O/a 9-13-85

047

IN THE SUPREME COURT OF FLORIDA

CITY OF CASSELBERRY, Petitioner, v. ORANGE COUNTY POLICE BENEVOLENT ASSOCIATION and FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION, Respondents.	:	Case No. 66,155

PUBLIC EMPLOYEES RELATIONS COMMISSION'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In PERC v. City of Orlando, 452 So.2d 517 (Fla. 1984), this Court held that the Commission was entitled to participate as a party in appeals concerning its orders. However, the Commission was cautioned to restrain its participation to cases where it had a direct interest or where an issue had a direct impact upon other public employers, public employees or taxpayers. Such an issue is present in this case, where the Appellant, the City of Casselberry, has called into question the constitutionality of a highly significant provision of the statutory scheme the Commission is charged with implementing. Therefore, even though the decision under review reversed a Commission order, on other grounds, the Commission will participate in this appeal to demonstrate that the First District Court of Appeal's construction of Section in this appeal 447.401 is constitutional.[1]

1/ Pursuant to Florida Appellate Rule of Procedure 9.020(f) the Commission was named by the City as an appellee in this case.

SUMMARY OF ARGUMENT

The City's argument that Section 447.401, as construed by the First District Court of Appeal, violates its alleged constitutional right, under Article III, Section 14, to have demotion and discharge decisions decided pursuant to the City's civil service ordinance is without merit. Article III, Section 14, only grants authority to the State Legislature to establish a civil service system by general, special or local law. No such power is granted to municipalities by this constitutional provision. The City's authority in this regard comes from Article VIII, Section 2(b), as implemented by the Municipal Home Rule Power Act, Chapter 166, Florida Statutes (1983). Therefore, any potential conflict between the City's civil service ordinance and Section 447.401 must be resolved in favor of the latter enactment of the Florida Legislature.

The City also is in error when it contends that a grievance/arbitration procedure and a civil service system cannot coexist. First the decision under review did not require that a provision governing demotion and discharge must be in every collective bargaining agreement. These subjects are negotiable. More importantly Section 447.401 provides public employees with the choice of utilizing a grievance/arbitration procedure or a civil service system, thereby indicating the Legislature's clear intent that a grievance/arbitration and a civil service system can, for purposes of employee appeals, coexist.

STATEMENT OF THE FACTS AND CASE

The Commission accepts the City's statement of the facts and case.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT DEPRIVE THE CITY OF CASSELBERRY OF ANY CONSTITUTIONAL RIGHT WITH RESPECT TO THE IMPLEMENTATION OF ITS CIVIL SERVICE ORDINANCE.

The primary thrust of the City's second argument is that Section 447.401, Florida Statutes (1983), as interpreted by the First District Court of Appeal, violates the City's alleged constitutional right to create a civil service system for hearing appeals of demoted and discharged employees. This argument is based upon the erroneous premise that Article III, Section 14, of the Florida Constitution, grants to municipalities the right to establish a civil service system by ordinance that takes precedence over any conflicting state statute. Simply stated, Article III, Section 14, grants no such authority and therefore cannot provide the basis for examination of the constitutionality of Section 447.401, as construed by the First District Court of Appeal in this case. Rather, the City's authority to enact a civil service ordinance emanates from Article VIII, Section 2(b), and Section 166.021, Florida Statutes (1983). Thus, to the extent that there is any conflict between the City's ordinance and Section 447.401, the latter prevails. See also § 447.601, Fla. Stat. (1983) (conflicts between civil service ordinance and Chapter 447, Part II, are to be resolved in favor of the statute). In addition, the Commission will demonstrate that there is no irreconcilable conflict between the City's civil service ordinance and Section 447.401, as construed by the First District Court of Appeal in this case.

A. Article III, Section 14, does not empower municipalities to enact civil service ordinances.

Article III, Section 14, of the 1968 Florida Constitutions provides:

> By law there shall be created a civil service system for state employees, except those expressly exempted, and there may be created civil service systems and boards for county, district or municipal employees and for such offices thereof as are not elected or appointed by the governor, and there may be authorized such boards as are necessary to prescribe the qualifications, method of selection and tenure of such employees and officers.

An examination of the placement of this provision as well as its evolution demonstrates that it was intended to authorize only the Florida Legislature to enact laws creating a civil service system for persons employed by local governments. It does not authorize creation of such a system by local ordinance, as was done by the City of Casselberry in this case.

First, Article III deals solely with the powers granted to the Florida Legislature. Nowhere in Article III is there any reference to powers granted to local governments. Instead, the constitutional source of power to enact local ordinances is found in Article VIII of the 1968 Florida Constitution.

Secondly, the history behind the adoption of Article III, Section 14, as explained by this Court in Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979), leads to the inescapable conclusion that the phrase "by law" refers to general or special acts of the Florida Legislature. In Ison, a county sheriff challenged the constitutionality of a special act of the Florida Legislature creating a civil service system for the sheriff's employees. The sheriff alleged that the phrase "by law" only referred to general laws and not special or local laws. This Court rejected the sheriff's challenge stating:

> In this instance strong extrinsic evidence shows us that the drafters intended the meaning of "by law" to encompass both "by general law" and "by special or local law."

372 So.2d at 434. In reaching this conclusion the Court relied in part on an examination of the predecessor to Article III, Section 14.

Article XVI, Section 34, of the 1885 Florida Constitution provided in pertinent part:

> The Legislature may by general, special or local laws create Civil Service Systems and Civil Service Boards for municipal, county, and state employees. . . .

The reporter's contemporaneous commentary explains that the change in wording to the phrase "by law" in Article III, Section 14, of the 1968 Florida Constitution is a mere simplification that encompasses the alternatives of general, special or local legislative enactments. Ison v. Zimmerman, 372 So.2d at 434, citing 25 A Fla. Stat. Ann. 786-87 (1970). Thus, Article III, Section 14, does not grant authority to local governments, such as the City, to create a civil service system for its employees by ordinance.

That authority, as stated above, comes from Article VIII, Section 2(b), of the 1968 Florida Constitution which provides:

> Municipalities shall have the governmental, corporate, and propriety powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

(emphasis added). This grant of authority to municipalities was implemented by Chapter 166, Florida Statutes (1983), known as the Municipal Home Rule Powers Act. Section 166.021(3)(c) prohibits municipalities from enacting ordinances on

> [a]ny subject expressly preempted to state or county government by the constitution or by general law.

Consequently, a municipality is without authority to enact an ordinance which either conflicts with state law or is preempted by state law. Lake Worth Utilities Authority v. City of Lake Worth, No. 66,102, 10 F.L.W. 104 (Fla. Feb. 7, 1985); Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984); West Palm

Beach Association of Fire Fighters v. Board of Commission of West Palm Beach, 448 So.2d 1212 (Fla. 4th DCA 1984); City of Miami Beach v. Rocia Corp., 404 So.2d 1066 (Fla. 3d DCA 1981).

In Lake Worth Utilities Authority, this Court recently observed that the authority given to municipalities by Article VIII, Section 2(b), is neither "absolute," nor "supreme" but rather it is subject to limitation by the Florida Legislature which retains "an all-pervasive power." 10 F.L.W. at 105.

In the instant case, the record clearly indicates that the civil service system at issue was enacted by the City of Casselberry City Council and not the Florida Legislature. (R. 93) Indeed, in its initial brief on the merits at page 13 the City states that its civil service system was enacted pursuant to the Municipal Home Rule Powers Act. Accordingly, to the extent that there is a conflict between the City's civil service ordinance and Section 447.401, as construed by the First District Court of Appeal, that conflict must be resolved in favor of Section 447.401.

Moreover, the Legislature has expressly preempted the subject matter of how a merit or civil service system shall relate to the provisions of Chapter 447, Part II. Section 447.601 indicates the supremacy of Chapter 447, Part II over any conflicting provision in a merit or civil service statute or ordinance.

> 447.601. Merit or civil service system; applicability.--The provisions of this part shall not be construed to repeal, amend, or modify the provisions of any law or ordinance establishing a merit or civil service system for public employees or the rules and regulations adopted pursuant thereto or to prohibit or hinder the establishment of other such personnel systems unless the provisions of such merit or civil service system laws or ordinances or rules and regulations adopted pursuant thereto are in conflict with the provisions of this part,

> in which event such laws, ordinances, or rules and regulations shall not apply, except as provided in s. 447.301(4).[2] (emphasis added)

For the foregoing reasons, the City's constitutional challenge to the First District Court of Appeal's interpretation of Section 447.401 is without merit. Article III, Section 14, does not provide a constitutional basis for the City's civil service ordinance. Any possible conflict between the ordinance and Section 447.401 must be resolved in favor of the latter state statute.

B. There is no irreconcilable conflict between the City's civil service ordinance and Section 447.401, as construed by the First District Court of Appeal.

The City argues that the decision under review deprives it of its ability to require utilization of its civil service system in demotion and discharge cases, and thus its ability to control the "final disposition" in such cases. The City bases its argument on an erroneous interpretation of the First District Court's holding. Contrary to the City's assertion, the Court did not hold that each municipality is required to have a grievance/arbitration procedure that will displace a civil service system in demotion and discharge disputes. Rather, the Court's decision allows for a grievance/arbitration procedure and a civil service system to coexist.

The Court below did not hold that all disputes concerning demotion and discharge must be subject to final and binding arbitration by an impartial

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2/ Section 447.301(4) allows an employee to present a grievance to his or her employer in person without being represented by a certified bargaining agent. See Galbreath v. School Board of Broward County, 446 So.2d 1045 (Fla. 1984); Heath v. School Board of Orange County, 5 FPER ¶ 10074 (1979).

third party. The Court merely held that because demotion and discharge are mandatory subjects of bargaining, i.e., come within the ambit of wages, hours and terms and conditions of employment,[3] a public employer must bargain in good faith over these subjects. Orange County PBA v. City of Casselberry, 457 So.2d 1125, 1128 (Fla. 1st DCA 1984). Part of this good faith obligation prohibits a public employer from insisting to impasse upon a nonmandatory subject as a condition to agreement on a mandatory subject. In this case the Court held that waiver of the statutory obligation set forth in Section 447.401, that every collective bargaining agreement contain a grievance/arbitration procedure for resolving disputes over the interpretation of the agreement, is a nonmandatory subject of bargaining.[4] Id., see also Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, No. 84-2063, 10 F.L.W. 1235 (Fla. 4th DCA May 15, 1985); In re AFSCME, Local 1363, 8 FPER ¶ 13278 at 489 (1982), aff'd, 430 So.2d 481 (Fla. 1st DCA 1983).

Private sector employees likewise have the right to require their employer to engage in good faith collective bargaining negotiations regarding subjects that constitute terms and conditions of employment, such as demotion and discharge. E.g. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85

3/ See Sections 447.309(1), 447.203(14), 447.301(2) and 447.403(1), Florida Statutes (1983); PERC v. District School Board of DeSoto County, 374 So.2d 1005, 1013 (Fla. 2d DCA 1979), cert. denied, 383 So.2d 1193 (Fla. 1980).

4/ In the private sector a grievance/arbitration procedure is recognized as the quid pro quo for a no-strike clause in a collective bargaining agreement. E.g. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 455, 77 S.Ct. 912, 917 (1957). Section 447.401 was no doubt enacted to maintain this same quid pro quo in Florida where strikes are illegal. In re Levy County School Board, 5 FPER ¶ 10213 (1979).

S.Ct. 398, 403 (1964); NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342, 78 S.Ct. 718 (1958). Moreover a party to negotiations in the private sector may not insist upon agreement concerning a nonmandatory subject as a condition precedent to entering into an agreement over mandatory subjects. Latrobe Steel v. NLRB, 630 F.2d 171, 179 (3d Cir. 1980). Thus, the First District Court of Appeal's decision is consistent with Article I, Section 6, of the Florida Constitution which requires that Florida public sector employees enjoy the same rights to collective bargaining as enjoyed by private sector employees. City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1982).

Although the First District Court of Appeal held that a public employer must negotiate in good faith regarding demotion and discharge, it did not mandate that the City agree on a particular provision. The obligation to bargain in good faith over a mandatory subject is not tantamount to an obligation to agree. § 447.203(13); City of Tallahassee, 410 So.2d at 491. For example, there is no requirement in Part II of Chapter 447 that every collective bargaining contain a "just cause" provision. In re AFSCME, Local 1363, 8 FPER ¶ 13278 (1982); In re CWA, 4 FPER ¶ 4135 (1978). Thus, the City may bargain in good faith without agreeing to a demotion and discharge provision as long as the basis for its refusal is not to prevent arbitration over these subjects. Under the First District Court of Appeal's holding, unless and until the parties agree on a contractual provision concerning demotion and discharge, Section 447.401 final and binding arbitration over demotion and discharge issues will not become available to bargaining unit employees. Therefore, the City is in error when it asserts that the First District Court of Appeal's holding requires it to have a grievance/arbitration procedure to be used in disputes over demotion and discharge.

Moreover, even if the parties might agree on a demotion and discharge provision, the City's civil service ordinance would not be rendered meaningless. Contractual grievance arbitration and civil service can peacefully coexist. The Court did not hold that final and binding arbitration is the sole and exclusive procedure for resolving demotion and discharge disputes. In fact, the Legislature contemplated the dual existence of a grievance/arbitration procedure and a civil service appeal procedure when it enacted the following language in Section 447.401:

> A career service employee shall have the option of utilizing the civil service appeal procedure or a grievance procedure under this section, but such employee cannot use both a civil service appeal and a grievance procedure.

Section 447.401 does not require an employee to choose an available contractual grievance/arbitration procedure but rather allows the employee to make an election of remedies. See PERC v. District School Board of DeSoto County, 374 So.2d at 1013. Similarly, the City's civil service ordinance does not purport to provide the only means by which a City employee may contest a demotion or discharge (R. 93-185).

Moreover, under certain situations a bargaining unit employee may not be in a position to choose arbitration over a civil service appeal. Where the collective bargaining agreement provides that the certified union has the exclusive authority to determine whether to pursue a grievance to arbitration, and where it determines that a discharged or demoted employee's grievance lacks merit, the employee may not require the employer to arbitrate his or her grievance. See Galbreath v. School Board of Broward County, 446 So.2d 1045 (Fla. 1984). The employee's only choice is a civil service appeal. Thus, the City is in error when it asserts that the First District Court of Appeal's

holding will render the City's civil service ordinance useless as a means of resolving demotion and discharge disputes.

In advancing this argument, the City seems to suggest that its civil service ordinance was enacted solely to benefit the City in its capacity as employer by giving it the right of "final disposition" in demotion and discharge matters. This view is distorted in that it is the Civil Service Board, not the City, that makes the final disposition in demotion and discharge appeals under the City's ordinance (R. 175).

The City has also misconceived the purpose of a civil service system, such as the one established by the City's ordinance. An employer does not gain rights from a civil service system. On the contrary, civil service diminishes the right an employer would otherwise have to summarily demote and discharge an employee. It is designed to protect competent employees against unwarranted removal, and thus benefits not only the employees but the public as well. E.g. City of Clearwater v. Garretson, 355 So.2d 1248, 1249-51 (Fla. 2d DCA 1978), cert. denied, 364 So.2d 885 (Fla. 1978).

Final and binding arbitration also serves a public interest. It is widely accepted as the most desirable means of peacefully resolving disputes concerning the terms of a collective bargaining agreement without the disruption of an employee strike. Allis-Chalmers v. Lueck, 105 S.Ct. 1904, 1915-16 (1985). It affords a prompt and inexpensive resolution by an impartial expert of the parties own choosing, who has special competence in matters concerning collective bargaining agreements. See e.g. Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionery Workers Union, 430 U.S. 243, 97 S.Ct. 1067, 1073 (1977); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363

U.S. 574, 80 S.Ct. 1347 (1960); Devine v. White, 697 F.2d 421, 435 (D.C. Cir. 1983). The City's assertion that Section 447.401-mandated arbitration and the City's civil service ordinance work at cross-purposes must therefore be rejected.

In conclusion, even assuming arguendo that the Florida Constitution required that any possible conflict between the City's ordinance and Section 447.401 be resolved in favor of the ordinance, this would not provide a basis for this Court to overturn the First District Court of Appeal's construction of Section 447.401 because there is no irreconcilable conflict in this case.

CONCLUSION

This case does not present an issue of constitutional dimension. Article III, Section 14, does not grant to local governments the right to establish a civil service system by ordinance. Consistent with the powers granted to municipalities by Article VIII, Section 2(b), and Chapter 166, Florida Statutes (1983), any conflict between the City's ordinance and Chapter 447.401 must be resolved in favor of the latter.

Moreover, a close examination of the holding of the Court below will reveal that there is no conflict between the City's civil service ordinance and the Court's construction of Section 447.401. A grievance/arbitration procedure and a civil service system can in this instance peacefully coexist.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been mailed by U.S. Mail this 27th day of June, 1985, to the following:

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