IN THE SUPREME COURT OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION,	:	
Petitioner,	:	Fla. Sup. Ct. Case No. 64,835 3d DCA Case No. 81-2023
v.	:	
DADE COUNTY POLICE BENEVOLENT ASSOCIATION,	:	
Respondent.	:	

INITIAL BRIEF ON THE MERITS OF PETITIONER PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

The Public Employees Relations Commission (hereinafter referred to as the "Commission"), a state agency acting in the public interest rather than on behalf of any private person, organization, or entity, was created by the Legislature as the statutory instrument for assuring the resolution of questions, controversies, and disputes arising under Chapter 447, Part II, Florida Statutes. Therefore, while it obviously was not a party adversely affected by its own final agency action, nonetheless it participated in the appellate proceedings below because of the substantial interest it had in vindicating the policies and practices that were the subject of the Third District's review. See Bureau of Community Medical Facilities Planning v. Samson, 341 So.2d 1071 (Fla. 1st DCA 1977); Fla. Admin. Code Rule 38D-11.09(1). Identical considerations underlie the Commission's participation in the instant proceedings.

Unless otherwise indicated, the following references will be used throughout this brief:

1. as indicated above, the Petitioner, Public Employees Relations Commission, will be referred to as the "Commission;"

2. the Respondent, Dade County Police Benevolent Association, will be referred to as the "PBA;"

3. the City of Homestead will be referred to as the "City;"

4. the original record on appeal will be referred to parenthetically by the symbol "R" followed by the appropriate page number(s); and

5. the appendix to this brief, which was prepared in accordance with the provisions of Fla. R. App. P. 9.220, will be referred to parenthetically by the symbol "A" followed by the appropriate page number(s).

STATEMENT OF THE CASE

On December 4, 1980, the City filed an unfair labor practice charge with the Commission, pursuant to Section 447.503, Florida Statutes, alleging inter alia, that the PBA had violated Section 447.501(2)(a) and (e), Florida Statutes, by threatening to, and subsequently participating in, an illegal strike against the City. (R 426-427a) An evidentiary hearing on the charge was conducted before a Commission Hearing Officer on February 19 - 20, 1981. (R 1-358) On April 13, 1981, the Hearing Officer issued his order recommending that the Commission dismiss the unfair labor practice charge that had been filed against the PBA. (R 615-640) The Commission, on August 21, 1981, issued its final order in the case. (R 655-676) It adopted in toto "the Hearing Officer's factual findings listed as 'Findings of Fact'" in his Recommended Order (R 655); however, taking issue with the principles of law employed by the Hearing Officer in assessing the legal effect of these factual findings (R 655, 660), it rejected the Hearing Officer's recommendation of dismissal as to the allegation that the PBA, through the actions of one Nick Tauriello, a PBA membership representative, had violated the strike prohibition provisions of Chapter 447, Part II, Florida Statutes (R 663, 672). Having concluded that the PBA had violated Sections 447.501(2)(a) and (e) and 447.505, Florida Statutes, the Commission, in its final order, directed the PBA to pay a strike remedy and penalty of $4,430 to the City. (R 671, 673) The Commission further ordered the PBA, pursuant to Section 447.503(6)(c), Florida Statutes, to pay to the City those attorney fees and costs incurred by the City in the prosecution of its charge against the PBA. (R 671, 672)

The PBA appealed the Commission's final order to the Third District Court of Appeal. The Third District, in a majority decision rendered January 3, 1984, with Judge Nesbitt dissenting, reversed the Commission and remanded with directions that the Commission adopt the Hearing Officer's recommendation of dismissal. (A 1 - page 14) By separate order, a majority of the Third District panel hearing the case certified it to this Court as one that passes upon a question of great public importance, to wit:

> 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.

(A 2) On February 1, 1984, the Commission, pursuant to Fla. R. App. P. 9.120, filed its notice to invoke the discretionary jurisdiction of this Court to review the Third District's majority decision. (A 3) On February 7, 1984, this Court issued a schedule for the submission of briefs on the merits in this cause, thus evincing its intention to exercise its discretionary review jurisdiction.

STATEMENT OF THE FACTS

As stated previously, the Commission adopted in toto "the Hearing Officer's factual findings listed as 'Findings of Fact'" in his Recommended Order and relied exclusively upon these factual findings in concluding that the PBA had violated the strike prohibition provisions of Chapter 447, Part II, Florida Statutes. (R 655) The PBA, neither before the Commission nor the Third District, has taken exception to these factual findings. Furthermore, the Third District, on review, did not disturb any of these findings. Under such circumstances, it is appropriate for these findings to serve as the statement of the facts in the instant case. The following is a recital of these factual findings,[1] with the Hearing Officer's references to the record modified to conform with the symbols used in this brief:

1. Sergeant Nick Tauriello was elected as the representative for the Homestead PBA bargaining unit and participated on the Dade County PBA bargaining team during all 1980 Homestead contract negotiations (R 55-56).

2. Sharon Dranow, an employee of the Dade County PBA, represented the Dade County PBA in Homestead contract negotiations (R 112-13, 179-81, 229).

3. Tauriello functioned as a shop steward; he performed the liaison role of communicating with bargaining unit members during negotiations, calling meetings as he deemed it necessary; in this role, he did not attend meetings of the Dade County PBA Board of Directors; not all bargaining units represented by the Dade County PBA have a representative who sits on the Board of Directors (R 56-57, 145-46, 149-50, 268-69).

1/ These findings can be found on pages 623 through 629 of the original record on appeal.

4. The City's original contract proposal on salary was a 6% raise as of October 1, 1980, which the City maintained was a fair offer throughout negotiations until impasse (R 184-85).

5. Following a mediation meeting Monday, October 20, City Manager Alex Muxo gave Tauriello a memorandum around noon on Wednesday, October 22, which increased the City's salary proposal by addition of a 3% annual bonus payable in quarterly installments (R 167, 359-360).

6. At some point early in the week of Monday, October 20, Tauriello was quoted in the press as follows: "'We are not going to sign any contract for six percent,' said PBA representative Sergeant Nick Tauriello. 'The mood of the officers right now is that they're going to get sick, blue flu or whatever you want to call it'"; that statement substantially represented Tauriello's feelings at the time (R 72, 80-81).

7. Almost the entire Homestead PBA bargaining unit was present at a meeting held at the FOP Hall in Homestead on Wednesday night, October 22 (R 68-69, 114, 117).

8. Dade PBA President Hugh Peebles, Sharon Dranow, and Dade PBA counsel Don Slesnick attended the Wednesday night meeting from the Dade County PBA because of rumors circulating about a walkout (R 68-69, 230).

9. Peebles, Dranow, and Slesnick tried to talk the Homestead PBA bargaining unit members out of a walkout (R 69, 115, 128-29). Dranow summarized the contract negotiations (R 115). Peebles then 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).

10. Emotions were very high at the Wednesday night meeting; the Homestead PBA bargaining unit members understood the Dade County PBA's position; they

were visibly upset at and in disagreement with the position taken by Peebles, Dranow, and Slesnick (R 69, 115-17, 130, 317).

11. When Peebles, Dranow, and Slesnick were excused from the meeting, Peebles did not believe they had dissuaded the Homestead PBA bargaining unit members from a walkout (R 234, 274).

12. Before leaving the FOP Hall parking lot on Wednesday night, Peebles spoke to waiting media representatives, stating basically, as later reported in the media, that he was certain in his own mind that Homestead police officers were bound and determined to walk out if the City didn't meet their demands and there wasn't much he was going to be able to do about it (R 274).

13. Immediately after Peebles, Dranow, and Slesnick were excused from the meeting, Tauriello quieted everybody down, called the meeting back to order, and called for a vote: "You heard what the PBA said. If we do it, we're sticking our necks out. Hopefully it won't happen. All those in favor of walking out, raise your hands"; the vote was unanimous to walk out on Friday, October 24, at 4:00 p.m. (R 69, 130-31).

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

15. After Tauriello delivered the Dade County PBA's response to the Special Master's Recommended Decision to Mayor Nick Sincore at City Hall Thursday afternoon, October 23, the Mayor spoke to the press, and when asked for a response, Tauriello said, "I cannot answer that question. The men have to vote on it. I will call a special meeting. I will put it to the men what the Mayor said and I feel we'll go off 'til Monday. We'll give them to Monday. Ain't no problem" (R 81a-84, 620).

16. During the day on Thursday, Slesnick called Tauriello, explained that he was trying to work something out with the Mayor on the other phone at that moment, and urged Tauriello to go to the officers and beg them not to walk out, to picket instead, to wait until Monday when the City was scheduled to meet to consider the Special Master's Recommended Decision (R 118-19).

17. Almost the entire Homestead PBA bargaining unit met again at the FOP Hall late Thursday afternoon and, after a long heated argument, voted unanimously to put off the walkout until Monday; the alternative plan adopted was to meet at the FOP Hall following the City Council impasse resolution meeting on Monday, October 27, and to decide then what to do (R 84-85, 119, 127).

18. At some point following the Thursday afternoon meeting, Tauriello made a statement which appeared in the newspaper that if the Homestead PBA bargaining unit ultimately accepted less than their current salary demand, he would quit his job; he later decided not to quit (R 86-89).

19. Later that night, Tauriello attended his first Dade County PBA Board of Directors meeting; Dade County PBA President Peebles did not know that Tauriello was going to appear (R 121-22, 131-32, 240).

20. Tauriello went because, like most of the Homestead officers, he didn't believe Peebles' statement to the Homestead PBA bargaining unit the previous night that the Dade County PBA would not support a walkout in Homestead (R 122-23).

21. Peebles read a memo addressed from him to Tauriello expressing the same position he had stated the previous night to the Homestead PBA bargaining unit; Slesnick spoke; Tauriello explained why he wanted the Dade County PBA to back Homestead police officers in a walkout (R 123-24, 131-32, 373).

22. The Board of Directors discussed the Homestead situation, 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; Tauriello did not believe that the Board members were correct about losing citizen support (R 134-35).

23. Slesnick called Tauriello and spoke with him for about an hour after Tauriello returned home that evening; Slesnick repeatedly explained that a walkout was wrong; Tauriello told Slesnick basically to "take the PBA and shove it," that he (Slesnick) didn't have to work in Homestead (R 137-38).

24. Slesnick and Tauriello discussed a Public Employees Relations Commission order in which the Commission proposed that certain City of Hollywood police officers be dismissed for engaging in a strike; Tauriello got a copy of the proposed order and showed it to Homestead PBA bargaining unit members, and told them about the Board of Directors meeting (R 138-40, 147-48).

25. Peebles sent Mayor Sincore a letter dated October 23 mentioning the Wednesday meeting and the "threatened wildcat job action" and urging the Mayor to "take whatever action is necessary to reach an immediate equitable conclusion to this dispute"; copies were sent to the Public Employees Relations Commission and to Homestead City Manager Alex Muxo; Peebles did not intend either this letter or his statement to the press following the Wednesday night meeting as a threat (R 237-39, 372).

26. Peebles sent an official response to the Special Master's Recommended Decision dated October 23 in which he rejected the salary recommendation, reasserted the last offer made by the Dade County PBA, and offered an

alternative of a 15% raise effective October 1 on a one-year contract basis (R 369-371).

27. On Thursday or Friday, October 23 or 24, Slesnick initiated a three-way conversation with Mayor Sincore and City Manager Muxo in an effort to prevent the walkout (R 183, 620).

28. In the morning of Monday, October 27, City Manager Muxo and the City's counsel, Leonard A. Carson, met with Tauriello and gave him a copy of a just-written memorandum from Muxo to the Mayor and City Council and explained that Muxo's position was that the Special Master's Recommended Decision on salary should be accepted (R 168-69, 186-87, 361-363).

29. In response, Tauriello stated that he would make the officers aware of Muxo's new position (9% for each of two years), but that less than a double digit for each year would not be acceptable (R 168, 171).

30. The City Council meeting began around noon and ended at approximately 2:30 p.m. on Monday, October 27; City and PBA representatives made their presentations regarding the Special Master's Recommended Decision, and after a very brief discussion, the City Council voted to accept the Special Master's salary recommendation endorsed by the City Manager; some Homestead PBA bargaining unit members asked to be heard, and the Mayor denied their request (R 90-91, 318, 247-49).

31. Immediately upon adjournment of the City Council meeting after the impasse resolution vote, Homestead PBA bargaining unit members walked out in a group and commenced picketing in the parking lot in front of City Hall while someone played the song "Take This Job and Shove It"; Tauriello was in the front row of the group leaving City Hall (R 91, 128, 247-48, 366-368).

32. Peebles walked out of the City Council meeting with Carson and watched the picketing from just outside the City Hall doors (R 251, 367).

33. Peebles observed a police car pull into the parking lot, saw officers stop the officer in the car and speak to him, and noticed the man return a few minutes later with a hand-held radio; he concluded that an on-duty officer had walked off the job (R 253, 285-86).

34. Peebles spoke with Slesnick, they decided Peebles would tell Tauriello to direct the officers to return to work, and Peebles walked over to where Tauriello was standing by a tree talking to media people and so directed him; Tauriello refused; Peebles removed Tauriello from his position as Homestead PBA bargaining unit representative approximately 30 minutes after the picketing commenced (R 97, 253).

35. Peebles then went back inside City Hall, told City Manager Muxo that Tauriello was relieved of his position, and asked Muxo to get in touch with Officer Trussell so he could take Tauriello's place; Officer Trussell never showed up, and later resigned his PBA membership in writing effective October 29 (R 197-98, 253-54, 260-62, 375).

36. Peebles confirmed Tauriello's removal from his position as Homestead PBA bargaining unit representative in writing on October 28 (R 256, 374).

37. Peebles did not feel he had the rapport with the officers who had walked out that Tauriello did, and he did not seek to persuade the officers to go back to work; he did not attempt to contact Steve Garrison to ask him to help end the walkout (R 259, 271, 286).

38. Metropolitan Dade County Public Safety Department officers, at least one of whom was a Dade County PBA member, patrolled Homestead during the walkout; Tauriello knew these officers, and spoke with them; rather than

attempt to dissuade the outside officers from patrolling, the Homestead PBA bargaining unit members encouraged them to patrol (R 106-07, 136-37, 161-63).

39. Some officers who had walked out stayed at City Hall and others picketed; that evening they went to the FOP Hall where they elected Tauriello as their spokesman and voted to go back to work if an injunction was issued (R 99-101).

40. On Tuesday morning, October 28, Homestead police officers picketed entrances to City facilities where other City employees reported to work; these other City employees were members of a bargaining unit represented by the International Brotherhood of Electrical Workers (IBEW); IBEW unit members honored the police pickets and did not report to work; after approximately 45 minutes the pickets were withdrawn and the IBEW unit members reported to work (R 142, 172-73).

41. The value of the time not worked by IBEW bargaining unit members, time for which they were paid by the City, was $564.37 (R 174, 189-93).

42. Police officers who did not work October 27 and 28 were not paid by the City; Homestead lieutenants who worked overtime were paid for overtime by the City; the Metropolitan Dade County Public Safety Department officers who patrolled the City were not paid by the City (R 178, 194).

43. The City paid the Wackenhut Corporation $1,655.00 for security guards to watch the power plant the night of October 27-28; City Manager Muxo contracted with Wackenhut based on rumors of damage to City property, rumors which did not originate with or implicate Homestead PBA or IBEW bargaining unit members; City Manager Muxo's decision was based upon his judgment that the cost was worthwhile compared to the worth of the power plant (in excess of $30,000,000) and was not an overreaction (R 175-78, 196-97, 207).

44. There was no damage to any City property or vehicles during the walkout (R 177).

45. Tauriello believed that the walkout would not happen because there would be an eleventh-hour settlement or counter-offer from the City, such as "ten, ten" (10% effective October 1, 10% effective October 1, 1981); he did not believe the City would "let us down"; Tauriello was proud of the Homestead PBA bargaining unit members for walking out (R 75-77, 90, 98-99).

46. In Tauriello's statements to media representatives and in his actions during the week prior to October 27, as well as during the walkout, he represented all forty-three individually-named Respondents; he was a spokesman who accurately conveyed the views of the group (R 80, 97, 101, 321).

47. Of the forty-five members of the Homestead PBA bargaining unit, only the forty-three individually-named Respondents attended the meetings during the week prior to October 27 and walked out on October 27 and 28 (R 63, 84).

48. Article II, Section 2 of the constitution of the Dade County PBA provides (R 230-31):

> The Dade County Police Benevolent Association is an organization of professional law enforcement personnel dedicated to enforce the law under all circumstances and shall not strike or by concerted action cause or attempt to cause cessation of the performance of police duties.

49. At approximately 4:00 p.m. on October 27, Circuit Judge Francis X. Knuck issued a Temporary Injunction which stated in part:

> The Defendant public employees are engaging in a strike within the meaning of 447.203(6), Florida Statutes (1979) in violation of 447.505, Florida Statutes (1979).
>
> The Defendant, DADE COUNTY POLICE BENEVOLENT ASSOCIATION, through its agents and representatives, has incited and encouraged the illegal strike, sick-out, or withholding of services by Defendant public employees in violation of Section 447.505, Florida Statutes (1979).

50. As a result of a hearing on October 28, Judge Knuck issued an Order Continuing Temporary Injunction which stated in part (R 347, 621, 376-378):

> The Defendant public employees are engaging in a strike within the meaning of 447.203(6), Florida Statutes (1979) in violation of 447.505, Florida Statutes (1979).
>
> The Court reserves ruling on whether it has the authority to order the CITY OF HOMESTEAD and the DADE COUNTY POLICE BENEVOLENT ASSOCIATION to resume collective bargaining negotiations.
>
> The Defendants, DADE COUNTY POLICE BENEVOLENT ASSOCIATION, its members, agents, officers, representatives and all other named Defendants who have knowledge of this injunction, continue to be enjoined pending final hearing from instigating, supporting or participating in any manner whatsoever in a strike, sick-out, or withholding of services in violation of 447.505, Florida Statutes (1979).

ARGUMENT: ISSUE I

INASMUCH AS THE COMMISSION REJECTED THE HEARING OFFICER'S INTERPRETATION OF THE LAW AND NOT HIS FINDINGS OF FACT IN CONCLUDING THAT THE PBA HAD VIOLATED THE STRIKE PROHIBITION PROVISIONS OF CHAPTER 447, PART II, FLORIDA STATUTES, THE THIRD DISTRICT'S MAJORITY DECISION REVERSING THE COMMISSION'S DETERMINATION OF PBA LIABILITY ON THE GROUND THAT THE COMMISSION IMPERMISSIBLY STRAYED FROM THE HEARING OFFICER'S FINDINGS OF FACT, SHOULD BE QUASHED.

The instant case comes to this Court on the following question certified by the Third District as one of great public importance:

> 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.

As the foregoing question suggests, the majority of the Third District panel below held the view that the Commission rejected the Hearing Officer's findings regarding the agency relationship between the PBA and Nick Tauriello. Determining such findings to be factual in nature and supported by competent substantial evidence adduced at evidentiary proceedings comporting with the essential requirements of law, the majority held that the Commission erred reversibly in rejecting these findings made by the Hearing Officer. It is the position of the Commission in these review proceedings, however, that it did not reject any material findings of fact made by the Hearing Officer; rather, its disagreement with the Hearing Officer concerned the legal principles he applied to these factual findings to arrive at his conclusion of law that, for purposes of ascertaining the PBA's liability for Tauriello's unlawful strike activities, Tauriello was not an "agent" or "representative" of the PBA within the meaning of the strike prohibition provisions of Chapter 447, Part II, Florida Statutes. What the Commission rejected was the Hearing Officer's interpretation and construction of these strike prohibition provisions,

not his findings of fact. As the Commission will show, in so rejecting the Hearing Officer's views on the proper construction of Chapter 447, Part II, it acted within the scope of its statutory authority.

Chapter 447, Part II, was enacted by the Legislature, at the prompting of this Court,[2] to implement the provisions of Article I, Section 6 of the Florida Constitution, which reads:

> The right of persons to work shall not be denied or abridged on account of membership or 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. (Emphasis supplied.)

The constitutional genesis of Chapter 447, Part II, is made clear by the following legislative statement of policy found in Section 447.201, Florida Statutes:

> It is declared that the public policy of the state, and the purpose of this part, is to provide statutory implementation of s. 6, Art. I of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. It is the intent of the Legislature that nothing herein shall be construed either to encourage or discourage organization of public employees. These policies are best effectuated by:
>
> (1) Granting to public employees the right of organization and representation;
>
> (2) Requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees;

2/ See Dade County Classroom Teachers Association, Inc. v. Legislature, 269 So.2d 684, 688 (Fla. 1972).

> (3) Creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers; and
>
> (4) Recognizing the consitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition. (Emphasis supplied.)

The Legislature's "recognition" of the "constitutional prohibition against strikes by public employees" referred to in subsection (4) above is manifested in Sections 447.501(2)(e) and 447.505, Florida Statutes. The former provides:

> A public employee organization or anyone acting in its behalf or its officers, representatives, agents, or members are prohibited from:
>
> Participating in a strike[3] against the public employer by instigating or supporting, in any positive manner, a strike. Any violation of this paragraph shall subject the violator to the penalties provided in this part.[4]

Section 447.505 contains the same prohibition and reads as follows:

> No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike.

The Commission was created to assist in the accomplishment of the legislative objectives set out in Section 447.201, Florida Statutes.[5] To this end,

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3/ The term "strike" is defined in Section 447.203(6), Florida Statutes. It is undisputed that the activities of Tauriello and the 41 other bargaining unit members on October 27-28, 1980 constituted a "strike" within the meaning of Section 447.203(6). The Third District majority below asserted in its opinion that these activities on October 27-28, 1980 constituted Tauriello's "first illegal act". (A. 1 - page 13) With this assertion, the Commission takes issue. As the Hearing Officer found, (R 624) Tauriello conducted a strike vote of bargaining unit members on October 22, 1980. This was clearly "overt [strike] preparation" which itself is an unlawful "strike" within the meaning of Section 447.203(6).

4/ These strike penalties are found in Section 447.507, Florida Statutes.

5/ See, e.g., Section 447.207(2), Florida Statutes.

the Commission has been vested by the Legislature with the authority to administer and enforce, and therefore also to interpret and construe, the various provisions of Chapter 447, Part II, including the strike prohibition provisions of Sections 447.501(2)(e) and 447.505, in accordance with, with certain exceptions not pertinent here, the provisions of Chapter 120, Florida Statutes.[6] The Legislature has further delegated to the Commission "a range of discretion within which to make policy determinations necessarily involved in the interpretation and application" of the provisions of Chapter 447, Part II. City of Clearwater v. Lewis, 404 So.2d 1156, 1161-1162 (Fla. 2d DCA 1981). Through the exercise of this authority and discretion, the Commission, as one court has observed, "has developed special expertise in dealing with labor problems and is [therefore] uniquely qualified to interpret and apply the policies enunciated in Chapter 447." School Board of Dade County v. Dade Teachers Association, FTP-NEA, 421 So.2d 645, 647 (Fla. 3d DCA 1982).

The administrative proceedings below provided the Commission with occasion to use its "special expertise" and interpret the strike prohibition provisions of Chapter 447, Part II. Specifically, the Commission addressed the issue of a union's liability under these statutory provisions for the unlawful strike activities of an official union representative. The Hearing Officer, in his Recommended Order, had determined that such liability hinged upon a finding that it would have been reasonable for the other striking employees to have believed that the representative's strike activities represented the views of the union. (R 632-635) The Commission rejected this

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6/ See e.g. Sections 447.503 and 447.507(6)(a), Florida Statutes.

interpretation of Chapter 447, Part II, opting for a stricter standard of liability. Drawing from National Labor Relations Board and federal court cases involving the issue of a union's liability for the conduct of its representatives or agents, and taking into consideration the strong public interest in avoiding any interruption in the flow of public services, the Commission held:

> . . . if a local employee organization such as the Dade PBA desires to avoid responsibility for a "wildcat" strike by employees whom its [sic] represents, it must ensure that no serving union representative or official participates in or actively assists a strike. . . . If a union representative or agent takes a leadership role in a strike, the plain meaning of Section 447.505 decrees that the union is responsible for support of the strike unless it moves to terminate the official's status prior to the strike's occurrence, as soon as it knows of the conduct.

(R 664) As required by Chapter 120, Florida Statutes,[7] the Commission gave in its final order the following detailed explanation of its rationale for employing such a standard to determine union liability under Chapter 447, Part II:

> . . . We believe that public policy demands that employee organizations exercise stringent control over their agents and representatives to obviate their participation in unlawful strike activity or other unfair labor practices, just as we believe it demands that public employers restrain their managerial and supervisory employees from similar unlawful activities. For example, in Lake County Education Association v. District School Board of Lake County, 6 FPER ¶ 11019 (1979), the Commission held the public employer liable for unlawful polling of employees by school principals even though that polling was carried out in contravention of the employer's orders. Logic demands that this liability principle apply with equal force to labor and management representatives under most circumstances. Because each side retains full control

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7/ See McDonald v. Department of Banking and Finance, 346 So.2d 569, 583-584 (Fla. 1st DCA 1977).

over its agents who may be terminated for disobedience to instructions, each is in a much better position to eliminate potential labor strife at its inception rather than one-half hour after the event.

Furthermore, we have consistently interpreted Chapter 447 in such a manner as to balance the inequity of bargaining power created by public employees' lack of the right to strike, most recently in United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees, PERC Order No. 81U-251 (July 10, 1981). See also Palowitch v. School Board of Orange County, 3 FPER 280 (1977), aff'd, 367 So.2d 730 (Fla. 4th DCA 1979). Having done so, we must also ensure that the constitutional prohibition against strikes by public employees is not circumvented by those who, through the sanction of our certification, have been placed in a position of leadership. We therefore consider it appropriate for certified employee organizations to either restrain their agents from strike activity or answer for the resulting damages. It is obvious to any student of labor relations that the strike prohibition could easily be circumvented if unions were permitted to avoid liability for strike activity by union agents on the grounds that the activity was "unauthorized."

Finally, an employee organization can insulate itself from liability for unauthorized strike instigation on the part of its agents or representatives simply by terminating the offenders' agency as soon as it receives notice of the unauthorized action. On balance, the small inconvenience that this requirement could generate is far outweighed by the public's interest in stable labor relations and in the continuation of public services free from interruption by strike activity. As the Court held in Joel Strickland Enterprises v. Atlantic Discount Co., 137 So.2d 627 (Fla. 1st DCA 1962),

> Where one of two innocent parties must suffer because of the wrong doing of a third person, the loss must fall on the party who by his conduct created the circumstances which enabled the third party to perpetrate the wrong.

(R 664-666)

The ultimate authority to administratively interpret the provisions of Chapter 447, Part II, resides with the Commission, not its hearing officers. The Commission, therefore, is free to, as it did in the instant case, displace

a hearing officer's interpretation of the statute with one it believes to be more consistent with the Legislature's intent and objectives. See School Board of Dade County v. Dade Teachers Association, FTP-NEA, supra, at 647; J.A. Jones Construction Company v. Department of General Services, 356 So.2d 43 (Fla. 1st DCA 1978), cert. denied 362 So.2d 1055 (Fla. 1978); McDonald v. Department of Banking and Finance, supra, at 582-583; Section 120.57(1)(b)(9), Florida Statutes.

It is well established that the administrative construction of a statute by the agency charged with its administration and interpretation is entitled to great weight and will be overturned by a reviewing court only if there are compelling indications that such construction is erroneous. See Boca Raton Publishing Company, Inc. v. Department of Revenue, 413 So.2d 106, 107 (Fla. 1st DCA 1982); National Airlines, Inc. v. Division of Employment Security, Florida Department of Commerce, 379 So.2d 1033, 1035 (Fla. 3d DCA 1980); State ex rel. Szabo Food Services Inc. of N.C. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla. 1973); Greyhound Lines, Inc. v. Yarborough, 275 So.2d 1, 3 (Fla. 1973). See also Section 120.68(12), Florida Statutes, which applies to the review of Commission orders and provides that a reviewing court "shall not substitute its judgment for that of the agency on an issue of discretion." In recognition of this fundamental principle, reviewing courts have historically accorded great deference to Commission interpretations of Chapter 447, Part II, as the following excerpts from a sampling of their opinions illustrate:

> Essentially, we are asked in this appeal whether PERC's [the Commission's] interpretation of the Public Employees Relations Act (PERA) was in error. The standard to be

applied on review of the construction of a statute that an agency is charged to enforce is ordinarily to accord substantial deference to it and decline to overturn it, except for the most cogent reasons, or unless clearly erroneous, unreasonable, or in conflict with some provision of the state's constitution. [Citations omitted] As we observed in Framat Realty, Inc., 407 So.2d at 242: "[t]he judiciary must not, and we shall not, overly restrict the range of an agency's interpretative powers. Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views."

PERC has been provided with broad powers of administering Part II of Chapter 447 by Section 447.207, Florida Statutes (1979). We are not prepared to state on this record that PERC's interpretation of the respective statutes was clearly erroneous, unreasonable or in conflict with some provision of the constitution or the plain intent of the statutes involved . . .

Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133, 136 (Fla. 1st DCA 1982).

* * * * *

. . . an expert tribunal such as PERC is entitled to substantial deference in recognition of its special competence in dealing with labor problems. It is not our province to displace its choice between two conflicting views simply because we would have been justified in deciding the issue differently were it before us in the first instance. See Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1977). . . . Since there is a reasonable basis for the policy established by PERC in this case which is consistent with the philosophy of Chapter 447, we will not disturb it. . . .

City of Clearwater v. Lewis, supra, at 1162.

* * * * *

PERC's interpretation of the statute is within its range of discretion. We have on numerous occasions commented upon PERC's responsibility to define and implement public employees' substantive rights under PERA, and we are forbidden by § 120.68(12) from substituting our judgment for that of the agency on an issue of discretion.

Board of Regents v. Public Employees Relations Commission, 368 So.2d 641, 643 (Fla. 1st DCA 1979), cert. denied 379 So.2d 202 (Fla. 1979).

The Commission's interpretation of Sections 447.501(2)(e) and 447.505, Florida Statutes, to provide for the "strict liability" of unions for the unlawful strike activities of their official representatives and agents, was clearly "within its range of discretion" and, as the Commission explained in that portion of its order set out above, "consistent with the philosophy of Chapter 447" and the Florida Constitution regarding strikes by public employees. Moreover, it does not offend the plain meaning of any of the pertinent language found in Chapter 447, Part II. Of particular significance in this regard is the following language contained in subsection (4) of Section 447.507, the section dealing with the penalties for violations of the strike prohibition:

> An employee organization shall be liable for any damages which might be suffered by a public employer as a result of a violation of the provisions of s. 447.505 by the employee organization or its representatives, officers, or agents.

The foregoing language, when considered in conjunction with that of Sections 447.501(2)(e) and 447.505, would appear to require, rather than merely permit, the Commission's "strict liability" construction; and it certainly is not susceptible to the construction urged by the Hearing Officer that, as a condition of imposing liability on a union for the strike activities of its official representative, a finding must first be made that the other strikers reasonably believed that the representative's activities represented the views of the union. In employing such language the Legislature evidently recognized, as the Commission observed in its final order, "that the strike prohibition could easily be circumvented if unions were permitted to avoid liability

for strike activity by union agents on the grounds that the activity was 'unauthorized.'" (R 665) To prevent the possibility of such an avoidance of liability, the Legislature, as the foregoing language demonstrates, decreed that a finding of liability could be made simply upon the basis of the representative status of the individual engaged in the unlawful strike activities, regardless of whether those activities represented the official views of the union.

Furthermore, there is Florida and federal case law involving the issue of a union's liability for the conduct of its representatives which, although not directly on point, lends support to the proposition that the Commission's "strict liability" construction is not an "unreasonable" one.

In International Union of Operating Engineers, Local No. 675 v. Lassitter, 295 So.2d 634 (Fla. 4th DCA 1974), the Fourth District considered the issue of a local union's liability for an assault on a non-member during a labor dispute. The assailant was, as was Tauriello in the instant case, a union steward and his assault was for purposes of removing the victim from a job site over which the local union claimed jurisdiction. The Fourth District ruled that the status of the assailant as a local union steward made him an "agent" of the local union, and that, inasmuch as the assault was committed in furtherance of the local union's business and objectives, the local union could be held liable for the assault, even if it had not authorized it. Id. at 636-637.[8]

8/ This Court reviewed the Fourth District's decision but left undisturbed the Fourth District's ruling on the question of the local union's liability. See Lassiter v. Walton, 314 So.2d 761 (Fla. 1975). See also International Union of Operating Engineers, Local No. 675 v. Lassitter, 325 So.2d 408, 409 (Fla. 4th DCA 1975); Lassitter v. International Union of Operating Engineers, 349 So.2d 622, 624 (Fla. 1976).

The "business" of a union certified by the Commission, such as the PBA, is to "bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit." Section 447.309(1), Florida Statutes. A "strike", such as the one engaged in the instant case during the course of the collective bargaining process, which has the obvious purpose of "inducing, influencing, condoning, or coercing a change in the terms and conditions of employment"[9] of the public employees represented by the union, is necessarily in furtherance of that "business."[10] Therefore, under the rationale of the Lassitter case, a union may be held strictly liable for the unlawful strike activities of one of its stewards, notwithstanding the fact that these activities may not have been specifically authorized by the union hierarchy.

In International Union of Operating Engineers v. Long, 362 So.2d 987, 989 (Fla. 3d DCA 1978), cert denied, 372 So.2d 469 (Fla. 1979),[11] another case dealing with the question of union liability for injuries suffered during a jurisdictional dispute, the following was enunciated by the Third District as the standard to be used in ascertaining the existence of such liability:

> . . . a labor union or its membership may be held liable, under general principles of agency law, for the common law torts of its officers or members committed during the

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9/ Section 447.203(6), Florida Statutes.

10/ That a strike may constitute an "economic weapon" to accomplish a union's collective bargaining objectives cannot be disputed. See Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, supra, at 139, 140.

11/ See 388 So.2d 572 (Fla. 3d 1980), wherein the Third District corrected a typographical error in its original opinion.

> course of a lawful strike, or other primary labor activities, if the union officers or members authorized, participated in, or ratified the tortious acts. (Emphasis supplied.)

Under this standard, the mere participation by a union officer or member in strike-related activity constituting a tort subjects the union to liability for the tortious activity. To hold, as did the Commission in the instant case, that a union is strictly liable for any unlawful strike in which its officers, representatives, or agents participate, is certainly compatible with the test for union liability laid down in the Long case.[12]

In addition to the foregoing, as the Commission noted in its final order, (R 660-661) and as Judge Nesbitt remarked in his dissenting opinion in the instant case (A 1 - page 16), "a long line of cases" assessing union liability under federal labor statutes provide further support for the "strict liability" test adopted by the Commission in the instant case. Any discussion of these cases must begin with mention of the "landmark decision" of International Longshoremen's and Warehousemen's Union, CIO Local 6 (Sunset Line and Twine Co.), 79 NLRB 1487, 23 LRRM 1001, 1005 (1948), in which the National Labor Relations Board, in the course of determining a union's responsibility for unfair labor practices committed during a strike by two union officers — a business agent and a vice-president — stated:

12/ In Long, the jury was not correctly instructed as to this test, thus prompting the Third District to reverse the judgment under appeal. Similarly, in the instant case, the Hearing Officer, as the jury in the Long case, was misinformed as to the correct standard to apply to determine liability, which circumstance led the Commission to reject his ultimate determination regarding the PBA's liability.

> A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area in which the agent acted.

The Board, applying this test[13] to the facts of the case before it, found the union liable for the unfair labor practices committed by its officers. It explained:

> . . . [The business agent] testified that the union involved is under his "supervision". The record does not otherwise show how his duties are defined or what are the limitations of his authority. But neither is there evidence to rebut the inference that he was at the time of the events involved vested with the powers of general agent to conduct the local's business in the area. All his actions and conduct indicate that he was the officer of Local 6 who assumed immediate charge of the strike. He participated in many of the episodes which constitute restraint and coercion.
>
> The absence of evidence showing that the local specifically authorized or ratified his conduct is immaterial since there is evidence that he was within the scope of his general authority to direct the strike and the picketing . . .
>
> As in the case of the business agent, there is no evidence precisely defining the relationship to the local of the vice president who actively participated in certain of the conduct in question. However, in absence of evidence to the contrary, it is inferred that he was duly authorized to assist in the conduct of the strike and the picketing and that he, like the business agent, was authorized to instruct the pickets how to conduct themselves.

13/ Accordingly, under this test, the fact that the PBA may not have, by word or deed, conferred upon Tauriello the power to call strikes does not relieve it of liability. Therefore, the Third District majority's suggestion that it was necessary for the PBA to confer upon Tauriello the general authority to actually call a strike is a misapplication of this test. (See page 13 of Third District majority opinion (A 1 - page 13)).

Id. at 1006. The foregoing excerpt reveals that the factors critical to the Board's finding of liability were 1) that the unlawful acts were performed in furtherance of the union's business; and 2) that the union officers actively participated in these unlawful activities. As discussed above, the Commission's "strict liability" test also emphasizes these factors.

Regarding the Sunset Line and Twine test for agency status, the Commission stated:

> The foregoing test for agency status has been consistently cited with approval by Federal Courts. See e.g., Shinman v. Frank, 625 F.2d 80 (6th Cir. 1980); Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976). Under this test unions have been held responsible for unlawful strikes that were not specifically authorized or ratified when agents of the union who were acting within the scope of their authority had primary roles in initiating the strike and either directly engaged in the unlawful strike or directed others who engaged in it. NLRB v. Local No. 3887, United Steelworkers of America, AFL-CIO, 129 NLRB 6, 46 LRRM 1474 (1960), enf'd, 290 F.2d 587 (5th Cir. 1961); Central Massachusetts Joint Board, Textile Workers of America, AFL and Chas. Weinstein Company Inc., 123 NLRB 590, 43 LRRM 1481 (1959).

(R 661) Another federal case that provides some guidance on the issue of union liability for "unlawful" strikes is Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio and Machine Workers of America, AFL-CIO, 494 F.Supp. 872 (W.D. Pa. 1980), aff'd, 649 F.2d 858 (3d Cir. 1981). This case involved a strike, in violation of the collective bargaining agreement, instigated by a union steward.[14] The steward had been elected by union

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14/ In examining any federal case involving the question of union liability for a strike in the private sector, it must be kept in mind that, unlike the situation in Florida with respect to public employees, there is no federal constitutional or statutory provision specifically denying employees in the private sector the right to strike. Accordingly, the policy considerations

members in the department in which he worked and, among other duties, was required to represent the department's employees and to report important matters affecting these employees to higher union officials. After instructing the employees in his department to refuse to perform certain duties for alleged safety reasons, the steward joined the striking employees on the picket line. The federal district court held that the union was responsible for the actions of the steward, notwithstanding the fact that union stewards were not authorized by the union to call strikes. The court stated:

> The Third Circuit has suggested that the union steward is in a position of agency comparable to that of the employer's foreman. N.L.R.B. v. Brewery & Beer Distributor Drivers, etc., 281 F.2d 319, 321-322 (3d Cir. 1960). Certainly a union is not responsible for every act of a steward, simply by virtue of his position, but where, as here, the conduct falls within the apparent or actual authority of the steward, defendant is liable to the company under the common law of agency. In short, the actions of these union officials constitute sufficient inducement, encouragement and condonation of the strike to expose the union to damages.

Id. at 877.[15]

14/ Continued.

that were central to the Commission's adoption of a "strict liability" standard are not present in these cases. It is, therefore, admittedly, with great caution that these cases should be considered in the context of the instant case. See Palm Beach Junior College v. United Faculty of Palm Beach Junior College, supra, at 139.

15/ This statement by the court is followed by a footnote which is of particular interest in the instant case in light of the apparent significance placed by the panel majority below on the fact that Tauriello was elected by his fellow employees to his steward position and not selected by the PBA hierarchy. (A. 1 - page 12) The footnote reads:

> Although Local 502 Stewards are not elected by the total membership of the union, the principal in this agency relationship is the union since it provides the source of the Stewards' authority. That the recipient of the

As the foregoing cases further demonstrate, there exists a reasonable basis for the Commission's "strict liability" construction of the strike prohibition provisions of Chapter 447, Part II. Inasmuch as such statutory interpretation was neither unreasonable, clearly erroneous, outside the range of the Commission's discretion nor in violation of any constitutional or statutory provision, the provisions of Section 120.68(12), Florida Statutes, compelled its acceptance by the Third District, even though the Third District may have, had it the opportunity to initially rule on the matter, adopted another interpretation. See Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, supra, at 136; City of Clearwater v. Lewis, supra, at 1162; Board of Regents v. Public Employees Relations Commission, supra, at 643. The panel majority below did not, in its written opinion, claim otherwise; rather, it asserted that its reversal of the Commission's order was based upon its view that the Commission had rejected the Hearing Officer's findings of fact regarding the relationship between Tauriello and the PBA.

The Commission acknowledges that it may not, pursuant to Section 120.57 (1)(b)(9),

> . . . reject or modify the findings of fact [of a Commission hearing officer] unless [it] first determines from a review of the complete record, and states with

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15/ Continued.

> authority is named by someone other than its creator does not negate the agency's existence. N.L.R.B. v. International Longshoremen's & Warehousemen's Union, Local 10, 283 F.2d 558, 564 (9th Cir. 1960).

Id. at 877.

> particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

It would, however, dispute the assertion that it violated this prohibition in the instant case.

On the first page of its final order, the Commission made clear that it was adopting, not rejecting, "the Hearing Officer's factual findings listed as 'Findings of Fact'" in the Hearing Officer's Recommended Order. (R 655) It was upon these factual findings, not substituted factual findings, as well as the stipulations between the parties set out in the Hearing Officer's Recommended Order, (R 619-622) that the Commission relied in concluding that Tauriello was an "agent" or "representative" of the PBA within the meaning of the strike prohibition provisions of Chapter 447, Part II. Specifically, in reaching its conclusion, the Commission considered the following:

> No party excepts to the Hearing Officer's finding that Tauriello played the role of a union steward in serving as the Dade PBA's Homestead membership representative.[16] He also served on the PBA's bargaining team throughout the Homestead negotiations, had authority to call bargaining unit meetings to advise officers as to the progress of negotiations, and called such meetings.[17] Tauriello transmitted to City officials the PBA's October 23 response to the Special Master's recommended decision and received numerous communications by the City to the PBA, including the City's final salary offer of October 23.[18] Tauriello remained PBA Membership Representative until

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16/ See Hearing Officer's Findings of Facts 1 and 3 (R 623). Under the teachings of International Union of Operating Engineers, Local No. 675 v. Lassitter, 295 So.2d at 636, a union steward is an "agent" of the union.

17/ See Hearing Officer's Findings of Fact 1 and 3 (R 623).

18/ See Hearing Officer Stipulation 15 (R 620) and Hearing Officer's Findings of Fact 5, 15, 28 and 29 (R 623, 624, 626).

approximately 3:00 p.m., October 28, 1980, when he was removed from his position by PBA President Peebles.[19]

The circumstances of Tauriello's removal indicates clearly that Peebles also considered Tauriello to be an agent of the PBA, at least as of the beginning of the strike. PBA Exhibit 4, the October 28 memorandum to Tauriello from Peebles,[20] relates the events surrounding the inception of the October 22 [sic] walk out. As to the event which precipitated Tauriello's removal, Peebles stated:

> As soon as I was made aware of this illegal act, I ordered you, as the representative, to order all bargaining unit members to cease and desist this activity as it was unlawful and you refused to follow this directive, stating you could not as it was out of control. (Emphasis supplied.)

(R 661-662)

Based upon these facts found by the Hearing Officer bearing upon the relationship between Tauriello and the PBA, the Commission concluded that Tauriello was an "agent" or "representative" of the PBA within the meaning of the strike prohibition provisions of Chapter 447, Part II, for purposes of subjecting the PBA to liability for his actions. That this conclusion of law was contrary to the legal conclusion arrived at by the Hearing Officer in this case is of no import. An agency is free to reject a hearing officer's conclusion of law, where, as in the instant case, the hearing officer's findings of fact support a contrary legal conclusion. See DeLaurier v. School Board of Dade County, 443 So.2d 1067 (Fla. 3d DCA 1984); Alles v. Department of Professional Regulation, 423 So.2d 624, 626 (Fla. 5th DCA 1982); Section 120.57(1)(b)(9), Florida Statutes.

19/ See Hearing Officer's Finding of Fact 38 (R 628).

20/ See Hearing Officer's Finding of Fact 36 (R 627).

As the Hearing Officer himself recognized, his findings of fact clearly reveal that Tauriello was clothed with the "official status as the elected representative for the Homestead PBA bargaining unit members in Homestead contract negotiations." (R 632) The Hearing Officer, however, believed, contrary to the Commission's position on the matter, that such "official status" alone was insufficient to subject the PBA to liability under Chapter 447, Part II, for Tauriello's unlawful strike activities. It was his view that the law required, as a condition to a finding of liability, that a showing be made that it would have been reasonable for the other striking employees to have believed that Tauriello's strike activities represented the views of the PBA. (R 632-633)[21] The Hearing Officer, upon review of the record evidence, concluded that no such showing had been made, explaining at the length the factual basis for his conclusion. (R 633-635)

It appears from a reading of the majority decision below that these observations made by the Hearing Officer regarding the "reasonable beliefs" of the other striking employees, which, interestingly, are set forth, not in the "Findings of Fact" portion of the Hearing Officer's Recommended Order, but rather in the "Analysis" portion thereof, constituted the "findings of fact" that, in the opinion of the majority, the Commission impermissibly rejected. (A 1 - pages 5-7) An examination of the Commission's order, however, reveals that these observations were not rejected by the Commission as factually inaccurate and replaced by substituted findings upon which the Commission relied in concluding that the PBA had violated the strike prohibition provisions

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21/ This view is not supported by any relevant case law.

of Chapter 447, Part II. Rather, these observations were simply considered by the Commission as unnecessary and immaterial to the outcome of the case,[22] a product of the Hearing Officer's misperception of the law. It was the legal standard employed by the Hearing Officer, not the accuracy of any of his factual findings, with which the Commission took issue in the instant case. As indicated above, the authority of the Commission to overrule its hearing officers as to matters of law is firmly established. See School Board of Dade County v. Dade Teachers Association FTP-NEA, supra, at 647; Krestview Nursing Home v. State Department of Health and Rehabilitative Services, 374 So.2d 638, 639 (Fla. 3d DCA 1979); J.A. Jones Construction Company v. Department of General Services, 356 So.2d 43 (Fla. 1st DCA 1978); McDonald v. Department of Banking and Finance, supra, at 582-583; Section 120.57(1)(b)(9), Florida Statutes.

The instant case is one of great public importance. It raises the very significant question of whether the ultimate power to make policy determinations and to interpret the provisions of Chapter 447, Part II, rests with the Commission or its hearing officers. By reversing the Commission's rejection of the Hearing Officer's recommendation of dismissal, where such rejection was based solely upon the Commission's disagreement with the Hearing Officer's interpretation of the strike prohibition provisions of Chapter 447, Part II, the majority of the Third District panel below has effectively held that such

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22/ To state the obvious, immaterial or unnecessary factual findings may be summarily dismissed by an agency. See Forrester v. Career Service Commission, 361 So.2d 220, 221 (Fla. 1st DCA 1978), cert. denied 366 So.2d 1366 (Fla. 1979).

ultimate policymaking and interpretative power lies with the Commission's hearing officers and not the Commission. Such a holding is contrary to the overwhelming statutory and case authority cited above and therefore should be quashed by this Court.

ARGUMENT: ISSUE II

THE COMMISSION'S ASSESSMENT OF A $4,430 STRIKE REMEDY AND PENALTY AGAINST THE PBA WAS WITHIN THE LIMITS PRESCRIBED BY SECTION 447.507(6)(a)4., FLORIDA STATUTES, AND THEREFORE SHOULD BE AFFIRMED.

In the appellate proceedings before the Third District, the PBA raised the issue of whether, assuming, arguendo, that it had violated the strike prohibition provisions of Chapter 447, Part II, the Commission's assessment of a $4,430 strike remedy and penalty against it was appropriate. The Third District's majority determination that the Commission should have adopted the Hearing Officer's recommendation of dismissal transformed this question into an academic one and it was therefore not addressed by the Third District.

In acquiring jurisdiction of a case, this Court has appropriate authority to dispose of all issues contested by the parties in the district court appellate proceedings under review. See Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974); Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970). It is with this principle in mind that the Commission engages in the following discussion regarding the propriety of the strike remedy and penalty it imposed against the PBA in the instant case.

Upon its determination that the strike prohibition provisions of Chapter 447, Part II, have been violated by a union, the Commission, pursuant to the specific authorization of Sections 447.501(2)(e) and 447.505,[23] may impose a

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23/ Section 447.501(2)(e) provides in pertinent part:

> Any violation of this paragraph shall subject the violator to the penalties provided in this part.

penalty upon that union. The array of penalties that the Commission may impose are set forth in Section 447.507(6)(a)1.-4.. They include the assessment of fine of "up to $20,000 for each calendar day" of the strike. Section 447.507(6)(a)4..[24]

The Commission ordered the PBA to pay a penalty of only $4,430 in the instant case, which is less than the $20,000 per calendar day maximum prescribed in subsection (6)(a)4. of Section 447.507. It is well established that so long as an agency imposes a penalty within the limits allowed by law, it has acted within the range of its discretion and therefore the penalty so imposed is not subject to reversal by a reviewing court. See Magnolias Nursing and Convalescent Center v. Department of Health and Rehabilitative Services, 438 So.2d 421, 426 (Fla. 1st DCA 1983); Woodworth v. Department of Education, Office of Blind Services, 369 So.2d 1040, 1041 (Fla. 4th DCA 1979); Florida Real Estate Commission v. Webb, 367 So.2d 201, 203 (Fla. 1978); Section 120.68 (12), Florida Statutes. The penalty imposed by the Commission in the instant case was within the limits permitted by subsection (6)(a)4. of Section 447.507. Accordingly, this penalty assessment should be affirmed.

23/ Continued.

The pertinent language of Section 447.505 is:

> Any violation of this section shall subject the violator to the penalties provided in this part.

24/ A fine in excess of $20,000 per calendar day may be imposed under subsection (6)(a)4. only if the cost to the public of the strike exceeds $20,000, in which event a fine equal to such public cost may be assessed.

ARGUMENT: ISSUE III

THE COMMISSION DID NOT ABUSE ITS DISCRETION IN AWARDING REASONABLE ATTORNEY'S FEES AND LITIGATION COSTS TO THE CITY AND AGAINST THE PBA AND, THEREFORE, SUCH AWARD SHOULD BE AFFIRMED.

Another issue raised by the PBA in the Third District proceedings below was the propriety of the Commission's award to the City of reasonable attorney fees and litigation costs.

The Commission is authorized to award litigation costs and attorney fees in unfair labor practice cases by Section 447.503(6)(c), Florida Statutes, which provides:

> The commission may award to the prevailing party all or part of the costs of litigation, reasonable attorney's fees, and expert witness fees whenever the commission determines that such an award is appropriate. (Emphasis supplied.)

As the underlined statutory language above indicates, the discretion with which the Commission has been vested to award costs and fees is extremely broad. Absent a clear showing of an abuse of this broad discretion, a Commission award of costs and fees should remain undisturbed. See City of Lake Worth v. Palm Beach County Police Benevolent Association, 413 So.2d 465, 466 (Fla. 4th DCA 1982); Military Park Fire Control Tax District No. 4 v. DeMarois, 411 So.2d 944 (Fla. 4th DCA 1982); International Brotherhood of Painters and Allied Trades v. Anderson, 401 So.2d 824, 831 (Fla. 5th DCA 1981), pet. for rev. den. 411 So.2d 382 (Fla. 1981); City of Ocala v. Marion County Police Benevolent Association, 392 So.2d 26, 33 (Fla. 1st DCA 1980).

The Commission explained its rationale for exercising its discretion to award costs and fees in the instant case as follows in its final order:

> . . . We think it good public policy that public employers be able to recoup attorney's fees incurred in the successful prosecution of an unfair labor practice charge resulting from a strike situation. Furthermore, it is clear from the record herein that the PBA knew or should have known that its agent and membership representative, Sergeant Nick Tauriello, took the leading role in the instigation and execution of the police strike which occurred in Homestead, Florida on October 27-28, 1980. The record in this case reveals that, although the PBA's other representatives actively attempted to discourage the strike, fully aware of its unlawful character, Tauriello was permitted to remain as an official PBA representative until after the strike had already taken place.

(R 671-672). This "knew or should have known" standard utilized by the Commission in determining whether to exercise its broad discretion to award costs and fees against a union guilty of an unfair labor practice recently passed judicial scrutiny in International Brotherhood of Painters and Allied Trades v. Anderson, supra, at 831, where the Fifth District stated:

> . . . The Commission determined that the Union "knew or should have known that its conduct was in violation of Section 447.501(2)(a)," and determined that an award of attorney's fees was appropriate. Appellant fails to show that this constitutes an abuse of discretion by the Commission.

The Commission would further point out regarding this standard that it is virtually identical to the standard used in respondeat superior cases to determine whether an award of punitive damages against an employer is appropriate. An employer may be held vicariously liable in punitive damages for the tort of an employee under the doctrine of respondeat superior where the employer knew or should have known that its employer would engage in the tortious activity. See Eastern Air Lines Inc. v. Gellert, 438 So.2d 923, 928-929 (Fla. 3d DCA 1983); Life Insurance Company of North America v. Del Aguila, 417 So.2d 651, 652-653 (Fla. 1982); Alexander v. Alterman Transport Lines, Inc., 387 So.2d 422 (Fla. 1st DCA 1980), approved in Mercury Motors

Express, Inc. v. Smith, 393 So.2d 545, 548 (Fla. 1981). If an award of punitive damages against an employer, the purpose of which award is to punish and to deter, is appropriate under such circumstances, then surely the Commission's award of costs and fees against a union, held vicariously liable for the unlawful strike activities of its official representative and which knew or should have known that the representative would engage in such activities, is also appropriate and reasonable. Such an award not only serves the primary purpose of Section 447.503(6)(c), Florida Statutes, of making prevailing unfair labor practice litigants "financially whole when they vindicate their rights before the Commission,"[25] but also, consistent with the strong public policy against strikes by public employees expressed in Article I, Section 6 of the Florida Construction and Chapter 447, Part II, acts as a deterrent with respect to such unlawful strike activity.

Accordingly, the Commission did not abuse its broad discretion in awarding reasonable attorney's fees and litigation costs against the PBA in the instant case pursuant to Section 447.503(6)(c). The award, therefore, should be affirmed.

25/ See State Department of Health and Rehabilitative Services v. Hall, 409 So.2d 193, 195 (Fla. 3d DCA 1982), where the Third District stated, with respect to Section 110.309(5), Florida Statutes, which provides that the Career Service Commission "may" award attorney's fees and costs to an employee who prevails before the Commission:

> The purpose and legislative intent of allowing aggrieved employees attorney's fees and other costs under Section 110.309(5), supra, is to place them on parity with their agency-employer and render the employees financially whole when they vindicate their rights before the Commission.

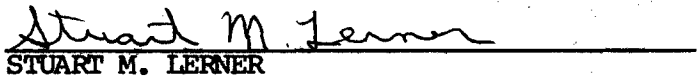
CONCLUSION

The Commission did not commit any material error in procedure which impaired the fairness of the unfair labor practice proceedings below or the correctness of its determination that the PBA, through the actions of its official representative, Nick Tauriello, had violated the strike prohibition provisions of Chapter 447, Part II. In making such a determination, the Commission did not reject any material finding of fact made by the Hearing Officer; it simply rejected the Hearing Officer's interpretation of the statutory provisions at issue.

The Commission's assessment of a $4,430 strike remedy and penalty against the PBA was within the limits allowed by law. Furthermore, the Commission's award of litigation costs and attorney's fees was also within the range of discretion delegated to it by the Legislature.

For the foregoing reasons, the majority decision of Third District reversing the Commission's determination of PBA liability on the grounds that the Commission improperly rejected the Hearing Officer's findings of fact should be quashed and remanded with directions that the Commission order be affirmed in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Initial Brief on the Merits of Petitioner Public Employees Relations Commission was furnished by U.S. Mail this 16th day of March, 1984, to the following:

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