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.	:	

REPLY BRIEF OF PETITIONER
PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

In this brief, the Commission will use the same references that it employed in its initial brief. In addition, the PBA's answer brief will herein be referred to parenthetically by the symbol "A.B." followed by the appropriate page number(s).

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 PBA in its answer brief takes exception to the Commission's failure to recite in the Statement of the Facts portion of its initial brief those findings made by the Hearing Officer, set forth in the "Analysis" portion of his Recommended Order, relating to whether it was "unreasonable for Homestead PBA bargaining unit members to believe that their walkout represented the views of the Dade County PBA." The PBA claims that these findings were "accepted by PERC [the Commission] as valid" and should be "as equally binding upon PERC as those facts enumerated in the part of the order specified as 'Findings of Fact.'" (A.B. 3, 5)

A reading of the Commission's order clearly reveals that, contrary to the PBA's assertion, the Commission did not make any determination as to whether these findings made by the Hearing Officer were supported by competent substantial evidence. Such a determination was unnecessary because, as noted on pages 32-33 of the Commission's initial brief, these findings were "immaterial to the outcome of the case, a product of the Hearing Officer's misperception of the law." It was for this same reason that these findings were omitted from the Statement of the Facts portion of the Commission's initial brief.

Unquestionably, a finding of fact made by a hearing officer should be treated as such by an agency regardless of where it is located in the hearing officer's recommended order. See Hernicz v. State Department of Professional

Regulation, 390 So.2d 194, 195 (Fla. 1st DCA 1980). There is, however, no requirement that an agency "accept as valid" and controlling, and be bound by, a hearing officer's findings that, in light of the applicable law and policy considerations, are immaterial to the ultimate issue in the case. See Forrester v. Career Service Commission, 361 So.2d 220, 221 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1366 (Fla. 1979).

At issue in the Commission proceedings below was whether Nick Tauriello could be deemed the PBA's "agent" or "representative" within the meaning of the strike prohibition provisions of Chapter 447, Part II, Florida Statutes, for purposes of subjecting the PBA to liability for Tauriello's unlawful strike-related activities. The Hearing Officer recommended that this question be answered in the negative, but the Commission declined to follow the Hearing Officer's recommendation. The Third District Court of Appeal held that the Commission's rejection of the Hearing Officer's determination violated the provisions of Section 120.57(1)(b)9., Florida Statutes, which require an agency to adopt a hearing officer's findings of fact that are supported by competent, substantial evidence and based upon proceedings complying with essential requirements of law. The Third District, though, did certify to this Court the question of whether the Commission may overturn such a determination by one of its hearing officers "in light of what it perceives to be the applicable law and relevant policy considerations."

Pursuant to Section 120.57(1)(b)9., Florida Statutes, an agency is free to reject or modify a hearing officer's conclusions of law, which may be defined as propositions arrived at by applying statutes, case law or other fixed rules of law to findings of fact. 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); Fla. Admin. Code Rule 38D-12.12. As the Commission pointed out in its initial brief, the Hearing Officer's determination that Tauriello was not the PBA's "agent" or "representative" within the meaning of the strike prohibition provisions of Chapter 447, Part II, Florida Statutes, was clearly a conclusion of law. Such determination, as the certified question itself reflects, involved the application of "law [specifically, the strike prohibition provisions of Chapter 447, Part II] and relevant policy considerations."

In its answer brief, the PBA contends that the Hearing Officer's determination was a finding of fact within the contemplation of Section 120.57(1)(b)9., Florida Statutes, as opposed to a conclusion of law. It asserts that 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." (A.B. 4) Significantly, the appellate court cases cited by the PBA in support of this assertion involved the review of judicial proceedings, rather than administrative proceedings governed by Chapter 120, Florida Statutes. None of these cases stand for the proposition that a finding of agency is purely a factual matter that may be made without reference to any rules of law; nor do these cases hold that a trier of fact's finding of agency may not be overturned where it is contrary to the legal effect of the evidence. On the contrary, the case law is well-settled that such a finding must be reversed if it is a result of the trier of fact's misapplication or erroneous view of the law. See Foley Lumber Co. v. Koester, 61 So.2d 634, 640 (Fla. 1952); International Union of Operating Engineers v. Long, 362 So.2d 987, 989 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 469 (Fla.

1979);[1] Shaffran v. Holness, 102 So.2d 35, 40-41 (Fla. 2d DCA 1958). See also Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956); Northwestern National Insurance Co. v. General Electric Credit Corp., 362 So.2d 120, 123 (Fla. 3d DCA 1978), cert. denied, 370 So.2d 459 (Fla. 1979); Leonard v. Leonard, 259 So.2d 529, 532 (Fla. 3d DCA 1972); Lee Construction Corp. v. Newman, 143 So.2d 222, 226 (Fla. 3d DCA 1962), cert. denied, 148 So.2d 280 (Fla. 1962). This is precisely what the Commission did in the instant case: it reversed the Hearing Officer because he had applied an erroneous legal standard in evaluating the PBA's liability for Tauriello's actions.[2] As the United States Supreme Court has held, "[e]valuations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations" subject to reversal. Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 20 L.Ed.2d 1, 88 S.Ct. 1157, 1173-1174 (1968).

Notwithstanding its contention that the only real disagreement the Commission had with the Hearing Officer concerned simply a factual matter, the PBA later in its answer brief takes the clearly contradictory position that it was the Commission, not the Hearing Officer, that had applied an erroneous legal

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1/ Contrary to the PBA's assertion (A.B. 21), the Long decision was just one of the cases cited by the Commission in its initial brief as supporting the proposition that the Commission's interpretation of the strike prohibition provisions of Chapter 447, Part II was not unreasonable. Furthermore, the PBA's bare assertion that the decision in this case does "not reflect an accurate interpretation of the law" fails to take into account that this Court refused to review the Long decision.

2/ The application of an erroneous rule of law to the evidence constitutes a departure from the essential requirements of law. See Wolkowsky v. Goodkind, 14 So.2d 398, 402-403 (Fla. 1943). Pursuant to Section 120.57(1)(b)9., Florida Statutes, an agency must reject findings of fact based upon proceedings departing from the essential requirements of law. Accordingly, even assuming arguendo that the Hearing Officer's determination were a finding of fact, rather than a conclusion of law -- which it certainly was not --, its rejection by the Commission was proper inasmuch as it was based upon the Hearing Officer's erroneous view of the law.

standard in determining whether the PBA should be held liable for Tauriello's conduct. In advancing this latter argument, however, the PBA concedes that the legal standard employed by the Commission finds support in a "literal reading of Chapter 447." (A.B. 24) This is a significant concession since this Court has "consistently held that unambiguous statutory language must be accorded its plain meaning." Carson v. Miller, 370 So.2d 10, 11 (Fla. 1979).

The PBA, in urging this Court to reject the Commission's "literal reading of Chapter 447," claims that such reading imposes a "severe burden on public employee organizations" threatening their survival (A.B. 24) and "disregards the 'intent of [the] Legislature that nothing [in Chapter 447, Part II] shall be construed either to encourage or discourage organization of public employees'." (A.B. 27) The Commission disputes these contentions. Its interpretation of Chapter 447, Part II, neither encourages nor discourages public employees to engage in lawful organizational activities; nor does it place an unreasonable or severe burden on employee orrganizations. As the Commission noted in its final order:

> Finally, an employee organization can insulate itself from liability for unauthorized [i.e., not specifically or actually authorized] 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.[3] On bala nce, 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.

3/ Contrary to the PBA's suggestion, the Commission's standard of liability (or more accurately, the Legislature's standard) is different than one which requires an employee organization "to use all reasonable means to end the strike." (A.B. 18) Nor does the Commission's standard impose liability on the organization for the unlawful strike conduct of bargaining unit members who are not representatives, officers, or agents of the organization.

(R 666) If there has been any neglect of relevant policy considerations, it has been by the PBA, not the Commission. Conspicuously absent from the PBA's answer brief is any mention that the Florida Constitution prohibits strikes by public employees; nor does the PBA acknowledge that in Section 447.201, Florida Statutes, the Florida Legislature has declared that it is the public policy of this state "to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." Since these were factors that weighed heavily in the Commission's decision in the instant case, the PBA's failure to discuss them is most surprising.

The PBA further argues that the standard of liability employed by the Commission in the instant case is inconsistent with the principles of common law agency. Initially, the Commission would point out that the Florida Legislature, in enacting the strike prohibition provisions Chapter 447, Part II, was not bound by the principles of common law agency. See DeGeorge v. State, 358 So.2d 217, 220 (Fla. 4th DCA 1978). Nonetheless, despite the absence of such a constraint, the Legislature did not stray from the common law. Generally, under the common law, a principal may be held liable for an agent's wrongful act committed in the general scope of the agent's employment or authority, even though the act was not authorized by, or was indeed specifically forbidden by, the principal. See Jacobi v. Claude Nolan, Inc., 122 So.2d 783, 788-789 (Fla. 1st DCA 1960). In view of the close nexus between a strike and the collective bargaining objectives of a certified employee organization, it is not at all unreasonable to infer that a representative, officer, or agent of such an organization who is engaging in unlawful strike activity is acting within the scope of his or her implied authority. Accordingly, holding a certified employee organization liable for the unlawful strike activities of its

representatives, officers or agents is not incompatible with the principles of common law agency. See Williams v. Alyeska Pipeline Services Co., 650 P.2d 343 (Alaska 1982).[4]

In an attempt to distinguish the instant case from International Union of Operating Engineers, Local No. 675 v. Lassitter, 295 So.2d 634 (Fla. 4th DCA 1974) and other cases holding unions liable for the unlawful or tortious acts of union stewards, the PBA asserts on page 20 of its answer brief that "Tauriello was not a union officer nor was he a union steward," but rather was "simply a bargaining unit member, elected by the others in the unit [and not appointed by the PBA hierarchy] to speak for them at the 1980 contract negotiation sessions." The assertion that Tauriello was not a union steward finds no support in the record and directly conflicts with the Hearing Officer's Finding of Fact 3 that "Tauriello functioned as a shop steward." (R 623) Tauriello was not, as the PBA claims, just another bargaining unit member. While he may not have been a

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4/ In this case, the Alaska Supreme Court stated:

> The legal principles governing the question of whether the union is liable in this case [for the tortious acts of one of its stewards] is straightforward. A master is liable for the torts of a servant committed while the servant is acting in the scope of his employment . . . Of course not every tort of a person who also happens to be an employee is chargeable to his employer.
>
> > The acts of the employee need be so connected to his employment as to justify requiring that the employer bear the loss . . . . Employees' acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself.

Id. at 349. A steward's strike activities are "sufficiently connected" with a certified employee organization's business to be "considered as deeds of the [organization] itself" under the common law principles enunciated in the Williams case.

constitutional officer of the PBA,[5] he was a PBA representative[6] and clearly considered as such by the PBA hierarchy, until he was removed from his position by the PBA's President[7] after the commencement of the walkout. Pursuant to Section 447.507(1), Florida Statutes, an employee organization is liable for the strike activities of not just its officers, but those of its agents and representatives as well, regardless of whether such agents and representatives are compensated by the organization[8] or whether they have attained their positions through appointment or election.

As to the PBA's argument that it should not have been held liable for Tauriello's conduct because he held an elective, rather than an appointive, position, the Commission would point out that the Florida Legislature in Chapter 447, Part II has made no distinction, for purposes of ascribing liability to employee organizations, between elected and appointed representatives. In

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5/ Although in its answer brief the PBA contends that the "position he [Tauriello] carried was not recognized in the PBA Constitution," the Hearing Officer did not make any findings of fact to such effect.

6/ See e.g., Hearing Officer's Findings of Fact 1 (R 623).

7/ As Judge Nesbitt observed at page 17 of his dissenting opinion in the Third District Court of Appeal proceedings below:

> Even the circumstances of Tauriello's removal indicate that the PBA considered Tauriello to be an agent of the PBA. The PBA president ordered Tauriello to direct the men back to work. This only serves to reinforce the fact that he was clothed with the general authority to act on behalf of the PBA.

8/ As evidenced by that portion of the majority opinion of the Third District excerpted on page 13 of the PBA's answer brief, the majority apparently found significant the fact that Tauriello was not "on the PBA payroll insofar as this record reflects." This view is supported by neither Chapter 447, Part II, nor the common law. It is well established that "[a]lthough labor union stewards are not typically paid employees of their unions . . . [t]he union is vicariously liable for the torts of the steward performed within the scope of his agency." Williams v. Alyeska Pipeline Service Co., supra, at 349.

District 34, I.A.M., 254 NLRB 282 (1981), the National Labor Relations Board was confronted with a similar argument advanced by a union seeking to avoid responsibility for the unlawful acts of two of its representatives, one of whom was a steward. In rejecting the argument, the Board, speaking through its hearing officer whose recommended order it had adopted, stated:

> . . . Nickell's argument at the hearing, that because it was the employees who selected these men for such representative status they may not be deemed agents of the "Union," merits no comment at all. What is a union if not the employees acting together?

Id. at 283. The PBA's argument should similarly be rejected. See also N.L.R.B. v. I.L.W.U., Local 10, 283 F.2d 558, 564 (9th Cir. 1960) (union held liable for unlawful acts of union stewards notwithstanding fact stewards elected by members).

Among the powers possessed by Tauriello by virtue of his serving as a PBA representative was the authority to call meetings of bargaining unit members "as he deemed it necessary"[9] and to communicate with these members regarding collective bargaining matters. Tauriello exercised his authority to call such meetings and communicate with bargaining unit members the week preceding the walkout; and it was at these meetings that he fomented and, with the other participants, planned the walkout.[10] It can therefore readily be seen that, notwithstanding the PBA's assertion on page 19 of its answer brief to the contrary, Tauriello's instigation of the walkout was within the scope of the general area that he was authorized to act on behalf of the PBA. See Williams v. Alyeska Pipeline Service Co., supra, at 350 (union steward's tortious conduct held to be within scope of

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9/ See Hearing Officer's Finding of Fact 3 (R 623).

10/ See, e.g., Hearing Officer's Findings of Fact 13 and 17 (R 624, 625).

his agency where steward's acts "of calling the union meeting at the bus loading area, leading the union members to Williams [the victim] for the purpose of extracting money and an apology, under a threat of violence, were closely connected with Reinhardt's [the steward's] union position," a position "that enabled him to call the meeting"). Having created Tauriello's authority to call meetings and communicate with bargaining unit members, the PBA must take responsibility if that authority has been wrongly used. See N.L.R.B. v. I.L.W.U., Local 10, supra, at 564. Accordingly, the Commission acted in a manner consistent with the principles of common law agency in concluding that the PBA, through Tauriello, "violated Section 447.501(2)(a) and (e) and Section 447.505, Florida Statutes (1979), by instigating and supporting the walkout by Homestead PBA bargaining unit members." (R 672)

The PBA suggests in its answer brief that it should not have been held responsible for Tauriello's instigation and support of the walkout because its Constitution did not sanction such conduct. (A.B. 1, 19) The prohibition against strikes found in the PBA's Constitution apparently applies to all PBA officers, agents, representatives and members. Therefore, since an organization like the PBA can act only through these individuals, taking the PBA's argument to its logical extreme, the PBA would never, under any circumstances, be liable for any unlawful strike activity, even if everyone associated with the PBA, from the President on down, actively participated in such activity. Certainly, the Florida Legislature did not intend such a result.

The PBA further contends that "the PBA specifically forbid" Tauriello to engage in any unlawful strike activity. (A.B. 14) A review of the Hearing Officer's Findings of Fact demonstrates that this is not an accurate statement. Tauriello was simply advised by the PBA hierarchy that they would not lend their

support to a walkout. Refusing to support a walkout is not the same as forbidding it. Although aware of the planned walkout and Tauriello's role in its orchestration, at no time prior to the walkout did the PBA hierarchy threaten to expel Tauriello as a member of the organization or to remove him from his representative position if he persisted in his unlawful conduct. He was never issued a directive not to participate in the planned walkout. As Judge Nesbitt observed at page 17 of his dissenting opinion in the appellate proceedings below:

> . . . Despite Tauriello's advance announcement of his intent to lead the policeman [sic] out on strike, which intention was never recanted, the PBA officials permitted Tauriello to pursue his avowed course.

In any event, it is of no consequence to the outcome of the instant case as to whether the PBA expressly prohibited Tauriello from engaging in unlawful strike activity or merely declined to support him in his illegal endeavors. Even under the common law, as noted above, a principal is not relieved of liability for the unlawful acts of its agent simply because such acts may have been contrary to the express directives of the principal. See N.L.R.B. v. I.L.W.U., Local 10, supra, at 565; Sheet Metal Workers' International Association v. N.L.R.B., 293 F.2d 141, 149 (D.C. Cir. 1961); cert. denied, 82 S.Ct. 172 (1961); Whittington v. Withers Transfer and Storage of Coral Gables, Inc., 391 So.2d 275, 276 (Fla. 3d DCA 1980) (court held that a "showing that the defendant's employees are instructed to be courteous and polite does not obviate plaintiff's claim that the alleged tortious behavior was conducted in the course and scope of their employment"); Jess Parrish Memorial Hospital v. Fla. PERC, 364 So.2d 777, 783 (Fla. 1st DCA 1978) (in finding employer guilty of unfair labor practice for statements made by two supervisory employees during an organizational drive, court rejected employer's argument that it disclaimed any agency relationship it had with these employees by advising them to avoid making such

statements); Philips Petroleum Company v. Royster, 256 So.2d 559 (Fla. 1st DCA 1972) (service station owner held liable for false and unlawful credit card sales made by agent while operating station under power of attorney from owner even though power of attorney allowed agent to perform only "lawful acts" on behalf of owner); Sands v. Ivy Liquors, Inc., 192 So.2d 775, 776 (Fla. 3d DCA 1966); Jacobi v. Claude Nolan, Inc., supra.

In an attempt to support its position that it should not have been held liable for Tauriello's unlawful strike-related activity, the PBA cites in its answer brief several federal court cases in which a union was absolved of liability for an illegal work stoppage. (A.B. 17-19) The PBA's reliance on these cases is misplaced. In none of these cases did the court base its decision on the fact that it would have been unreasonable for the striking employees to have believed that their walkout represented the views of the union, the test that the Hearing Officer employed, and the Commission rejected, in the instant case. Moreover, the cases cited by the PBA are all factually distinguishable from the instant case in a material respect. In none of the cases relied upon by the PBA did a representative of the union instigate and participate in the walkout as in the instant case. This is a critical distinction since the Commission found the PBA liable in the instant case only because of the role its representative, Nick Tauriello, played in the walkout.

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.

The PBA, citing the case of York Division Borg-Warner Corp. v. United Association of Journeymen and Apprentices of Plumbers and Pipe Fitting Industry, 473 F.Supp. 896, 900 (S.D. Fla. 1979), claims that the Commission's assessment against the PBA of a $4,430 strike remedy and penalty was excessive. It reasons that since Tauriello was removed from his representative position thirty minutes after the strike began and twenty-six hours before it ended, its "liability must be limited to damages occurring [only] during that [initial thirty-minute] time span."

In advancing this argument, the PBA has apparently overlooked the fact that the $4,430 assessment represents a penalty for the violation of Florida law, not an award of damages for a private wrong. It was the amount of such a damage award for the breach of a no-strike clause in a private sector collective bargaining agreement that was at issue in the York Division Borg-Warner Corp. case cited by the PBA and, therefore, the PBA's reliance on this case is misplaced. Since the penalty assessed against the PBA was within the $20,000 maximum prescribed by law, it should not be disturbed.[11] See cases cited on page 36 of initial brief.

11/ Even if the $4,430 assessment were an award for damages suffered by the City, the PBA's argument would fail since it is premised upon a theory contrary to the well established legal principle that a wrongdoer is liable to the victim for all damages proximately caused by the wrongdoer, whether such damages arise at the time of, or subsequent to, the commission of the wrongful act. See e.g., National Car Rental System v. Holland, 269 So.2d 407, 411-412 (Fla. 4th DCA 1972), cert. denied, 273 So.2d 768 (Fla. 1973) (award of damages reasonably certain to be incurred in future affirmed).

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 AN AWARD SHOULD BE AFFIRMED.

In challenging the attorney's fee award made by the Commission in the instant case, the PBA claims that "the attorney's fees petitioned for by the City amount to $15,537,[12] over three times greater than the [$4,430 strike penalty assessed against it]" and that therefore, under the circumstances of this case, the Commission's award of attorney's fees was inappropriate. (A.B. 29-30) One can understand the PBA's displeasure with having to pay such an award. Is it, though, fair and equitable for the City, the victim of the PBA's unlawful strike activity, to have to bear the cost of its successful prosecution against the PBA? The Commission thinks not, particularly where, as the Commission noted in its final order,

> . . . 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.

(R 671) Furthermore, the fact that the attorney's fees awarded in this case may well exceed the penalty assessed against the PBA is, if anything, a factor militating in favor of, not against, affirming such an award. An award made under such circumstances would encourage those public employers who, because of financial disincentives, would otherwise be disinclined, to actively prosecute strike violators, a result consistent with the strong public policy in this State against strikes by public employees.

12/ Although this assertion goes beyond the scope of the appeal record, the Commission does not dispute its accuracy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Reply Brief of Petitioner Public Employees Relations Commission was furnished by U.S. Mail this 15th day of May, 1984, to the following:

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