective bargaining to mean:

> (T)he performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate a good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment. (Emphasis supplied).

Moreover, Section 447.301(2), Florida Statutes (1979) similarly provides that:

> Public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, when their public employer in the determination of the terms and conditions of employment. (Emphasis supplied).

And, indeed Section 447.309(1) states that:

> (T)he bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers pointly shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employee within the bargaining unit. (Emphasis supplied).

From the foregoing it is abundantly clear that the duty to bargain only extends to those items that are "terms and conditions of employment." Although both parties may activate the public policy favoring harmonious labor relations by submitting non-mandatory items during negotiations, it does not logically follow that proposals outside the scope of the "terms and conditions of employment" can be insisted upon as a condition to any agreement. National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (1958). Indeed, to allow an employer to submit non-mandatory items to impasse would essentially act as a repudiation of the collective bargaining system. The required subjects of bargaining as in this case, would inevitably take a "back seat" to the employer's self-interest.

The provisions referring to "terms and conditions of employment" are undefined by statute. Therefore, it is not only appropriate, but in fact necessary for PERC to define what

subjects under PERA are mandatory subjects of bargaining.[2]

In their analysis of the proposal in question, both PERC and the First District Court of Appeal quickly recognized that the clause did not merely delineate the employer's rights guaranteed by Section 447.209, Florida Statutes (1979). Indeed, it is undisputed that the employer's self-designated "management rights" clause in fact seeks to eviscerate collective bargaining rights previously accorded to public employees. School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979); School Board of Indian River County v. Indian River County Education Association, 373 So.2d 412 (Fla. 4th DCA 1979); School Board of Martin County v. Martin County Education Association, 390 So.2d 830 (Fla. 1st DCA 1980).

In School Board of Orange County v. Palowitch, the Fourth District Court of Appeal dealt with the unilateral implementation of the school board's decision to change from a semester to quinmester system without bargaining the effect of

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[2]In a similar manner the National Labor Relations Act (N.L.R.A.), 29 U.S.C. Section 151 et. seq., fails to define "terms and conditions" of employment. Most recently, the Supreme Court in First National Maintenance Corp., supra, acknowledged that the NLRB was not to be deprived of the power to further define the terms in light of specific industrial practices. Id. at 4771. To disallow PERC the similar flexibility when the propriety of a particular clause is raised is distructive of the Legislative intent that PERC be given broad powers in administering Chapter 447, Part II. §447.207, Fla. Stat. (1979)

such action. The school district claimed that the unilateral action was authorized by Section 447.209, Florida Statutes (1979) and/or a contractual managements rights clause contained within the collective bargaining agreement. In its analysis, the Court distinguished between the unilateral making of a management decision and the unilateral implementation of that decision in a manner which affects the wages, hours and terms and conditions of employment of employees. The Court unequivocally stated that the employer must provide the collective bargaining representative an opportunity to bargain the effects of the implementation of the management decision on employees. To hold otherwise, the Court stated would "effectively gut the life of the statute providing for bargaining by public employees." Id. at 731. Thus, in defining the scope of collective bargaining, the Commission and the courts of this state have concluded that the exercise of a managerial right that impacts upon terms and conditions of employment is a mandatory subject of bargaining.[3]

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[3]The Supreme Court in First National Maintenance Corp. recently reaffirmed that effects bargaining constitutes a mandatory subject of bargaining. Id. at 4772. Footnote 15.

Again, it must be emphasized that the employer's clear motive behind the proposal in this case was not to further define employer rights as delineated by statute but rather was to intrude upon the statutory rights of bargaining public employees and force a waiver of these rights to avoid the duty to bargain a mandatory subject of bargaining.

The duty to bargain can only be relinquished through an effective waiver. Such waivers must be clear and unmistakable and demonstrate an unequivocal yielding by the organization of its rights to negotiate over a specific subject. Palowitch, supra; Hillsborough PBA v. City of Tampa, 6 FPER ¶111033 (1980).[4] As evidenced by the instant case, to continue such a proposed waiver as a mandatory subject of bargaining violates the concept of voluntary relinquishment. The Appellant seeks not only a blanket or complete waiver of all impact bargaining rights, but moreover has attempted to do so in a fundamentally coercive setting. As the Commission aptly stated in its order, public employees will be placed in an untenable situation if such a waiver indeed becomes a mandatory subject of

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[4]It is well-established under the N.L.R.A. and other public sector jurisdictions that waivers must be clear and unmistakeable. City of Detroit and Detroit Police Officers Association, 1974 MERC Lab. Op. 470; City of Mount Vernon and Local 456, Teamsters, 5 PERB 3057 (N.Y. 1972); Timken Roller Bearing Company v. NLRB, 325 F.2d 746 (6th Cir. 1963).

bargaining. Not only would negotiations on traditional subjects be deterred, but the invariable consequence would be to jeopardize a final resolution of the contract until such time as the complete waiver is acquiesced in by the collective bargaining representative. Public employees would then have two options: (1) accept a contract and thereby waive impact bargaining rights or (2) operate without a collective bargaining agreement. In other words, the waiver becomes the price of the contract.

Even if this result is acceptable in the private sector (a highly doubtful conclusion) it is wholly unauthorized under Florida law. As the Commission stated in its Order:

> The aim of labeling a matter a mandatory subject of bargaining rather than simply permitting but not requiring, bargaining is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor **and** management within the framework established by Congress as most conducive to industrial peace." [Fiberbond Paper Products Corp. v. N.L.R.B, 379 U.S. 203, 211 (1964)]. The concept of mandatory bargaining is premised on the belief that collective discussion backed by the parties economic weapons will result in decisions for both management and labor and for society as a whole. (Emphasis supplied, citations and footnote omitted).

bargaining rights is permissible in the private sector. We submit the reason for this glaring absence of authority is due to the fact that there is no such authority.[5]

II

THE DISTRICT COURT OF APPEAL AND PERC CORRECTLY CONSIDERED THE LACK OF THE RIGHT TO STRIKE BY PUBLIC EMPLOYEES IN INTERPRETING THE SCOPE OF THE STATUTORY PHRASE "WAGES, HOURS AND TERMS AND CONDITIONS OF EMPLOYMENT"

The Employer's attack upon the First District Court of Appeal and PERC on the issue identified above is erroneously based upon the proposition that in reaching their conclusions sub judice both forums carved out an area of public policy heretofore unrecognized in Florida. In so stating, the Appellant has flagrantly misread and ignored many decisions in this state which have touched upon the issue. In fact, those courts facing this issue have both explicitly and implicitly

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[5]The employer in this case, contrary to the employer in American National, has never attempted to submit specific items that it is requesting the public employees to waive. This recalcitrance on the part of the employer, as the District Court of Appeal noted, cannot be condoned when the ultimate purpose is to abrogate the constitutional rights of public employees.

acknowledged that the most salient distinction between public employees and private employees, the right to strike, must be considered. [6]

At the outset, it should be noted that the severe restrictions on strikes have properly been counter balanced by broadening the scope of bargaining. In its decision holding impact bargaining to be a mandatory subject of bargaining, the Fourth District Court of Appeal unequivocally confirmed that to do otherwise would

> . . . gut the life of the statute providing for bargaining by public employees. There are certain tradeoffs in the statuatory scheme not the least of which is the lack of the right to strike. Section 447.505, Florida Statutes (1977) (Emphasis supplied). Id at 731.

Indeed, the First District Court of Appeal has similarly recognized the propriety of requiring a broad scope of negotiations in balancing the absence of the right to strike by public employees. In School Board of Escambia County v. PERC , 350 So.2d 819 (Fla. 1st DCA 1977), the Court stated that the constitutional prohibition against strikes was not

> [i]ntended to give public employers a

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[6] Dade County Classroom Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969).

> power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circumvent the rights of public employees to meaningful collective bargaining with their employers.

Finally, this Court, in City of Tallahassee v. PERC, 410 So.2d 847 (Fla. 1981) citing from Dade County Classroom Teachers Association v. Ryan, supra, endorsed the principle that "special considerations" not necessarily accorded to private sector employees may indeed exist for public employees. This authority seriously calls into question the Appellant's contention that the Court below and PERC have "granted concessions to a special interest group in order to dissuade them from breaking the law." (Appellant's Brief pg. 42).

Despite the Appellant's attempt at artistic sophistry, the District Court of Appeal's and PERC's conclusions are entirely consonant with the federal sector precedents as well as that of other public sector jurisdictions which permit collective bargaining but prohibit strikes.[7] Perhaps, even more

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[7] Teamsters Local 320 v. City of Minneapolis, 225 NW2d 254 (Minn. 1975) (despite statutory management rights clause that because of severe stake prohibitions mandatory scope of bargaining should be broadly construed). Van Buren Public School District v. Wayne County Circuit Judge, 232 NW2d 278 (Mich. Ct. App. 1975) (scope of bargaining should be broadly construed because public employees are forbidden to strike) Pennsylvania Labor Relations Board v. State College And School District, 337 A.2d 262 (Pa. 1975) (an interpretation of the statutory management rights provision would "eclipse the legislative intent in [the phrase wages, hours, and terms and conditions of employment] and under a real disservice to the public interest.")

illustrative of this point is the recent statement by the United States Supreme Court in First National Maintenance, supra. In this case the Supreme Court stated:

> Both employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims. N.L.R.B. v. American National Insurance Company, 343 U.S. 395 (1952).
>
> * * *
>
> The concept of mandatory bargaining is premised on the belief that collective decisions backed by the parties economic weapons will result in decisions that are better for both management and labor and for society as a whole. (Emphasis supplied, citations and footnotes omitted.)

Notwithstanding the employer's assertion to the contrary, the most fundamental weapon private sector employees have in their collective bargaining arsenal is the right to strike. In this State, the Legislature and the courts have recognized the significance of the absence of the right to strike by public employees. Thus, the interpretation of the proposal in question by PERC and the District Court of Appeal affirms the Legislative intent to broadly construe mandatory subjects of bargaining to balance the prohibition against strikes in the public employment sector.

The decision below requiring a broad application of mandatory bargaining to counter-balance the lack of the right to strike is consistent with other decisions rendered in this state and is moreover analogous to decisions of other jurisdictions which have addressed the identical issue.

III.

THE DISTRICT COURT OF APPEAL DECISION DOES NOT CONTRAVENE CITY OF TALLAHASSEE v. PERC, DADE COUNTY CTA v. RYAN NOR ARTICLE I, SECTION 6, FLORIDA CONSTITUTION

The Association respectfully submits that the decision below does not expressly or directly conflict with City of Tallahassee v. PERC, 410 So.2d 847 (Fla. 1981) or Dade County CTA v. Ryan, 225 So.2d 903 (Fla. 1969) nor does it expressly construe Article I, Section 6, Florida Constitution (1968). To the contrary, the decision sub judice is entirely consonant with the above-cited decision as it relates to the rights accorded public employees.

In City of Tallahassee v. PERC, supra, this Court dealt with the question of whether a statutory provision excluding retirement from the collective bargaining process was constitutional. In its analysis of the constitutional ramifications of such a provision, this Court concluded that

"retirement benefits have become an important and integral part of employment agreements [and as such] to prohibit bargaining in so important an aspect of an employee agreement is in our judgment, an abridgement of the right to collectively bargain." 410 So.2d at 489, 491. The ultimate intention of this decision and the Ryan decision upon which City of Tallahassee rested, was to safeguard the collective bargaining rights of public employees.

The employer, in a rather novel approach, now urges this Court to extend the protections guaranteed to public employees under these decisions to public employers and takes a quantum leap in logic by contending that the decisions stand for the proposition that public employers should have the same rights as private sector employers.

Notwithstanding the obvious distinctions between public and private employers referred to earlier in this brief, the Appellant has premised his theory upon an interpretation of Article I, Section 6, Florida Constitution (1968) which is wholly misplaced. First and foremost, the Florida Constitution, does not define, much less ever refer to, the rights of public employers in the collective bargaining process. Rather, unlike its private sector counterpart, employer rights are specifically established by statute in Section 447.209, Florida Statutes (1979). The statute reproduced in part sets forth the parameters under which public

employers may render unilateral decisions.[8]

Section 447.209 provides that:

> It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work and for other legitimate reasons.

The District Court's affirmance of the PERC Order which concluded that the employer's waiver provision, although contained within a managements rights proposal, was not a mandatory subject of bargaining does not in any manner deprive the employer of its legitimate management rights contained in Section 447.209 nor does it abridge any constitutional right of the employer. In essence, the Commission and the Court below were safeguarding the constitutional rights of public employees to bargain collectively by preventing the employer from obtaining rights beyond those provided by statute.

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[8]It worthy of repetition to stress that although a subject may fall within the scope of Section 447.209, the employer's obligation to duly notify the certified bargaining agent of its decision and to provide a meaningful opportunity to negotiate the effect of such decision prior to its implementation is not abrogated. See Palowitch, supra.

The critical focus of this review should be upon the consequences of permitting the proposal in question to become a mandatory subject of bargaining. The District Court of Appeal and PERC recognized that to sanction an unqualified waiver as a mandatory subject of bargaining would not only create the power imbalance so often proscribed by this Court but moreover would be injurious to the rights public employees have been able to garner since the inception of PERA. There is no question that this result is what the employer hopes to accomplish; the ultimate defeat of all impact bargaining rights of public employees. However, the District Court of Appeal has recognized that to effectuate the clear mandate of Article I, Section 6, the asserted right of the employer to insist upon a proposal which would "gut the life" of the collective bargaining process for public employees cannot be tolerated. Palowitch, supra.

CONCLUSION

The amicus respectfully submit that jurisdiction in the case was improvidently granted. The decision of the Court below is entirely consistently of the decisions rendered by the Court in City of Tallahassee and Ryan and thus should be affirmed. It is clear that the impetus of this appeal is to impair, if not totally abrogate a significant aspect of the

collective bargaining rights of public employees. Such a result is directly contrary to the teachings of this Court in its previous rulings in the area of public sector collective bargaining.

Respectfully submitted,

PAMELA L. COOPER
OFFICE OF GENERAL COUNSEL
FLORIDA TEACHING PROFESSION-
NATIONAL EDUCATION ASSOCIATION
213 South Adams Street
Tallahassee, Florida 32301
(904)222-4702

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 8th day of November, 1983 to:

S. A. Been, Esquire
C. Anthony Cleveland, Esquire
208 West Pensacola Street
Tallahassee, Florida 32301
for Appellee

W. Reynolds Allen, Esquire
609 W. Horatio Street
Tampa, Florida 33606
Attorney for Miami-Dade Attorneys
Community College

Vernon Grissard, Esquire
2600 Blair Stone Road, Ste. 300
Tallahassee, Florida 32301
Attorney for Florida Public
Public Relations Commission

Richard H. Bailey, Esquire
1205 Manatee Avenue, West
Bradenton, Florida 33505
Attorney for Manatee Jr. College

Chester B. Griffin, Esquire
P. O. Box 1270
Fort Pierce, Florida 33454
Attorney for Indian River
Community College

Richard F. Trismen, Esquire
Post Office Box 1660
Winter Park, Florida 32790
Attorney for Valencia
Community College

Richards, Nodine, Gilkey,
Fite, Meyer & Thompson, P.A.
1253 Park Street
Clearwater, Florida 33516
Attorneys for St. Petersburg
Junior College

Maheny & Brewer
Post Office Box 6526
Titusville, Florida 32780
Attorneys for Brevard
Community College

Marian P. McCullock, Esquire
220 Madison Street
Tampa, Florida 33602
Attorney for Hillsborough
Community College

Richard Wayne Grant, Esquire
209 North Jefferson Street
Marianna, Florida 32446
Attorney for Chipola
Junior College

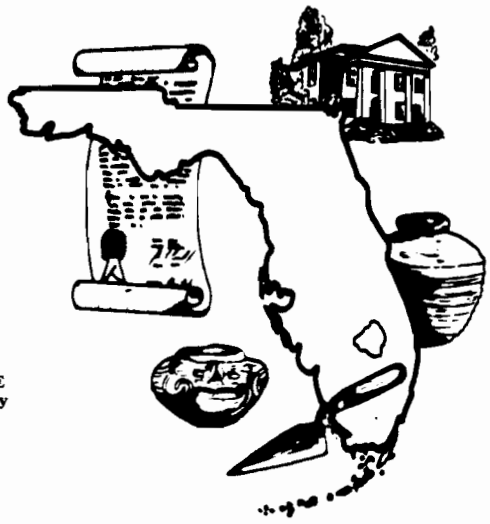
Coffman, Coleman, Henley &
Andrews, P.A.
Post Office Box 40089
Jacksonville, Florida 32203
Attorneys for Edison
Junior College

J. Robert McClure, Jr., Esquire
Post Office Drawer 190
Tallahassee, Florida 32303
Attorney for Tallahassee
Community College

Lorenz, Lungstrum & Heflin
Post Office Box 1706
Fort Walton Beach, Florida 32549
Attorneys for Okaloosa-Walton
Junior College

PAMELA L. COOPER

AMICUS CURIAE BRIEF



STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History
and Records Management

O/A 1-13-84

STATE OF FLORIDA
BEFORE THE SUPREME COURT

PALM BEACH JUNIOR COLLEGE BOARD OF TRUSTEES,

Appellant,

v.

UNITED FACULTY OF PALM BEACH JUNIOR COLLEGE,

Appellee.

Case No. 63,352

BRIEF AMICUS CURIAE ON BEHALF OF PINELLAS CLASSROOM TEACHERS ASSOCIATION AND ORANGE COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.

RICHARD H. FRANK
MARK F. KELLY
LAW OFFICES OF
FRANK & KELLY, P. A.
2124 W. Kennedy Boulevard
Suite A
Tampa, Florida 33606
(813) 251-0555

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PRELIMINARY STATEMENT

The instant amicus curiae brief is tendered on behalf of the Pinellas Classroom Teachers Association and the Orange County Classroom Teachers Association, Inc. Each organization shares a common interest in the present proceeding: hence, they are jointly referred to as "the CTA." The appellant, the Board of Trustees of Palm Beach Junior College, is referred to as "the College." The appellee, the United Faculty of Palm Beach Junior College, is referred to as "the UF." The Florida Public Employees Relations Commission is referred to as "the Commission." The Florida Public Employees Relations Act, §§447.201, et seq., Florida Statutes, is referred to as "the Act."

STATEMENT OF THE CASE AND OF THE FACTS

The statement of the case and of the facts contained in the College's brief is mainly an embellishment upon its argument. It omits certain facts which are crucial to an understanding of the decisions of both the Commission and the Court below. Those facts which are included are not fully explained. Accordingly, a comprehensive opposing statement of the case and of the facts is appropriate. The matters set forth herein are extracted solely from the published orders of the Commission and its Hearing Officer.

On December 10, 1980, the UF filed an unfair labor practice charge alleging that the College violated §§447.501(1)(a) and (c), Florida Statutes (1979) "by maintaining its current

management prerogatives proposal to the point of impasse and throughout §447.501 impasse resolution procedures, and by conditioning the implementation of a salary increase or any agreed contractual provisions upon the UF and the unit's forced acceptance of a management prerogative clause which by law cannot be imposed." The parties waived an evidentiary hearing and stipulated the facts.

On June 10, 1980, in the course of collective bargaining negotiations, the College submitted to the UF the following proposal (Proposal #1):

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

On June 17, 1980, the UF declared an impasse without offering a written counterproposal to the College's Proposal #1. The parties continued bargaining with the help of a mediator, but without further agreement. On August 17, 1980, the UF orally expressed the following options with respect to Proposal #1:

> a) That the College's proposal be withdrawn;
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> b) That the College substitute a proposal which would list the subjects to which a waiver such as required by the proposal would apply;
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> c) That the parties negotiate on a list of subjects for waiver to be proposed by UF, but not until the 1981-82 negotiations; and,
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> d) That the College agree that substantive matters be submitted for the bargaining process and other charges be resolved by consultation. (A-6, ¶5)

After mediation failed to produce an agreement, a Special Master was appointed . In his recommended decision issued October 10, 1980, the Special Master recommended, inter alia, that Proposal #1 not be incorporated in an agreement. On October 30, 1980, in the course of the bargaining discussions required by §447.403(3),[1] the College proposed two alternative forms of its

[1] "Such recommended decision will be discussed by the parties...." §447.403(3), Florida Statutes (1981).

proposal. No agreement was reached. The first alternate proposal (Proposal #2) stated:

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

The second alternate proposal (Proposal #3) (A-7, ¶14) provided that:

> The right to take unilateral action refers to all rights described in Section A, and is not qualified by or subject to any duty to bargain over the effects or impacts of actions taken or of consequential, reasonable changes in terms or conditions of employment made in consonance with such actions. (A-7, ¶14)

On November 19, 1980, the College took legislative action on the disputed impasse items and mandated that Proposal #1 be included within the proposed collective bargaining agreement it subsequently offered to the UF. The UF refused to conduct a ratification vote on the agreement, and filed its unfair labor practice charge.

In his recommended order dated March 26, 1981, the Commission's Hearing Officer concluded that the College had refused to bargain in good faith with the UF by its insistence upon the inclusion of Proposal #1. In its order dated July 10, 1981, the Commission agreed. It concluded that the College violated §447.501(1)(c) and (a) by its insistence upon Proposal #1 during the negotiations and by its effort to impose it upon unit employees through its legislative action . To remedy the unfair labor practices, the Commission ordered the College to rescind the legislative action by which it mandated inclusion of Proposal #1 in the collective bargaining agreement, and to offer the UF the very agreement it had previously offered but without Proposal #1.

The College's appeal of the Commission order was rejected by a panel of the First District Court of Appeal, which on December 30, 1983, affirmed the Commission's order. Palm Beach Jr. College Board of Trustees v. PERC, 425 So.2d 133 (Fla. 1st DCA 1982).

By order dated September 13, 1983, this Court accepted jurisdiction of the College's petition for certiorari.

ARGUMENT

Introduction

The College's argument in this case is premised upon the theory that the United States Supreme Court's decision in NLRB v. American National Insurance Co., 343 U.S. 395, 72 S.Ct. 824 (1952), authorized the conduct which both the Commission and the First District Court of Appeal found to violate the Act. The College attempts to inject matters of claimed constitutional significance into this proceeding to bolster an otherwise unpersuasive attack on the Commission's order and its affirmance by the Court below. By suggesting that the decisions below deny to public employers "collective bargaining rights" granted to private employers, the College asserts a conflict between the decision below and this Court's decision in City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981). But the College never develops this proposition and fails to indicate either the nature or the source of the "rights" denied it by the lower tribunals. Moreover, it fails to disclose any basis for the conclusion that the decision of the First District conflicts in any way with this Court's City of Tallahassee decision.

In our first argument, we show that there is no constitutional dimension to this appeal and no conflict between the decision appealed and City of Tallahassee. In our second argument we discuss the merits of the decision below. We show that American National Insurance cannot be squared with the Act, and that the College's reliance on that decision is misplaced.

We then explain how the College's proposal in this case far exceeds that at issue in American National Insurance, and gives rise to a far greater intrusion into employee rights. Both lower tribunals correctly discerned the College's Proposal #1 not to be the type of "management functions" clause approved in American National Insurance, but rather a waiver clause fundamentally designed to foreclose any possible mid-contract collective bargaining between the College and the UF thus resulting in unfettered mid-contract changes determined only by the will of the College.

I.
THERE CAN BE NO CONFLICT BETWEEN THE DISTRICT COURT"S DECISION CONSTRUING A PUBLIC EMPLOYER'S RIGHTS UNDER THE ACT AND THIS COURT'S DECISION IN CITY OF TALLAHASSEE, WHICH IS DEVOTED TO PUBLIC EMPLOYEES' RIGHTS UNDER ARTICLE I, SECTION 6 OF THE FLORIDA CONSTITUTION.

Of the various premises urged by the College in its brief on jurisdiction, the Court appears to have accepted for now the assertion of conflict between the decision below and City of Tallahassee, supra, and the related theory that this case somehow implicates Article I, Section 6 of the Florida Constitution. It appears, however, that neither aspect of the jurisdictional thesis is sound. This case presents asserted employer rights, which are mentioned nowhere in Article I, Section 6. That being so, the College must turn to the Act itself, rather than the

Constitution, as its sole source of collective bargaining rights. And the Act's relevant provisions are in direct conflict with the proposition, apparently borrowed from the private sector, that the College has championed in this case, so far without any success. Hence there can be no conflict with City of Tallahassee.

The College, for obvious reasons, repeatedly describes this case as involving public employee rights. It argues that by restricting its freedom of action in bargaining, the Commission and the Court below correspondingly enhanced the rights of its employees and their bargaining representatives. But this artifice cannot obscure the real nature of the College's claim: it asks the Court to find in Article I, Section 6 some right to do that which it has thus far been denied. There is no such right in Article I, Section 6.

Article I, Section 6 provides:

> The right of persons to work shall not be denied or abridged on account of membership on non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Not a word in this section purports, even by implication, to confer rights on employers, public or private. Nor do this Court's decisions applying the Section to public employees even hint that it simultaneously crystallizes certain bargaining rights for public employers. Neither Dade County Classroom Teachers Assn, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), Dade County Teachers Association, Inc. v. Legislature, 269 So.2d 684

(Fla. 1972), nor City of Tallahassee v. PERC, supra, supports the College's view. To the contrary, the only courts which have considered the matter have held that Article I, §6 rights may not be asserted by employers. Miami Laundry Co. v. Laundry, Linen, Dry Cleaning Drivers, Salesmen & Helpers, Local Union No. 395, 41 So.2d 305 (Fla. 1949); Trowel Trades Employees Health and Welfare Trust Fund of Dade County v. Edward L. Neyelek, Inc., 482 F.Supp. 846 (S.D. Fla. 1979), affirmed, 645 F.2d 322 (5th Cir. 1981). Thus, whatever collective bargaining rights the College may enjoy are derived from the Act, not the Constitution, and this case in no manner brings Article I, Section 6 into play.

As we have noted, the two Dade County Classroom Teachers Association cases and City of Tallahassee speak solely in terms of employee rights. The lesson of these three cases is "that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6." 410 So.2d at 490. (emphasis in the original). This is what Article I, Section 6 guarantees to public employees. The College argues that this language fixes employee rights, i.e. that public employees can enjoy no greater rights than private employees. But nothing in City of Tallahassee supports this view. To the contrary, the Court there cautioned:

> . . . we do not mean to require that the collective bargaining process in the public sector be identical to that in the private sector. We recognize that differences in the two situations require variations in the procedures followed. 410 So.2d at 491.

The foregoing passage suggests the Court's appreciation that certain circumstances may call for public employees to have greater rights than their private sector counterparts. Certainly nothing in Article I, Section 6 precludes such a result.

There is, simply put, no constitutional dimension to this appeal. The case turns solely upon the provisions of the Act itself, and the correctness of the construction placed on it by the Commission. As we show below, not only is the Commission's view appropriate, but the contrary position advanced by the College is rendered impossible by the Act's express provisions.

II.

THE COMMISSION'S VIEW, APPROVED BY THE DISTRICT COURT, REPRESENTS AN APPROPRIATE CONSTRUCTION OF THE ACT AND SHOULD NOT BE DISTURBED

If the Court accepts our contention that neither a constitutional issue nor a conflict with City of Tallahassee can be coaxed from the decisions below, it can decide that jurisdiction is lacking. Having accepted jurisdiction, however, the Court is authorized to consider the merits. Should it choose to do so, we contend that the result reached below is correct and should remain intact.

A. The View Advanced By The College Cannot Be Squared With The Act's Express Provisions.

Reduced to its basic parts, the central thesis pressed by the College is as follows:

1. City of Tallahassee requires exact symmetry between the Act and the federal law governing private sector labor relations, at least insofar as collective bargaining is concerned;

2. NLRB v. American National Insurance Co., 343 U.S. 395 (1952) represents the private sector rule of law most directly applicable to this case; and

3. The result reached by the Commission and the First District is inconsistent with American National Insurance and is therefore erroneous.

We have exposed the fallacy in the College's first premise. Its second premise is also wrong, as we show in a subsequent argument. But even if one grants, arguendo, that this case is akin to American National Insurance, the result reached below is nonetheless correct.

The explicit terms of the Act preclude the adoption of American National Insurance as the urging of the College. The collective bargaining proposal which the United States Supreme Court there sanctioned stated as follows:

> The right to select and hire, to promote to a better position, to discharge, demote, or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the compnay in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be reviewable by arbitration. 343 U.S. at 398 (empahasis added).

But §447.209 of the Act contemplates an entirely different state of affairs:

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

Section 447.401 of the Act requires that all grievance procedures terminate in binding arbitration.[2] Thus, American National Insurance, which contemplates that employers may exclude management rights provisions from arbitration by insisting on the right to do so in negotiations, is facially inconsistent with the Act.

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2 Section 447.401 provides, in pertinent part, that:

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

Indeed, the very existence of §447.209 strongly suggests the Legislature's view that management rights clauses be excluded from mandatory collective bargaining. When the Act was first passed, American National Insurance had long since been decided. Yet the Legislature, in one of its more dramatic departures from the provisions of the National Labor Relations Act (NLRA), 29 U.S.C. §151 et seq., saw fit to codify management's rights rather than commit the extent of such rights to the viscissitudes of collective bargaining. One can readily imagine the legislative purpose for this; it prevents overreaching by employers which might erode employee rights through insistence on even more management prerogatives than the statute conveys, while at the same time protecting the public by ensuring a fixed reservoir of managerial authority which a powerful or clever union cannot initiate. But regardless of its purpose, §447.209 precludes the rigid application of American National Insurance as advocated by the College.

B. The Proposal At Issue Is A Waiver CLause Which, If Deemed Mandatory, Would Render The Constitutionally Guaranteed Right To Bargain A Nullity.

The College persists in seeking comfort in NLRB v. American National Insurance, supra, while forthrightly admitting that the proposal at issue in this case is not merely a management rights clause, but is in fact a waiver clause. The College admits that the purpose of the clause is to deprive employees of their statutory right to bargain over the effects of certain unilateral action taken by their employers, a right

adopted from the private sector in Palowitch v. School Board of Orange County, 367 So.2d 730 (Fla. 4th DCA 1979). As such the College's proposal is far more destructive of employee rights than the management rights clause considered in American National Insurance. As the Court below noted, the employees in American National Insurance at least knew what they were losing; here the College demanded the blanket authority to do whatever it chose, for the life of the contemplated agreement.

The proposal at issue in this case may well be more than simply a non-mandatory or permissive subject of bargaining: it may be an illegal subject. In PERC v. District School Board of DeSoto County, 374 So.2d 1005, 1015 (Fla. 2nd DCA 1979), the Court had the following to say about a collective bargaining agreement containing employee dismissal provisions less generous than those prescribed by the pertinent statutes:

> We feel it is clear that the legislature did not intend to permit a public employer to negotiate a collective bargaining agreement in which it relinquishes a statutory duty or in which its employees relinquish statutory rights. The agreement may add to statutory rights and duties, but may not diminish them.

If the College cannot even agree with the UF to include a waiver-of-rights provision in the collective bargaining agreement, then a fortiori it cannot coerce its employees, through their bargaining agent, by insisting on such a clause to impasse.

Even if the proposal at issue here should escape condemnation under the foregoing authority, it must nonetheless be viewed as a permissive subject at best. Everyone, the College

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did serve a true and correct copy of the foregoing by first class United States mail upon the following persons this 8th day of November, 1983:

Jesse S. Hogg, Esquire
121 Majorca Avenue, Third Floor
Coral Gables, Florida 33134

C. Anthony Cleveland, Esquire and Steven A. Been, Esquire
208 West Pensacola Street
Tallahassee, Florida 32301

Pamela L. Cooper, Esquire
213 South Adams Street
Tallahassee, Florida 32301

Frederick G. Bohannon, Clerk
Public Employees Relations Commission
2600 Blair Stone Road, Suite 300
Tallahassee, Florida 32301

W. Reynolds Allen Esquire
609 W. Horatio Street
Tampa, Florida 33606

Richard Bailey, Esquire
1205 Manatee Avenue, West
Bradenton, Florida 33505

Chester B. Griffin, Esquire
P. O. Box 1270
Fort Pierce, Florida 33454

Richard E. Trismen, Esquire
P. O. Box 1660
Winter Park, Florida 32790

Richards, Nodine, Gilkey, Fite, Meyer & Thompson, P. A.
1253 Park Street
Clearwater, Florida 33516

Marian P. McCulloch, Esquire
220 Madison Street
Tampa, Florida 33602

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Even if the proposal at issue here should escape condemnation under the foregoing authority, it must nonetheless be viewed as a permissive subject at best. Everyone, the College

and the dissenting judge below included, acknowledges that the waiver clause at issue here cannot be imposed on employees through the Act's impasse resolution procedures, apparently recognizing that such a compulsory waiver of constitutional rights is simply inconceivable. But the Court must recognize that the "compromise" approach suggested by the dissent below involves a forced divestiture of employee rights almost as grave as that occasioned by an employer's actual imposition of such a provision.

The dissent suggests that the College should be permitted to propose its waiver clause, and even insist on it to impasse, although its attempted imposition of it through legislative body action would be a "nullity" (but not an unfair labor practice). This view, we submit, overlooks the true nature of the evil inherent in permitting an employer to bargain to impasse over a proposal such as this one: it diverts attention from matters that are truly "wages, hours, terms and conditions of employment." And if an employer can insist upon such a proposal to the point of impasse, it can effectively force the employees either to accept it if they want a contract (as opposed to legislatively imposed employment terms) or to relinquish other important benefits in order to avoid the waiver clause. Such a Hobson's choice is scarcely less coercive or repugnant to the notion of good faith bargaining than is the simple imposition of the waiver clause in the first place.

The decision below recognizes the various matters of law and policy supporting the Commission's order. The College and the amici aligned with it have failed to show error on the part of the First District, and its opinion should be affirmed.

CONCLUSION

Based upon the foregoing, the Court is urged to dismiss the petition for lack of jurisdiction or, alternatively, to affirm the decision of the Court below.

RICHARD H. FRANK

MARK F. KELLY
LAW OFFICES OF
FRANK & KELLY, P. A.
212 W. Kennedy Boulevard
Suite A
Tampa, Florida 33606
(813) 251-0555

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121 Majorca Avenue, Third Floor
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208 West Pensacola Street
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Tallahassee, Florida 32301

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2600 Blair Stone Road, Suite 300
Tallahassee, Florida 32301

W. Reynolds Allen Esquire
609 W. Horatio Street
Tampa, Florida 33606

Richard Bailey, Esquire
1205 Manatee Avenue, West
Bradenton, Florida 33505

Chester B. Griffin, Esquire
P. O. Box 1270
Fort Pierce, Florida 33454

Richard E. Trismen, Esquire
P. O. Box 1660
Winter Park, Florida 32790

Richards, Nodine, Gilkey, Fite, Meyer & Thompson, P. A.
1253 Park Street
Clearwater, Florida 33516

Marian P. McCulloch, Esquire
220 Madison Street
Tampa, Florida 33602

Richard Wayne Grant, Esquire
209 N. Jefferson Street
Marianna, Florida 32446

Coffman, Coleman, Henley & Andrews, P. A.
P. O. Box 40089
Jacksonville, Florida 32203

J. Robert McClure, Jr., Esquire
P. O. Drawer 190
Tallahassee, Florida 32303

Lorenz, Lungstrum & Neflin
P. O. Box 1706
Ft. Walton Beach, Florida 32549

ATTORNEY