O/a 9-13-85

IN THE SUPREME COURT OF FLORIDA

CITY OF CASSLEBERRY,

Petitioner,

vs.

ORANGE COUNTY POLICE BENEVOLENT ASSOCIATION AND FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION

Respondents.
_____/

CASE NO. 66,155
DISTRICT COURT OF APPEAL
1ST DISTRICT - NO. AS-43

INITIAL BRIEF OF PETITIONER, CITY OF CASSLEBERRY, ON THE MERITS

Frank C. Kruppenbacher, Esquire
SWANN AND HADDOCK, P.A.
135 West Central Boulevard
Suite 1100
Post Office Box 640
Orlando, Florida 32802-0640
305/425-3939

ATTORNEYS FOR PETITIONER,
CITY OF CASSLEBERRY, FLORIDA

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References to the Record on Appeal as used by the District Court of Appeal, First District shall be indicated by the symbol (R-).

STATEMENT OF CASE AND OF THE FACTS

This is an appeal from an Order of the District Court of Appeal, First District, rendered on October 16, 1984. In this appeal, Petitioner will be referred to as "City." The Respondents, Orange County Police Benevolent Association and the Public Employees Relations Commission, will be referred to as PBA and Commission respectively.

The City adopts the findings of fact of the District Court Appeal, First District, as follows:

In August, 1981, PBA was certified as the bargaining agent for the City's police officers, excluding sergeants, lieutenants, assistant chief, chief and non-sworn personnel. Bargaining for an initial contract commenced in October, 1981. There were approximately ten negotiating sessions over the next ten months. From the inception, and throughout the period of negotiations, PBA contended that the contract's "grievance procedure culminating in binding arbitration,"hould include disputes involving

discharge or demotion. The City, however, consistently maintained that any agreed upon demotion and discharge provision should not be handled through the contract's grievance procedure. Instead, it was the City's position that such matters should be processed through the City's existing civil service procedures. At one point, the City, as an alternative to its preferred position, offered to submit grievances regarding discharge or demotion to a panel of law enforcement officers similar to that provided for by Section 112.532, Florida Statutes (1981). This was not accepted. Also, there was discussion about a detailed definition of "cause" for discharge. However, no agreement was reached prior to impasse regarding any demotion or discharge provision or definition of cause.

During the course of negotiations, the parties reached agreement on such subjects as overtime, workweek, workshift, leaves of absence, compensation for injuries, equipment safety, life insurance and medical insurance. When PBA declared impasse on August 5, 1982, the issues regarding wages and demotion and discharge were still pending and in dispute. At no time did PBA ever volunteer to exclude disputes involving discharge or demotion from a grievance-to-arbitration provision. Following PBA's declaration of impasse, the City proposed certain disciplinary provisions contained in existing collective bargaining agreements from two other municipalities. The PBA declined the offer because the provisions were not covered by a grievance-to-arbitration provision.

After the declaration of impasse on August 5, 1982, the parties continued to negotiate and eventually reached an agreement on October 7, 1982, the date of the evidentiary hearing on PBA's unfair labor practice charge. The parties never utilized a special master or other procedures available under Section 447.403 for the resolution of impasses. The parties stipulated in the proceedings below that agreement on a contract did not render moot PBA's unfair labor practice charge. [R17-14,63-82].

An evidentiary hearing was held on October 6 and 7, 1982, wherein the PBA withdrew without objection all of the allegations of its charge, amended its charge to reflect that the only issue to be litigated in the proceeding, "is whether or not it is an unfair labor practice for the City to insist upon the exclusion of disputes regarding discharge, and demotion from the grievance machinery set forth in a collective bargaining agreement, which grievance machinery culminates in final and binding arbitration for disputes regarding all other matters arising under the agreement, to the point of impasse; notwithstanding that the City has a preexisting Civil Service Ordinance pertaining to discipline of City employees, presently in effect" (R-408-422). Additionally, the parties jointly requested that all testimony and evidence from the October 6 and 7, 1982, evidentiary records be stricken and that the Commission consider as the evidentiary records in deciding the case only the transcript of the parties July 15, 1982, negotiating session and the depositions with exhibits of

the parties chief negotiators, City Negotiator Ned Julian, Jr., and Union Negotiator J. Randall Blankenship. (R-408-422, 440-446). The Hearing officer and Commission granted the parties request (R-408-422).

Next, the Hearing Officer issued a Recommended Order on December 16, 1982, finding the City had failed to bargain collectively by unlawfully insisting that the PBA waive the applicability of the statutorily mandated grievance procedure by the exclusion of disputes concerning discharge or demotion from binding arbitration (R-408-422, 440-446).

The City filed exceptions to the Hearing Officer's recommended Order on January 5, 1983, with an accompanying Memorandum of Law (R-430-432, 433-434, 436-439). The PBA filed no exceptions. On February 28, 1983, the Commission entered its Order rejecting the Hearing Officer's conclusion of law the City acted unlawfully by its conduct during the 1981-82 negotiations with the PBA and dismissing all portions of the unfair labor practice charge (R-440-446). The PBA filed an appeal to the District Court of Appeal, First District. The District Court of Appeal, First District, reversed PERC's order dismissing PBA's unfair labor practice charge and remanded for the entry of an Order finding that the City committed an unfair labor practice. The City has taken this appeal therefrom.

ISSUE ONE

THE DECISION OF DISTRICT COURT OF APPEAL, FIRST DISTRICT, INCORRECTLY CONCLUDED THAT THE CITY OF CASSLEBERRY COMMITTED AN UNFAIR LABOR PRACTICE BY ITS CONDUCT DURING THE 1981-82 NEGOTIATIONS WITH THE ORANGE COUNT POLICE BENEVOLENT ASSOCIATION

ARGUMENT

Initially it is noted that the party who alleges an unfair labor practice carries the burden of providing sufficient evidence to prove the claim. Fla. Admin. Code Rule 38B-21.08. The burden is not upon the disclaiming party to disprove the alleged facts. International Brotherhood of Painters v. Anderson, 401 So.2d 824 (Fla. 5th D.C.A., 1981). In this case, the record demonstrates the Commission correctly decided that the PBA did not prove that the City acted unlawfully by its conduct during 1981-82 negotiations with the PBA. That the same record demonstrates the Commission's decision is based upon competent substantial evidence and is in accordance with the essential requirements of the law.

First, there were not disputed issues of fact or questions of credibility in this case. The Hearing Officer and the Commission reviewed the same evidence stipulated to by the parties. That is, the depositions with exhibits of the parties chief negotiators and the transcript of the parties July 15, 1982, negotiating session (R-17-42, 63-82 and 186-395).

The PBA did not challenged the Commission's findings of facts. A review thereof demonstrated substantial competent

evidence exists to support the findings. As such, this Court should not substitute its version of the facts. Fla, Stat. §120.68 (1981); Pasco County School Board vs. PERC, 353 So.2d 108 (Fla. 1st. D.C.A., 1978); City of Lake Wales v. PERC, 402 So.2d 1224 (Fla. 2nd D.C.A., 1981).

Second, PERC's application of the law to the facts was incorrectly challenged by the First District Court of Appeal. The PBA asserted that PERC erred by refusing to hold that the City's insistence upon the exclusion of discharge and demotion from the grievance procedure required by Fla. Stat. §447 (1981), to the point of impasse, constituted an unlawful refusal to bargain in good faith. However, the facts simply did not legally support the requested finding.

Fla. Admin. Code Rule 38D-19 and Fla. Stat. §447.403 contemplate and delineate the process and procedure for the resolution of impasse issues. Therein, Fla. Admin. Code Rule 38D-19.06 specifically states:

> Within ten (10) days after the date of appointment of a special master, each party shall serve upon the special master a written list of issues at impasse, simultaneously serving a copy of the list upon each other party.

In this case, the parties had never established the issues for impasse, In fact, there was never an appointment of a special master as contemplated by law. Clearly, from a review of these facts PERC properly legally concluded that:

> Absent agreement on a provision covering demotion and discharge and absent any impasse proceedings before a special master where such a provision could eventually

be legislatively imposed, the hearing officer would not correctly conclude that the City unlawfully compelled the PBA to waive its rights to arbitrate demotion and discharge grievances. (Emphasis added)

The record reveals the PBA failed to establish what issues were at impasse. The PBA's argument and District Court of Appeal, First District Court's finding that discipline and discharge were at impasse because its negotiator declared so was contrary to the principles of good faith bargaining. That is, as outlined above, the process for collective bargaining in Florida provides for the parties to prepare a list of written issues for impasse resolution by a special master. This stage is a continuation of the collective bargaining process. However, to accept the District Court's finding would be tantamount to placing a loaded gun in their negotiator's hands and pointing it at the head of the City's negotiator. That is, whenever the City negotiator would attempt to engage in hard bargaining, the PBA could declare impasse and hold the City liable for an unfair labor practice. Clearly, the Commission was correct in construing that this interpretation of collective bargaining was not the purpose of Fla. Stat. §447 (1981). As such, the Commission is entitled to substantial deference from this Court in its review of the evidence presented of Fla. Stat. §447 (1981). Palm Beach Jr. College v. United Faculty, 425 So.2d 133 (Fla. 1st D.C.A., 1983); City of Lake Wales v. PERC, supra; and State v. Hawkins, 364 So.2d 723 (Fla. 1978).

Next, the PBA incorrectly argued and the First District Court of Appeal incorrectly found that the facts in this case established bad faith bargaining by the City. The Supreme Court in Borg-Warner, supra, held that if, as a condition precedent to entering into contract one party, in the face of refusal by the other, adamantly insists upon a clause which constitutes a permissive subject, such conduct constitutes a per se unlawful refusal to bargain. Applying these criteria to the instant case the PBA failed to sustain its burden of proof:

A. There was no evidence in the record that the City made any permissive subject or proposal a condition precedent to its acceptance of an agreement.

B. There was no evidence in the record that the PBA refused to accept a subject or proposal made a condition precedent to its acceptance of an agreement.

C. There was no evidence the City adamantly insisted that any subject or proposal be made a condition precedent to its acceptance of an agreement.

In the absence of the three elements above, NLRB v. Borg-Warner Corp., supra, demonstrates the City bargained in good faith with the PBA.

ISSUE TWO

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, INCORRECTLY CONCLUDED THAT ARTICLE I, SECTION 6, FLORIDA CONSTRUCTION AND CHAPTER 447, FLORIDA STATUTES, AUTHORIZE THE DEPRIVATION OR THE CITY OF CASSLEBERRY'S CONSTITUTIONAL RIGHTS TO ITS CIVIL SERVICE ORDINANCE UNDER ARTICLE 111, SECTION 14, FLORIDA CONSTITUTION, BY REQUIRING A MANDATORY ARBITRATION OF DISCHARGE AND DEMOTION IN THE PARTIES COLLECTIVE BARGAINING AGREEMENT.

ARGUMENT

First, The City maintains that Fla. Stat. §447 (1981), does not require that every collective bargaining agreement contain a "proper clause" limitation upon a public employee's right to discipline. In AFSME, Local 1363 v. PERC, et al., 430 So.2d 481 (Fla. 1st D.C.A. 1983), the First District Court of Appeals held that:

> While the Legislature has mandated that each public employer and bargaining agent must negotiate a grievance procedure, it has not in §447.40, specified which issues must be included in the procedure. Section 447.40 must be read in pari materia with Fla. Stat. §447.309(50 (1981), which sets forth the matters which must be included in a collective bargaining agreement. That section says that "any collective bargaining agreement . . . shall contain all of the terms and conditions provided for ... on applicable merit and civil service rules and regulations." (Emphasis supplied)

The First District Court of Appeal's decision would create an unconstitutional interpretation of Fla. Stat. §447 (1981), et. seq. Article III, Section 14, of the Constitution of the State of Florida, guarantees that a municipality may create a civil service system for its municipal employees. In the creation of a civil service system, Article, III, Section 14, further guaran-

tees the municipality the right to prescribe the qualifications, and method of selection and termination of employees.

Pursuant to Fla. Stat. §166 (1981), and in the exercise of its constitutional right, on October 26,1970, the City of Casselberry passed and adopted Ordinance 197, otherwise known as the "Civil Service Act of the City of Casselberry, Florida" (R-83-86, 87-89, 90-92, 93-185). As stated therein, the Act, its rules and regulation is, were adopted to provide for the administration of the City's civil service system, covering all City employees, including members of the certified bargaining unit in this case. Further, in Sections 13 and 15 of the Act, the City afforded its employees, rules and regulations for the handling of grievances, including grievances relating to the discipline and discharge of the employees. Employees were specifically granted the right to have a representative appear on their behalf at any civil service hearing. Clearly, PBA's present interpretation of Fla. Stat. §447.401, (1981), that is the City of Casselberry must agree to final and binding arbitration of grievances related to discipline and discharge, is violative of the Florida Constitution.

Second, the City 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, The City 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.

Though, the City maintains Section 447.601, Florida Statutes, specifically provides a legal basis for the City's position in collective bargaining.

Though this case involves only one city, it has impact which covers the entire state. Each city which has a police 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. The City 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. 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

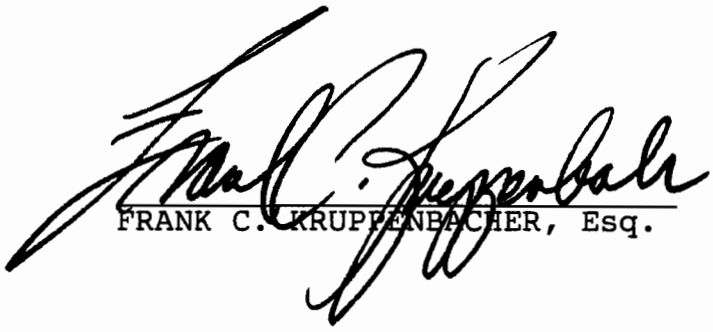
neutral third party. That decision should belong to the entity who has the responsibility to insure that the proper use of force occurs, the city. This is especially true in Florida where the courts have held that the mistakes in the application of law or the facts by the arbitrator cannot be remedied 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.

CONCLUSION

The City of Casselberry asserts that the February 28, 1983, Order of the Florida Public Employees' Commission dismissing all portions of the labor practice charge filed by the Orange County Police Benevolent Association was based upon substantial competent evidence and in accordance with applicable principles of law and that the Order of District Court of Appeal, First District, receiving the Order of PERC should be reversed.

The City of Casselberry respectfully requests the Court enter an Order reversing the February 28, 1983 decision of the District Court of Appeal, First District and enter an Order affirming the February 28, 1983 Order of the Commission and specifically find that a municipality in the State of Florida is not required by Chapter 447, Florida Statute, to agree to binding arbitration of discipline and discharge grievances where there is a preexisting civil service ordinance established pursuant to the municipalities rights under Article III, Section 14, of the Florida Constitution.



FRANK C. KRUPPENBACHER, Esq.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY**, that a true copy of the foregoing was mailed to Thomas J. Pilacek, Esq., PILACEK, COHEN & SOMMERS, 1516 East Hillcrest Street, Suite 204, Orlando, FL 32803, and the Public Employee Relations Commission, Attn: Joan Stewart, Esq., 2600 Blair Stone Road, Suite 300, Tallahassee, FL 32301, this 23rd day of May, 1985.

FRANK C. KRUPPENBACHER, Esq.
SWANN & HADDOCK, P.A.
Post Office Box 640
Orlando, FL 32802-0640
305/425-3939

Attorneys for Appellee, City of Casselberry