IN THE SUPREME COURT

FOR THE STATE OF FLORIDA

City of Casselberry,

Petitioner,

vs. Case No. 66,155.

Orange County Police Benevolent Association and Florida Public Employees Relations Commission,

Respondents.
_____/

DISCRETIONARY REVIEW OF A DECISION RENDERED BY THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

BRIEF OF PETITIONER, CITY OF CASSELBERRY, ON JURISDICTION

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PREFACE

Petitioner is requesting this Court to review, pursuant to its discretionary jurisdiction, an order of the District Court of Appeal, First District, rendered on October 16, 1984. In this appeal, Petitioner will be referred to as Casselberry. Respondents, Orange County Police Benevolent Association and Florida Public Employees Relations Commission, will be referred to as PBA and PERC respectively. Casselberry and PERC were appellees in the district court while PBA was the appellant. An appendix has been provided which contains a conformed copy of the decision in the district court. Also, the appendix contains the proposed order of the hearing officer and the order of PERC. References to the appendix will be made as follows:

Appendix tab number and page (A/Tab., P.)

This case involves an issue concerning an unfair labor practice charge by PBA against Casselberry filed with PERC. The charge deals with the negotiation of a grievance procedure.

STATEMENTS OF FACTS AND CASE

In August, 1981, PBA was certified as the bargaining agent for all sworn police officers and detectives employed by Casselberry. Between October 1981 and October 1982, Casselberry and PBA met on numerous occasions for an initial contract. During the negotiations PBA consistently maintained that all grievances arising out of disputes on demotion and discharge must be subject to a grievance procedure which ends in binding arbitration decided a neutral third party as required by Section 447.401, Florida Statutes. Casselberry, on the other hand,

maintained that all disputes, except those disputes concerning discharge or demotion, are grievable by statutory arbitration. However, Casselberry maintained that binding arbitration of disputes concerning discharge or demotion of a sworn police officer must be handled through Casselberry's then existing civil service appeal procedure. Also there was a discussion about a detailed definition of "cause" for discharge. However, no agreement was reached on the demotion or discharge provision or definition of "cause" for discharge.

During the course of negotiations, the parties reached agreement on the other terms of the contract. However, on August 5, 1982, PBA declared an impasse on the issues of wages and demotion and discharge. PBA never during the negotiations agreed to have the dispute over demotion and discharge resolved by any manner other than in the statutory grievance-to-arbitration provision.

PBA, shortly after the declaration of impasse, filed an unfair labor practice charge against Casselberry. The issue of the charge was whether or not Casselberry committed an unfair labor practice by insisting to the point of impasse upon the exclusion of disputes regarding discharge and demotion from the grievance-to-arbitration provision of the collective bargaining agreement when Casselberry had a civil service ordinance presently in effect.

On December 16, 1982, the hearing officer issued a recommended order (see A/Tab 3, P. 1-7). The hearing officer found that Casselberry committed an unfair labor practice by

insisting to impasse on the exclusion of the disputes on demotions and discharge from the grievance-to-arbitration procedure. The hearing officer based this finding on the fact that the grievance-to-arbitration procedure is a permissive subject of negotiations. This procedure may be waived but an employer cannot force the bargaining agent to negotiate to impasse over the procedure as in a mandatory subject. Later, Casselberry filed several exceptions to the proposed order.

On February 28, 1983, PERC issued its decision on the unfair labor practice charge. (See A/Tab 2, P. 1-14). PERC added to the facts that the parties never reached an agreement on the definition of proper "cause" in the demotion and discharge provision. In addition, PERC found that the impasse issues were not resolved by Casselberry's legislative body. PERC reasoned that PERC could not require the inclusion in the agreement of a provision on demotion and discharge. Therefore, where there is no provision for demotion and discharge, there cannot be an unfair labor practice concerning negotiations over a grievance procedure affecting disputes over demotions and discharge. PERC dismissed the charges of PBA.

PBA filed an appeal to the First District on PERC's decision. On October 16, 1984, the First District rendered its opinion in which it found that Casselberry did commit an unfair labor practice by insisting to impasse on the exclusion of disputes on demotions and discharge from the grievance-to-arbitration procedure (see A/Tab 1, P. 1-12).

On November 14, 1984, Casselberry filed its notice of invoking the discretionary review by the Supreme Court of the decision of the First District. The basis for jurisdiction of the Supreme Court is that the First District construed several constitutional provisions in arriving at its decision. In addition, the decision of the First District will affect a class of constitutional or state officers. This filing of notice was timely pursuant to rule 9.120, Florida Rules of Appellate Procedure.

ARGUMENT I.

THE SUPREME COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT IN THAT THE FIRST DISTRICT EXPRESSLY CONSTRUES A PROVISION OF THE STATE CONSTITUTION IN ARRIVING AT ITS DECISION.

Article V and Rule 9.030 (a) (2) (A) (ii), Florida Rules of Appellate Procedure, provide that a decision of a district court of appeal may be reviewed where that decision expressly construes a provision of the State Constitution. Casselberry maintains that the First District construed two constitutional provisions in its decision and thereby renders its decision reviewable by the Supreme Court.

In its decision, the First District compares Article I, Section 6 with Article III, Section 14 of the Florida Constitution (See A/Tab 13, P.8). The discussion of the two constitutional provisions are a important part of the decision of the First District.

The issue presented to the First District was whether or not Casselberry's insistence to impasse of the exclusion of disputes concerning demotion and discharge from the grievance-to-

arbitration provision of the collective bargaining agreement where there was an existing civil service ordinance is an unfair labor practice. To reach its decision on this issue, the First District went first to the constitution. Article I, Section 6, Florida Constitution, establishes that public employees have the same rights to work and collectively bargain as private employees, except the right to strike. From that provision, the State legislature enacted Section 447.401, Florida Statutes, which provides that the parties shall negotiate a grievance procedure which shall have at its terminal step, binding arbitration by a neutral arbitrator. From this, the First District found that the grievance-to-arbitration procedure was a permissive subject of negotiations. In other words, grievance-to-arbitration procedure is required by statute. However, the parties may voluntarily substitute another procedure for it. The court held that one party cannot require the other to exclude the grievance-to-arbitration procedure from the agreement. From this, the First District holds that the grievance-to-arbitration procedure is a constitutionally guaranteed right. (See A/Tab 1, P.8 last sentence).

Casselberry's position throughout was that the demotion and discharge of a sworn police officer was different from the run of the mill disputes between an employer and employee. As one basis, Casselberry urged that Article III Section 14, Florida Constitution, gave Casselberry the right to establish a civil service grievance procedure which would handle demotions and discharges. Casselberry urged that the requirement of Chapter

447 to include in such situations the grievance-to-arbitration procedure is only statutory and, therefore, is an unconstitutional deprivation of Casselberry's rights under Article III, Section 14, Florida Constitution. The First District Court of Appeals construed both Article III, Section 14 and Article I, Section 6, Florida Constitution and found that these provisions do not conflict. Casselberry is now requesting this Court to review that decision.

Casselberry maintains that the grievance-to-arbitration provision as set forth in Section 447.401, Florida Statutes, is not constitutionally mandated but is only a creature of the legislature. Therefore, Casselberry maintains that the statute, Section 447.401, Florida Statutes, which requires the grievance-to-arbitration provision was unconstitutionally applied because the statute conflicts with Article III, Section 14, Florida Constitution.

Casselberry maintains that this Court should review the decision of the First District because of the importance of the issue. Though this case involves only one city, it has impact which covers the entire state. Each city which has a policy department which now has or may have a bargaining agent will be affected. Each city will be required to have a grievance to arbitration procedure to be used in disputes over discharges or demotion of sworn public officers. The impact is obviously statewide and not strictly a local issue with limited impact.

The inability of Casselberry to use its civil service ordinance is also a significant issue. Casselberry maintains

that Casselberry, through its existing grievance procedures adopted pursuant to Article III, Section 14, Florida Constitution, should have the final disposition over disputes over the demotion and discharge of a police officer. Casselberry maintains that the city must retain this final disposition over the disputes because of the unique nature of the employment of a police officer, the seriousness of the decision to retain the wrong person as a police officer, and the responsibility of Casselberry to its citizens. Casselberry maintains that these factors make the rights of Casselberry under Article III, Section 14, Florida Constitution superior to the rights established by Section 447.401, Florida Statutes.

A police officer is a unique employee of the city. The police officer has the power to use in proper circumstances, deadly force in the apprehension of persons who are believed to be criminals. Obviously, the city has a responsibility to insure that the person who has this training and power uses the training and power only under the proper circumstances. The city insures the proper use of force through its discipline of the police officer and through its determination of who will be and will remain a police officer. The failure to maintain discipline over the police concerning the use of force or the failure to have the proper person authorized to use that force could have disastrous effects. The city is the authority which gave the police officer the power to use this force and the city is the entity responsible for the use of that force by the police officer. See Cleveland v. City of Miami, 263 So. 573 (Fla. 1972). In

addition, the control over a city's police officers through discipline and retention of those officers must be prospective. It is not enough to correct the improper use of lethal force after the improper use has occurred. The city has an obligation to insure through its discipline and through its procedures to retain a person as a police officer that the use of force will occur only in the proper circumstances. Therefore, because of the effect of such a decision, Casselberry maintains that it is not proper for a decision as to who will remain and who will not remain a police officer authorized to use deadly force to rest solely with a neutral third party. That decision should belong to the entity who has the responsibility to insure that the proper use of force occurs, the city. This is especially true in Florida where the courts have held that the mistakes in the application of law or the facts by the arbitrator cannot be remedied by the courts, see Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 4 DCA 1973).

Casselberry recognizes that the police officer must have the protection from unwarranted, arbitrary or unfounded decisions to demote or discharge the officer, and that this protection can be provided in the collective bargaining agreement. Casselberry, however, maintains that because of the importance of the final decision as to demotion or discharge of a police officer must rest with the city as provided by Article III, Section 14, Florida Constitution. Therefore, Casselberry maintains that the Article III, Section 14, Florida Constitution under these circumstance does take precedent over the rights of the public

employees established by Section 447.401, Florida Statutes. The construction of these important constitutional issues give the Supreme Court jurisdiction to review the decision of the First District.

ARGUMENT II

THE SUPREME COURT HAS JURISDICTION OVER THE DECISION OF THE FIRST DISTRICT IN THAT THE DECISION AFFECTS A CLASS OF STATE OR CONSTITUTIONAL OFFICERS.

Article V, Florida Constitution and Rule 9.030 (a) (2) (A) (iii), Florida Rules of Appellate Procedure, provides that the Supreme Court has the discretionary jurisdiction to review a decision of the district court of appeal that affects a class of state or constitutional officers. The decision of the First District rendered on October 16, 1984 will affect the officers of Casselberry in the performance of their responsibilities in retaining police officers. Casselberry maintains that the officials of Casselberry are constitutional or state officers for the purpose of jurisdiction of the Supreme Court. Article VIII, Section 2, Florida Constitution, establishes municipalities and provides that the officers shall be elected. Section 165, Florida Statutes, establishes the forms of government that a municipality may take. Casselberry fits within the definition of municipality and, therefore, Casselberry maintains that the officials of Casselberry are constitutional or state officers for jurisdiction.

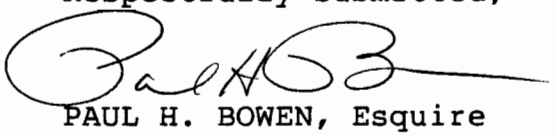
CONCLUSION

Casselberry maintains that the Supreme Court has jurisdiction to review the decision of the First District because

the decision construes a provision of the State Constitution and also affects class of state or constitutional officers.

The issues presented by this case are novel and have not been decided by Supreme Court. The issues are important and the resolution of the issues will have a significant impact on all the cities who have police departments with bargaining agents under Chapter 447, Florida Statutes. These issues are significant because of the adverse impact on the city's ability to carry out its responsibilities to its citizens that only proper persons will be police officers having the power to use deadly force. Therefore, Casselberry maintains that the Supreme Court has jurisdiction to review the decision of the First District.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 26th day of November, 1984 to TOM YOUNG, Public Employee Relations Commission, Twin Towers Office Building, 2600 Blain Stone Road, Suite 300, Tallahassee, Florida, 32301, and to THOMAS J. PILACEK, Pilacek, Cohen & Sommers, 1516 East Hillcrest Street, Suite 204, Orlando, Florida, 32803.

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