IN THE SUPREME COURT OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION,

Petitioner,

v.

DADE COUNTY POLICE BENEVOLENT ASSOCIATION,

Respondent.

Fla. Sup. Ct. Case No. 64,835
3d DCA Case No. 81-2023

ANSWER BRIEF ON THE MERITS OF
RESPONDENT DADE COUNTY
POLICE BENEVOLENT ASSOCIATION

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PRELIMINARY STATEMENT

The Dade County Police Benevolent Association (hereinafter "the PBA") is a public employee organization certified by the Florida Public Employees Relations Commission (hereinafter "PERC") and duly registered by the State of Florida, Department of Labor and Employment, to represent all law enforcement personnel in the classifications enumerated in Article 2 of the Collective Bargaining Agreement between the PBA and the City of Homestead (hereinafter "the City").

Article II of the PBA Constitution provides in part:

> Section 2. The Dade County Police Benevolent is an organization of police officers sworn to enforce the law under all circumstances and shall not strike, or by concerted action cause, or attempt to cause a cessation of the performance of police duties. (Emphasis added)

The PBA has consistently adhered to the policies enumerated in Section 2 and has not, at any time, condoned action inconsistent with these policies.

PERC issued an Order concluding that the PBA had engaged in an Unfair Labor Practice by violating the strike prohibitions of Section 447.501 (Fla. Stat.), despite contrary findings of fact by the Hearing Officer.

The Third District Court of Appeal reversed PERC's Order and certified to this Court the question of:

whether the Public Employees Relations Commission may overturn the hearing officer's ultimate determination of agency in light of what it perceives to be the applicable law and relevant policy considerations.

The decision of the Third District is cloaked with a presumption of correctness, and can be reversed only by a showing that the decision is clearly erroneous. Shayne v. Saunders, 129 Fla. 355, 176 So. 495 (1937). The Third District found that PERC misconstrued the relevant substantive law of agency, and disregarded the Hearing Officer's findings of fact in order to justify a conclusion based on this erroneous interpretation of the law. PERC thereby acted in a manner inconsistent with the policy considerations of the Florida Administrative Procedure Act, (Chapter 120 Fla. Stat.) and Chapter 447, Part II (Fla. Stat.) which governs public sector employment relations.

Accordingly, the PBA urges this Court to answer the certified question in the negative and affirm the decision of the Third District Court rendered in the proceedings below.

Unless otherwise indicated, the following references will be used throughout the Brief; the original record on appeal will be referred to parenthetically by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE FACTS

The PBA takes exception to the Statement of Facts in PERC's Initial Brief insofar as those statements reflect only what appears in the section of the Hearing Officer's Recommended Order entitled "Findings of Fact." A more accurate Statement of the Facts would additionally include those evidentiary findings discussed in the Hearing Officer's "ANALYSIS" (R. 633). PERC itself declared that the "Hearing Officer's evidentiary findings are supported by competent, substantial evidence. The proceedings upon which the findings are based comply with the essential requirements of the law." (R. 655) Thus, the Hearing Officer's determination of facts was accepted by PERC as valid, and there should be no differentiation between the various facts due to their physical location within his report.

The factual findings as they pertain to this Appeal are examined more fully in the Answer Brief herein.

ARGUMENT: ISSUE I

PERC MAY NOT CIRCUMVENT THE REQUIREMENTS OF s.120.57(1)(b)(9) FLA. STAT. (1984) BY MIS-CHARACTERIZING THE ISSUE OF AGENCY AS A MATTER OF LAW RATHER THAN WHAT IS APPROPRIATELY DEFINED AS A MATTER OF FACT

It is a well established principle of law that a finding of agency is a matter of fact to be determined by the trier of fact. Smith v. Texas Co., 111 Fla. 527, 149 So. 585 (1933); Standard Oil Co. v. Nickerson, 103 Fla. 701, 133 So. 55 (1931); Watkins v. Sims, 81 Fla. 730, 88 So. 764 (1921); Scott v. Sun Bank of Volusia County, 408 So.2d 591 (Fla. 5th DCA 1981); Cleveland Compania Maritima, S.A. Panama; Latin American Shipping Co. v. Pan American Trading Corp., 363 So.2d 578 (Fla. 3rd DCA 1978); Bernstein v. Dwork, 320 So.2d 472 (Fla 3rd DCA 1975); cert. denied mem., 336 So.2d 599 (Fla. 1976); Amerven, Inc. v. Abbadie, 238 So.2d 321 (Fla.3rd DCA 1970); Financial Fire and Casualty Co. v. Southmost Vegetable Cooperative Association, 212 So.2d 69 (Fla. 3rd DCA 1968), cert. denied mem., 219 So.2d 701 (Fla. 1968); City of Homestead v. Dade County Police Benevolent Association, 7 FPER Para. 12347 (1981); Silver Sand Company of Leesburg v. Department of Revenue, 365 So.2d 1090 (Fla. 1st DCA 1979).

Pursuant to Section 120.57(1)(b)(9) Fla. Stat. (1984), PERC may not reject or modify findings of fact in the recommended order

> "unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the

> findings were based did not comply with the essential requirements of the law."

PERC explicitly found that the Hearing Officer's findings of fact were based on competent substantial evidence and complied with the essential requirements of law (R. 655); and in its Initial Brief to this court PERC claims that "it does not reject any material findings made by the Hearing Officer." (Initial Brief p. 2). Yet in both its Order and in its Initial Brief PERC has restricted its adoption of the facts to those facts specifically listed in the Findings of Fact.

In his analysis of the law, the Hearing Officer states:

> "I further conclude that the actions of Peebles, Slesnick and Dranow made it unreasonable for Homestead PBA bargaining unit members to believe that their walkout represented the views of the Dade County PBA. The following paragraphs will enumerate the factual ground for my conclusions in this regard." (Emphasis added)

The factual determination contained in that analysis is as equally binding upon PERC as those facts enumerated in the part of the order specified as "Findings of Fact." Neither statute nor case law contemplate that PERC's deference to the Hearing Officer's findings is limited to a skeletal outline of the facts contained in the "Findings of Fact"; and PERC may not create its own set of inferences from the factual analysis developed by the Hearing Officer absent a finding that the set of facts developed by the Hearing Officer is not supported by substantial competent evidence. Venetian Shores Home and Property Owners v. Ruzakawski, 336 So.2d 339 (Fla. 3rd DCA 1976); Wash & Dry Vending Company v. State Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 429 So.2d 790 (Fla.

3rd DCA 1983).

The record established by the Hearing Officer is devoid of any competent, substantial evidence that Tauriello was acting as an agent for the PBA in instigating the strike or that an agency relationship existed betwen the PBA and Tauriello which implicitly empowered Tauriello with the authority to instigate and/or implement the strike.

Tauriello's role in the 1980 contract negotiations between the City of Homestead and the PBA was limited strictly to the role of a communication liason who served basically as a conduit of information between the various parties; he had neither the responsibility for nor the authority to make policy decisions regarding the manner by which the negotiations were handled. Both the Hearing Officer's findings and those adopted by PERC in its order acknowledge this fact.

With respect to Tauriello's official scope of authority over the PBA matters, the Hearing Officer found in Paragraph 3 of his "Findings of Fact", that as a "union steward" Tauriello performed the liason role of communicating with bargaining unit members during negotiations, calling meetings as he deemed necessary; He did not even attend or participate in meetings of the PBA Board of Directors. (R. 56-57, 145-46, 149-50, 268-69)

The language used in PERC's Order to describe Tauriello's function reiterates the Hearing Officer's findings and reinforces the view that Tauriello's authority was limited to only those duties appropriate to a person as a communication liason between the parties:

> (T)auriello had authority to call bargaining unit meetings, to advise officers as to the progress of negotiations and called such meetings. Tauriello transmitted to City officials the PBA's October 23 response to the Special Master's recommended decision and received numerous communications directed by the City to the PBA. (Emphasis added) (R. 661)

The facts glaringly omit evidence which would support a finding that Tauriello had authority to conduct negotiation sessions or to unilaterally institute changes in furtherance of bargaining goals.

The Hearing Officer explains in depth:

> "Tauriello's base of authority was local, and Dranow's was from downtown; both in a geographical and organizational sense...the Record does not support a conclusion that Tauriello had unilateral authority to agree to contract proposals without approval from Dranow or other PBA officials." (R. 633)

Tauriello's "official status as the elected representative for the Homestead PBA bargaining unit members in Homestead Contract Negotiations" fell short of any authority to direct changes in bargaining conditions without the approval of the PBA Board of Directors. That Tauriello attended the Board meeting of October 23, his first Board of Directors meeting since his election as PBA representative, to persuade the Board to support a walkout makes this clear. Moreover, the Hearing Officer's findings establish that Tauriello's views represented his personal beliefs specifically rejected by the PBA so that any action Tauriello took in furtherance of those beliefs without the PBA backing was taken outside the scope of his delegated authority.

The Hearing Officer found:

> "(W)hen intense conflict was generated between Dade County PBA officials and the Homestead PBA bargaining unit members at a meeting on Wednesday, October 22, Tauriello's actions identified him with the members of the local bargaining unit. The strike vote taken at that meeting was a decision to reject the leadership offered by Peebles, Dranow, and Slesnick." (Emphasis added)(R. 633)

The Hearing Officer continued:

> "Tauriello's attendance at the Dade County PBA Board of Directors meeting on Thursday night, October 23, indicated that he was not in touch with the feeling of that group, and resulted in a defeat for his attempt to persuade the Board to overrule Peebles and back a walkout in Homestead...Tauriello continued to believe that Peebles and the Dade County PBA were wrong in this judgment that a walkout would cause the loss of citizen support for the position of the Homestead PBA bargaining unit; Tauriello's belief in this regard emphasizes that his continued participation in plans for the walkout was based not on his estimation of support from the Dade County PBA, but on his relationship with the local community, a relationship which gave him confidence that Homestead PBA bargaining unit members could walk out without the support of the Dade County PBA." (Emphasis added) (R. 633)

Both the Hearing Officer and PERC agree that the PBA did not instigate, ratify, encourage or support a strike, but took affirmative steps to prevent the walkout planned for October 24 and to assure that all the parties were aware of its position.

Hearing Officer's findings of fact reveal that:

> At the October 22 meeting, Peebles explained that a walkout was totally illegal and that under no circumstances would the Dade County PBA lend support to such an illegal walkout (R.115, 231-32);

(After Peebles, Dranow and Slesnick left the meeting), Peebles instructed Dranow and Slesnick to do whatever they could to get a settlement and stop the walkout (R.234, 275-76);

During the next day Thursday, October 23, Slesnick called Tauriello, explained he was trying to work something out on the other phone at the moment, and urged Tauriello to go to the officers and beg them not to walk out (R.118);

(At the Board of Directors meeting on Thursday night, October 23), Peebles read a memo addressed to Tauriello expressing the same position he had stated the previous night to the Homestead PBA bargaining unit (R.123-24, 131-32, 373);

The Board of Directors...voted unanimously not to support a walkout, and explained that the Homestead officers could lose their jobs and were going to lose citizen support, and that the Dade County PBA could be fined twenty thousand dollars a day (if it supported the strike) (R.134-35);

Slesnick called Tauriello (after the meeting)... repeated(ly) explained that a walkout was wrong... and discussed a Public Employees Relations Commission order in which the Commission proposed that certain City of Homestead police officers be dismissed for engaging in a strike; Slesnick's numerous telephone calls to Tauriello, Mayor Nick Sincore, and City Manager Alex Muxo following the Wednesday night meeting played a major role in averting the walkout then planned for Friday, October 24 (R.137-38);

When Peebles walked out of the City Council meeting Monday, October 27 and concluded that on-duty officers had walked off the job, he removed Tauriello from his position when Tauriello refused to direct the striking officers back to work. (R.97, 253).

In its Order PERC expressly notes:

"There is no record evidence that Tauriello was directed to prepare for the conduct of a strike by any PBA officials. To the contrary, the PBA Board of Directors specifically rejected Tauriello's request for support of the walkout on October 24. (R.663) (Emphasis added)

PERC continues:

> We are mindful that the PBA, through its representatives, Peebles, Dranow and Slesnick made sincere efforts to persuade Tauriello and the rest of the Homestead officers not to strike (R.644); (Emphasis added)
>
> We also note that contemporaneously with Tauriello's statements, (to the press) other PBA officials moved to counteract these remarks by informing the City that the PBA did not support such a strike and by attempting to persuade the Homestead officers not to walk out. (R. 670)

PERC concludes in its Order that "(t)he record in this case discloses that the PBA's liability for the strike flows only from the actions of Tauriello." (Emphasis added) (R.670).

In its Initial Brief to this Court, PERC rationalizes the propriety of imposing a standard of strict liability against the PBA on the principle that since the business of a union is to bargain collectively in the determination of "wages, hours, and terms and conditions of employment", a strike, which has the obvious purpose of coercing a change in the terms of employment, is necessarily in furtherance of that union business. Yet, PERC explicitly found that the PBA neither used, nor encouraged the use of Tauriello's strike threats as an improper bargaining tool. The record establishes, and the Hearing Officer found, that the PBA strongly disapproved of the strike as an acceptable bargaining tool; and in averting a walkout prior to the meeting of the City Commission, the PBA acted in a manner consistent with the statutory prohibition against strikes.

Any reasoning that the PBA is liable for the actions of the strikers because of an agency relationship it had with Tauriello squarely contradicts this finding. Furthermore, a finding of liability based on agency principles ignores the facts of this case with regard to Tauriello's actual and contractual authority and imputes meaning to the term "union steward", not supported by the evidence presented in the proceedings below.[1/]

PERC takes issue with the Hearing Officer's conclusion that the PBA is absolved of liability solely on the basis that "it would not have been reasonable for members of the Homestead PBA bargaining unit who walked off the job on October 27 and 28 to believe that their walkout or Tauriello's participation in it, was supported by the Dade County Police Benevolent Association." PERC then dismisses the relevancy of the facts developed by the Hearing Officer in his analysis because PERC disagrees with his conclusion.

The Third District Court of Appeals found this action by PERC to be in violation of Section 120.57(1)(b)(9) stating:

> While approving the "ordinary law of agency" criteria embraced by Sunset Line and Twine Co., PERC noted that agency is a question of fact to be determined by the trier of fact. PERC nonetheless reweighed the facts and determined that Tauriello was acting as an agent of the PBA, but offered no justifiable rationale for its conclusion. The record in this case is replete with overwhelming evidence that

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[1/] PERC persistently argues that by virtue of the Hearing Officer's decision to label Tauriello as a "union steward", an agency relationship between the PBA and Tauriello is automatically and irrevocably created.

> Tauriello exceeded his authority and that the PBA had put Tauriello and the other Homestead officers on notice that the PBA would neither endorse nor sanction a strike, a conclusion reached by the Hearing Officer. (Page 9)

The facts developed by the Hearing Officer in his analysis, independent of the Hearing Officer's ultimate conclusion, adequately address the issue of an agency. Section 120.57(1)(b)(9) prohibits PERC from substituting its own judgment for the findings of fact merely because PERC is dissatisfied with the legal result which properly flows therefrom. By mischaracterizing the issue of agency as a matter of law in order to ignore factual findings with which it disagrees, PERC attempts to accomplish indirectly that which it is proscribed from directly doing. PERC's action cannot be condoned. See Silver Sand Co. v. Department of Revenue, 354 So.2d 1090 (Fla. 1st DCA 1979); Speiser v. Randall, 357 US 513 (1958).

ARGUMENT: ISSUE II

PERC ABUSED ITS STATUTORY DISCRETION IN FORMULATING A DEFINITION OF AGENCY NOT CONTEMPLATED BY WELL ESTABLISHED PRINCIPLES OF LAW

PERC is without authority to disturb the Hearing Officer's findings of fact unless it shows that the existence and scope of agency "is a matter of fact blurring into opinion infused with policy considerations involving special insight (by PERC) and is not susceptible of ordinary methods of proof before the trier of fact (the Hearing Officer) McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

The Third District found that the existence and scope of agency was clearly established by ordinary methods of proof:

> The hearing officer found that when Tauriello instigated the Homestead police officers' strike he was not acting, under the facts involved, as an agent of the PBA. Indeed, the record below suggests that Tauriello's role on behalf of the PBA was extremely limited. He was not selected by the PBA to participate in the negotiating sessions. He was selected by the officers who ultimately struck. His duties insofar as the PBA was concerned were limited to providing accurate information regarding representations made by the City of Homestead at the bargaining table and keeping the Homestead officers informed with respect to the status of negotiations. He was not an officer or director of the PBA, nor was he on the PBA payroll insofar as this record reflects.

and concluded that "(n)othing in the PERC order below indicates special commission insight into the determination of the existence and scope of agency." (p. 12)

Assuming arguendo that agency "is a matter of fact blurring into opinion infused with policy consideration involving special insight" by PERC, McDonald supra, PERC abused whatever discretion it may have had in reinterpreting the Hearing Officer's finding by imposing a standard of "strict liability" against the PBA when such a standard has not been sanctioned by law.

PERC finds its legal basis for adopting a standard of strict liability to the charges of 447.501(2)(e) by virtue of the principles of common law agency set forth in International Longshoremans' and Warehousemen's Union, CIO, Local 6 (Sunset Line and Twine Co.) 79 NLRB 1487, 23 LRRM 1001 (1948). PERC relies predominantly on one aspect of the definition which states that a principal may be liable for the act of his agent within the scope of the agent's general authority..., even though the principal has specifically forbidden the act in question. (R. 633) In the instant set of facts the PBA specifically forbid the act in question, and publically defined Tauriello's scope of authority to exclude the act in question.

Excerpts from the Sunset Line and Twine case are accurate but incomplete enunciations of the fundamental principle of the rules of agency set out in Mechem, Outlines of Agency (3rd Ed.), Sections 106, 223 and Restatement Agency (1933), Sections 1, 15, 219, 228-237.

Mechem, Outlines of Agency (3rd Ed.), Section 231, also provides that:

> No principle is better settled in law, nor is there any founded on more obvious justice, than if a person dealing with an agent knows that he is acting under a circumscribed and limited authority and that his act is outside of and transcends

> the authority conferred, the principal is not bound; and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as the other. (Emphasis added)

Additionally, Restatement Agency (1958) Section 125 provides that:

> Apparent authority, not otherwise terminated, terminates when the third person has notice of:
>
> a) the termination of the agent's authority;
> b) a manifestation by the principal that he no longer consents; or
> c) facts, the failure to reveal which, were the transaction with the principal in person, would be ground for recession by the principal.

Comment on Clause (a) provides that "apparent authority can exist only as long as the third person, to whom the principal has made a manifestation of authority continues reasonably to believe that the agent is authorized. He does not have this reasonable belief if he has reason to know that the principal has revoked..."

Other legal works on agency also hold that a principal is not bound by the acts of the agent if the person dealing with the agent has knowledge or has been notified that the agent is not authorized to act in such a manner. See Searey Agency (1964), Section 22(f), and Reuschlein and Gregory, Agency and Partnership (1979), Section 98.

The nature and extent of Tauriello's authority was narrowly circumscribed. He served as a line of communication between the parties and was empowered with the authority to call meetings of Homestead officers to relay information received from the PBA

and the City. He was authorized to sit in on negotiations and to express the views of the bargaining unit he represented. He did not serve on the Board of Directors, was not authorized to vote on association business matters and had no authority to conduct negotiation sessions or institute changes in those bargaining conditions.

Any argument that Tauriello had implied authority to act on his own accord regarding these matters is negated by facts demonstrated in the record, listed in the Hearing Officer's Findings and adopted by PERC. Whatever apparent authority Tauriello had to direct or instigate action in negotiations without Board approval was expressly revoked when PBA publically relieved Tauriello of any perceived authority to speak or act on behalf of the association in matters involving possible strikes. During the bargaining unit meeting of October 22, 1980, the Board of Directors meeting of October 23, 1980, and in the numerous conversations Counsel for the PBA had with Tauriello that week, the PBA expressly informed the membership, the City and the public that Tauriello was not and could not act on its behalf beyond the limited duties and responsibilities of his position.

The cases succeeding Sunset Line and Twine applying the principles enunciated therein fail to lend support to PERC's proposition that the language set forth in the case mandates adoption of a strict liability standard. In Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980), the court found the union liable for an assault on a dissident member of the union. The basis of liability was

founded on agency principles that the"Business Manager of the local failed to act after he had received notice of his subordinates' illegal and high-handed conduct." 625 F.2d at 97. (Emphasis added). "This inaction was such that the district court could have reasonably concluded that the Business Manager authorized (the district representative's) conduct." 625 F.2d at 97 n.32.

Unlike PERC here, which bases liability solely on Tauriello's position as a membership representative, the Sixth Circuit in Shimman did not rely on the agent's capacity as district representative in finding liability. The Court found that the Business Manager's inaction amounted to ratification of the agent's action and concluded that "The rule of law remains, however, that a union may only be held responsible for the authorized or ratified actions of its officers and agents, North American Coal Co. v. U.M.W., 497 F.2d 459, 466-467 (6th Cir. 1974) (citing cases)." 625 F.2d at 95. See also: Buckeye Power, Inc. v. Utility Workers Union of America, 607 F.2d 759 (6th Cir. 1979) (Court refused to hold international liable for a strike where its local's members walked out even though the representative of the national union was at the strike scene and advised the membership that the picketing of the construction cite was prohibited.)

In Southern Ohio Coal v. United Mine Workers of America, 551 F.2d 695 (6th Cir. 1977) cert denied, 434 US 876, the Court upheld the district court's refusal to issue an injunction against the union because the record did not disclose any facts that the union encouraged, condoned or induced the strike. The court noted that:

> There may be occasions where a union's studied ambivalance toward an unauthorized strike may constitute sufficient inducement, encouragement and condonation of the strike to expose the union to injunctive relief and damages. (Citations omitted) This generally arises where there are facts on record to suggest that the union was allowing the wildcat strike to continue to bring pressure to bear on the employer and reap benefits of the illegal work stoppage without violating its contractual commitments. (Emphasis added)

551 F.2d at 701. In the instant case, PERC specifically found that the PBA did not use the threat of a strike as an improper bargaining tactic. (R.666).

Carbon Fuel Co. v. United Mine Workers of America, 444 US 212 (1979), reaffirmed the application of the common law principles of agency to labor law, holding "that to find (a) union liable it must be clearly shown...that what was done was done by their agents in accordance with their fundamental agreement of association'", 444 US at 271, quoting Coronado Coal Co. v. United Mine Workers of America, 268 US 925 (1925).

Carbon Fuel rejected the standard proposed by PERC that PBA was under an obligation to use all reasonable means to end the strike including, as PERC suggests, the removal of Tauriello at the time he initiated the strike threats. Quoting in part from the lower court's opinion, the Court concluded that:

> "There was no evidence presented in the district court that (the union) instigated, supported, ratified or encouraged any of the work stoppages...(citations omitted)...the local unions lacked authority to strike without authorization from (the union) (citations omitted) Moreover, (the union) had repeatedly expressed its opposition to wildcat strikes. Petitioner thus failed to prove agency."

444 US at 218. Accord Consolidated Coal Company v. International Union, United Mine Workers of America, 500 F.Supp. 72 (D.Utah 1980).

In Consolidated Coal the Court ruled that that union was not liable for a wildcat strike because the union demonstrated that it disapproved of the unauthorized strike. In making its decision, the Court noted that:

> Under the doctrine of agency, liability is dependent upon a showing that the union in some way made itself a party to the illegal strike. Such a showing may be evidenced by a union's adoption, ratification or in some cases acquiescence in an illegal strike. (Citations omitted) Liability may be avoided by a credible demonstration of union disapproval of unauthorized acts of its members. (Citations omitted) 500 F.Supp. at 75.

See also:

Lakeshore Motor Freight Co. v. International Brotherhood of Teamsters, Warehousemen and Helpers of America, Teamsters' Steelhaulers, Local No. 800, 483 F.Supp. 1150 (W.D. Penn. 1980).

(Union is not liable "absent evidence of affirmative conduct", where local president had sent a telegram to the employer advising that the union did not sanction the work stoppage; and sent a letter by certified mail to each member telling them that work stoppage was unauthorized.) Similar actions were taken by the Dade PBA in the instant case.

In its Final Order, PERC erroneously concludes from an interpretation of case law that Tauriello's action in calling for the strike was within the scope of his general authority granted him by virtue of his position as membership representative. The power to call strikes as a bargaining weapon was sanctioned neither by the PBA Constitution nor by the PBA's actual relationship with Tauriello. PBA did not "instigate, support, ratify or encourage" the strike or strike threats, but expressly and publically revoked from Tauriello any arguable authority to act in such a manner, and took exceptional

measures to prevent him from doing so.

PERC's reliance on Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio and Machine Workers, 494 F.Supp. 872 (W.D. Pa. 1980) aff'd, 649 F.2d 84, fails to consider factual circumstances surrounding the union steward's action in that case. In Airco, the Court specifically found that the acts of the union steward fell within the actual or apparent scope of their authority. The court considered the complete inaction of the union to disavow the steward's activities as a ratification of those actions.

PERC mischaracterizes the facts of the instant case in order to justify the applicability of International Union of Operating Engineers v. Local No. 675 v. Lassiter, 295 S.2d 634 (Fla. 4th DCA 1974), as support of its position. Tauriello was not a union officer nor was he a union steward, and he did not hold any de facto position as such. Tauriello was not appointed by the PBA and the position he carried was not recognized in the PBA Constitution. He had no authority to issue directives nor initiate action on behalf of the PBA. Tauriello was simply a bargaining unit member, elected by the others in the unit to speak for them at the 1980 contract negotiation sessions.

PERC claims that the strike, which it recognizes as having flowed only from Tauriello's actions and not from any PBA directive, was action taken in "furtherance of union business." PERC's conclusion is simply inconsistent with the facts of the instant case.

The PBA constitution expressly prohibits the use of strikes in any manner and for any purpose,and the PBA publically denounced the strike as a direct violation of both the law and its policies. The PBA advised Tauriello that his threatened actions were illegal, proscribed by the PBA constitution and would not be supported by it.

The record is clear that Tauriello was not acting in any representative capacity for the PBA in initiating or carrying out the strike. There can be no question that Tauriello was acting on his own accord, explicitly in violation of recognized union business policy.

The jury instructions approved by the court in International Union of Operating Engineers v. Long, 362 So.2d 987 (Fla. 3rd DCA 1978) do not reflect an accurate interpretation of the law. It is noteworthy that PERC can find no other authority for its proposition that a strict liability standard is appropriate, and none of the cases PERC cites explain the policy reason for imposing such a severe burden on public employee unions.

On the contrary, "it has been clear to Congress for may years that imposition upon unions of vicarious liability for the unauthorized acts of individuals could easily mean the elimination of labor unions as a social institution in America." North American Coal Co. v. U.M.W., 497 F.2d 459 at 466 (6th Cir. 1974)

As the Third District concluded:

> "Fixing blame in a labor dispute, never an easy task, is uniquely a PERC responsibility. That responsibility, however, must be exercised in a manner consistent with established legal principles." (footnote omitted) (p. 14)

ARGUMENT: ISSUE III

PERC EXCEEDS ANY ADMINISTRATIVE DISCRETION DELEGATED TO IT BY STATUTE WHEN IT CREATES A STANDARD OF LIABILITY AGAINST UNIONS NOT CONTEMPLATED BY CHAPTER 447 AND IN CONTRAVENTION OF POLICIES PROMULGATED THEREIN

The Third District found that:

> (I)t may be inferred from this that PERC was suggesting that the agency tests of Sunset Line and Twine Co. and Carbon Fuel Co. are the same. Such a suggestion by PERC would not be ill-founded, for the "two" tests are but one: the common-law test of agency. In applying the test, PERC evidently chose to emphasize in its order certain facets of the test more heavily than others. (p. 12)

The Third District explains more fully:

> PERC states that its determination of PBA liability "does not turn on an analysis of whether Tauriello's strike activity was specifically or generally authorized by the PBA (but) (r)ather, the conclusion turns on the basic proposition of agency law that the principal is liable for the acts of the agent within the scope of the agent's general authority. . ., "City of Homestead at 724 (emphasis added). This seemingly contradictory statement appears to be an application of the third portion of the Sunset Line & Twine Co. test. It ignores the remainder of that test, the common-law test of agency. Assuming we are dealing with general authority conferred upon a shop bargaining representative to instigate an illegal strike, see art. 1, 6, Fla. Const. (1968), it must at least be shown that the PBA intended by word or deed to confer such general authority, even if not in the specific instance involved, see Sunset Line & Twine Co.; City of Homestead at 723. There is nothing in the record to indicate that shop bargaining representatives, or Tauriello, had within the scope of their general authority the power to call strikes, or that the PBA in any way intended to confer such illegal power. All evidence, as weighed by the hearing officer, is to the contrary. (Page 12, 13) (Emphasis added)

It appears that PERC failed to grasp the fundamentals of common law agency and now promulgates a standard of liability which allows it to hide behind its error and ignore well established principles of agency law.

PERC claims that it has been delegated a "range of discretion within which to make policy determinations" such that the interpretation of Chapter 447, Part II's mandate for "stable labor relations" is applied "with equal force to labor and management". (R. 665) Whatever discretion PERC may have in interpreting Chapter 447, PERC is not granted unbridled discretion, and reviewing courts must not be persuaded that "great deference" is analogous to blind approval. Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1977) warns:

> "Such deference must be qualified by the reservation that courts should not "slip into... judicial inertia which results in the unauthorized assumption by an agency of major policy decisions..." (cite omitted)

353 So.2d at 117

PERC's argument finds support only in an inflexible, literal reading of Chapter 447. A practical interpretation of Chapter 447, however, does not contemplate the imposition of this severe burden on public employee organizations, and indeed the adoption of a standard of strict liability would have serious ramifications on their survival. A reviewing court, pursuant to Pasco County, is charged with the responsibility of carefully examining proposed policy changes which have a major impact on the status quo. The Third District opinion does not succomb to the persuasiveness of an ad-

ministrative agencies discretionary boundaries and specifically comports with the Pasco County standard of review in reversing PERC's Order.

The Third District found:

> PERC suggests that public policy demands that the PBA be found strictly liable for Tauriello's actions: labor organizations should "exercise stringent control over their agents" to prevent their participation in unlawful strikes. See id. at 724. Nothing in the evidence, as weighed by the hearing officer, suggests that the PBA did otherwise. Indeed, the record demonstrates that the actions of Dranow, Peebles and Slesnick, as found by the hearing officer, support only the view that the PBA through its authorized agents acted consistently with the conduct one would expect of responsible union officials. Tauriello was reprimanded for threatening a strike, he was enlightened by the PBA as to the consequences and, thereafter, refrained from calling the strike. When he later did call a strike, his first illegal act, he was immediately relieved of his representative status with the PBA. 2/

2/
In Footnote 3 of its Brief, PERC submits that the strike vote of October 22, 1980 amounted "to overt (strike) preparation."

However, PERC has never held, and specifically declined to do so in this case, that the making of a strike threat by an employee organization constitutes a per se violation of Section 447.501(2)(c). Moreover, PERC explicitly found that the PBA did not violate Section 447.501(2)(c) and use strike threats to coerce or induce changes in terms of employment. (R. 666)

The Third District notes:

> As PERC states, 'The most effective way to terminate such liability is to terminate the agency relationship as soon as it becomes evident that the agent intends to persist in a course of conduct which is contrary to the best interest of the principal,' id. This the PBA did. Tauriello was terminated the moment it became evident on-duty police officers were participating in the picket line.

PERC seeks to justify the policy considerations behind the proposed standard claiming that:

> (S)trike prohibitions could be easily circumvented if unions were permitted to avoid liability for strike activities by union agents on grounds that the activity was unauthorized. (R. 664)

The imposition of liability against the PBA based on this rationale ignores facts of the case. The PBA's actions far surpassed any nominal or superficial condemnation of the walkout, and at no time did the PBA hide behind the cloak of legal terminology in order to covertly defend Tauriello's actions.

The PBA actively attempted to dissuade members from striking, emphasizing to Tauriello that it did not back him in his effects to implement one; the PBA informed Tauriello that the consequences of his actions could result in a loss of community support and warned him of statutory repercussions, including loss of jobs held by all officers who engaged in the walkout. The PBA removed Tauriello from his position as liason when it became evident that Tauriello was engaging in an illegal walkout.

Basically, the legal standard proposed by PERC turns on the factual question of whether or not the PBA terminated Tauriello from his liason position the moment at which statements regarding a strike were made. This result is not only legally untenable: it precludes

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2 continued/
Had the subsequent strike not occurred, PERC could not now assess punitive measures against Tauriello, nor could have an injunction be obtained to cease his speech in the days preceding the walkout.

Logically and legally, the only proper time to have removed Tauriello from his liason position was at the commencement of illegal activity or when he outwardly refused to obey the directives of the organization's elected leadership. The record clearly establishes and the hearing officer found that Tauriello was removed at the very moment

any review of the facts, which by statute is required when adverse parties dispute them, and upon which the common law determination of agency depends. (See Section 120.57 (Fla. Stat.); 447.503(5)(Fla.Stat.); Fla. Code Rule 38D-13.10(2).)

The imposition of a standard of strict liability disregards the "intent of Legislature that nothing herein shall be construed either to encourage or discourage organizations of public employees" s.447.201 (Fla.Stat. 1984), by stripping unions of the authority over the management of their internal affairs and preventing unions from exercising due care over its members.[3/] This result is not justified where there is no showing that the PBA's removal of Tauriello as when he spoke of a threatened strike at the meeting of October 22, 1980 would have averted the October 27 walkout. PERC itself admits it would be fruitless to speculate whether firing Tauriello before he persisted in calling the strike would have prevented the strike. (R. 663) The Hearing Officer's findings support the contrary; the Homestead officers reelected Tauriello as their leader <u>after</u> he had been terminated by the PBA from his liason position

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2/ continued/ when those actions occurred.

3/ See Footnote 2, <u>supra</u>. Imposing a standard of strict liability onto public employee unions creates a presumption of guilt against the union inconsistent with the test set forth in <u>Sunset Line & Twine</u>, that the Charging Party bears the burden of showing the scope and existence of agency. (23 LRRMat 1005) Moreover, the presumption, as applied by PERC here, is rebuttable only by a showing that the employee organization terminated the dissenting member from his position at the inception of talk of dissension. (R. 664) Imposing this presumption of liability upon the union prevents the union from using alternative means to handle internal dissension such as through discussion or in any other reasonable manner the union deems apporpriate.

and voted to go back to work only if an injunction was issued. (R. 626) [4/] As the Third District notes, "Firing Tauriello did not end the strike, a court order did." (Page 14)

4/
It bears repeating that, as PERC notes, "at the time Tauriello first threatened 'blue flu' in the press, 1980 negotiations had long since reached impasse and special master proceedings were in progress." (R. 667) The record is clear that the PBA's discussions with Tauriello were responsible for averting the strike planned on October 24, the Friday before the City Commission was to vote on the Special Master's recommendations. (R. 634) Far more serious damage would have occurred had the PBA done what PERC suggests it should have done to avoid liability and refused to recognize Tauriello as the spokesperson for the Homestead bargaining unit during this critical period.

ARGUMENT: ISSUE IV

PERC ABUSED ITS DISCRETION IN INAPPROPRIATELY ASSESSING ATTORNEY'S FEES AND DAMAGES AGAINST THE PBA AS VEHICLE FOR IMPOSING PUNITIVE DAMAGES NOT WARRANTED BY THE FACTS OF THE CASE

PERC has traditionally found the award of attorney's fees inappropriate except in circumstances showing (1) frivolous or bad faith filing of the unfair labor practice charge or (2) blatant violation of Chapter 447, Part II, because the charged party knew or should have known that its conduct violated the provisions of Florida Statutes, Chapter 447. Sanitation Employees Association v. City of Miami, PERC Case No. CA-81-098, Order No. 82U-087 (March 24, 1982). In view of the novel legal question herein presented, there can be no contention that the PBA knew or should have known that a severe and unusually strict interpretation of the common law doctrine of agency would be applied by the Commission to its relationship with Tauriello negating all of its good faith efforts to avoid and, subsequently, to terminate the illegal job action.

The award of attorney's fees is particularly inexplicable since PERC argues that due to the PBA's "serious, if unsuccessful, steps to squelch the strike soon after its inception..." (R. 670), PERC determined that the remedy and penalty assessed against the PBA should be significantly less than the maximum possible under law. The total strike penalty amounts to $4,430.00. However, the attorney's fees petitioned for by the City amount to $15,537.00, over three times greater the damage and fines. Thus, the penalty in a case of question-

able liability becomes as great or greater than a truly blatant violation of the act - an outcome which should not be condoned by the Court.

Finally, PERC's argument concerning the appropriateness of assessing a $4,430.00 strike remedy and penalty against the PBA is not supported by the facts.

PERC found that the monetary damages specifically proved by the City consisted of $560.00 worth of lost work time resulting from interference by picketing police with the commencement of work by other City employees on October 28; and $1,655.00 in costs for private security protection for the City power plant during the 26½ hour strike. (R. 671)

However, review of PERC's Order in other portions reveal that "the record in this case discloses that the PBA's liability for the strike flows only from the actions of Tauriello." (R. 670) The evidence further demonstrates that Tauriello was removed within thirty minutes of the strike's commencement. The Commission continued: "We perceive that the removal of Tauriello effectively dissociated the PBA from the strike from that point forward. Accord, York Division Borg-Warner Corp. v. United Association of Journeymen and Apprentices of Plumbers and Pipe Fitting Industry, 473 F.Supp. 896 at 900 (S.D. Fla. 1979)." (R. 663)

PERC further notes that "the record is clear that the strike lasted only twenty-six hours after Tauriello's removal." (R.633)

Since PERC concludes that the PBA was liable only through Tauriello, and that liability ended thirty minutes after the strike began when PBA dismissed Tauriello from his liason position;

PBA's liability must be limited to damages occurring during that time span. In fact, none of the damages enumerated above were suffered during the time period which PERC links the PBA to the strike. Therefore, the assessment of the damages against the PBA was inappropriate.

CONCLUSION

PERC abused its discretion both procedurally and substantively by the actions it took in the proceedings below. Specifically, PERC disregarded the Hearing Officer's factual findings in favor of findings not developed by the record but more consistent with a conclusion based on an erroneous interpretation of the law.

The standard of strict liability with PERC seeks now to impose upon public employee organizations, both in the abstract and as applied to the facts of this case, amounts to holding public employee organizations liable for all the unauthorized strike actions of all their members. PERC's standard attempts to work harmful changes in present public employment relations, results neither supported by case law, nor contemplated by statute.

PERC's assessment of strike fines and attorney's fees is inconsistent with the findings of fact in the record. Moreover, the imposition of attorney's fees against the PBA is inconsistent with its prior decisions.

Chapter 447 does not give PERC the authority to ignore procedural directives nor create substantive laws inconsistent with legal principles as a justification for its action, and PERC's Order is clearly unreasonable, erroneous and in conflict with the plain meaning of Chapter 447, Part II.

The Third District Court of Appeal properly reversed the Order.

WHEREFORE, the PBA respectfully requests this Court to answer the certified question in the negative and affirm the decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of April, 1984 to: Stuart M. Lerner, Staff Counsel, Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301.

DONALD D. SLESNICK II