OA 9-13-85
047

IN THE SUPREME COURT OF FLORIDA

CITY OF CASSELBERRY,

Petitioner,

CASE NO. 66,155

vs.

ORANGE COUNTY POLICE BENEVOLENT ASSOCIATION and FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION,

Respondents,

_____/

ORANGE COUNTY POLICE BENEVOLENT ASSOCIATION'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND OF THE CASE

Respondent Orange County Police Benevolent Association [OCPBA] accepts the City's Statement of the Facts and of the Case, with the following additions.

The Order of PERC, which the City contends is correct, found that the City did not commit an unfair labor practice because the parties had not reached an agreement upon a definition of "proper cause" at the time of impasse. (R. 443-446) In reversing PERC's Order, the Court of Appeals determined that such a provision was not a prerequisite to the OCPBA's unfair labor practice charge. Rather, the unfair labor practice was established by the fact that the City insisted to the point of impasse upon the exclusion of demotion and discharge disputes from the statutorily required grievance-to-arbitration provision (a non-mandatory subject of bargaining) as a condition to agreement upon mandatory subjects such as particular demotion and discharge provisions, definition of "cause" for discharge, and wages. (457 So. 2d 1125, at 1129 (Fla. App. 1st Dist. 1984))

ARGUMENT

I. The First District Court of Appeals Correctly Concluded That the City of Casselberry Committed an Unfair Labor Practice.

It is difficult for the OCPBA to discern the specific rationales urged by the City in support of its disagreement with the decision of the First District Court of Appeals. We understand the City's contentions to be twofold: First, since the parties arrived at an agreement subsequent to impasse and therefore did not follow the statutory impasse resolution procedures, therefore no "impasse" had occurred. (City Br. 8-10) Second, there is insufficient evidence to sustain a conclusion that the City unlawfully insisted to the point of impasse upon a permissive subject of bargaining within the meaning of NLRB v. Wooster Division of Borg-Warner Corp., 356 U. S. 342 (1958). (City Br. 11) Each of these points will be addressed in turn.

A. The City Unlawfully Refused to Bargain In Good Faith With the OCPBA by Insisting to the Point of Impasse Upon a Permissive Subject of Bargaining (City Br. 8-10)

Initially, it should be noted that the First District Court of Appeals [hereinafter the First District] did not disturb any finding of fact made by either the hearing officer or PERC. To the contrary, the facts set forth in the Court's decision summarized facts taken from the Hearing Officer's Recommended

Order, as adopted and augmented in PERC's final Order. (457 So. 2d at 1126) The Court's recitation of the facts has been adopted by the City in its brief, (City Br. 4-6) and has been accepted by PERC and OCPBA in their briefs. Accordingly, resolution of this matter turns upon an application of law to the undisputed facts.

OCPBA understands the City to contend that the parties were not at "impasse" as a matter of law because the post-impasse procedures for resolution of impasse disputes set forth in §447.403 were not followed. This contention was specifically addressed by the Court, and is clearly without merit.

As correctly noted by the Court, §447.403(1), Fla. Stats. defines what constitutes "impasse" for purposes of public sector bargaining within the State of Florida. That section provides that impasse shall be deemed to have occurred when:

(1) a dispute still exists over the terms and conditions of employment after a reasonable period of negotiation; and

(2) one of the parties declares in writing to the other party and to PERC that they are at impasse. 456 So. 2d at 1129

The hearing officer found that impasse had occurred within the meaning of that section; and he further found that the parties were "in fact deadlocked and at loggerheads." 457 So. 2d at 1130. PERC's Order adopted the hearing officer's findings; the Court found that this finding was supported by competent,

substantial evidence (457 So. 2d at 1130); and the City has not urged otherwise in this appeal.

The conclusion that impasse occurs when the criteria of §447.403(1) have been satisfied makes sense, and should be adopted as a matter of law by this Court, for several reasons.

First, contrary to the procedures used in the private sector, in which either party is free to use all economic weapons at its disposal after impasse, §447.403 sets forth post-impasse procedures to be utilized by the parties in resolving impasse disputes. Such procedures are a necessary recognition by the legislature that some viable mechanism must be provided to the parties as a tradeoff for the right to strike, and to promote the continuity of public service. As correctly noted by the First District, because of this fact the point of "impasse" under §447.403(1)

> "is fundamentally dissimilar to the private sector concept because a statutory impasse occurs before the end of the parties' obligations to participate in good faith bargaining." 457 So. 2d at 1130, quoting Schulman, The Case of Frustrated or Unsuccessful Public Employee Collective Bargaining: A Review of the Developing Legal Concepts in Florida, Volume 30, Fla. Rev. 867 457 So. 2d at 1129-1130

See also Hollywood Firefighters Local 1375 v. City of Hollywood, 8 FPER paragraph 13333 (1982), wherein PERC observed that in order for parties to be considered at impasse under §447.403(1), the parties need not be at the point of "deadlock" as

contemplated in a private sector impasse.[1/]

Second, and more important, the First District found that exclusion of discharge and demotion matters from the grievance procedure required by §447.401 constitutes a "permissive" or non-mandatory subject of bargaining. See also AFSCME Local 1363 v. Florida Public Employees Relations Commission, 430 So. 2d 481 (Fla. 1st DCA 1983) If, as a condition precedent to entering into any 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 within the meaning of the Act. NLRB v. Borg-Warner Corp., supra, 356 U. S. at 349 note 4. The distinction between mandatory and permissive subjects of bargaining has been adopted by PERC and the Florida Courts. Palm Beach Junior College, 7 FPER paragraph 12300 (1981), affirmed, 425 So. 2d 133 (Fla. 1st DCA 1982)

The legal significance of a permissive subject of bargaining is that it constitutes, in effect, a refusal to bargain over the mandatory bargaining subjects because it frustrates agreement on those subjects. As stated by the Supreme Court in Borg-Warner, supra:

> "The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to

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[1/] As noted by the Court, as a matter of fact the parties were at true "impasse" under private sector principles. 457 So. 2d at 1130

> enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clausesis lawful in itself. Each would be enforcable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement." 356 U. S. at 349 (emphasis supplied)

Insistence upon a permissive subject to impasse therefore violates the Act precisely because it tends to cause impasse by preventing agreement on mandatory subjects, contrary to the purpose of the Act to promote harmonious and cooperative relationships between government and its employees. §447. 201, Fla. Stats. Thus, the fact that the post-impasse resolution procedures set forth in the statute were not utilized because of the parties' subsequent agreement at the time of the unfair labor practice hearing is immaterial to a finding of the violation.

B. The First District Court of Appeals Correctly Decided That the Facts Established an Unlawful Refusal to Bargain by the City. (City Br. 11)

As mentioned above, it is well settled that the City's adamant insistence that discharge and demotion disputes be excluded from the grievance and arbitration machinery required by §447. 401, Fla. Stats. is a permissive subject of bargaining. That means that:

(1) the OCPBA was not obligated to bargain about the

exclusion, and was therefore not required to agree to any of the City's alternative proposals either prior or subsequent to impasse; and

(2) the dispute did not have to be resolved through the impasse procedure:

> "Any proposal which exempts contractual disputes from the grievance procedure constitutes a partial waiver of their statutory right. Therefore, as we have stated in prior decisions, such a proposal is a permissive subject of bargaining, that is, one over which neither party is required to negotiate and one which can be resolved through the impasse procedure only if both the parties voluntarily agree to submit it to the special master." In re: AFSCME, Local 1363, 8 FPER paragraph 13278 at 489 (1982), affirmed, 437 So. 2d 481 sub nom AFSCME, Local 1363 v. Florida Public Employees Relations Commission, 430 So. 2d 481 (Fla. 1st DCA 1983)

The hearing officer, PERC, and the First District all found (and the City recites, in its Statement of Facts) that at all times the City insisted upon the exclusion of discharge and demotion disputes from the statutory grievance procedure to the point of impasse. 475 So. 2d at 1126-1127

The OCPBA is therefore at a complete and total loss to understand the contentions made at page 11 of the City's brief, which contentions are unsupported by any specific reference to the facts or the law, and which are completely contrary to the facts found by the Court.

II. The Decision of the First District Court of Appeals Does Not Deprive the City of Casselberry of a Constitutional Right Concerning Its Civil Service Ordinance

The OCPBA agrees with and urges the arguments raised by PERC in its answer brief on the merits that

(1) no constitutional issue is presented by the decision of the First District Court of Appeals; and

(2) even were such an issue to exist, the decision of the First District Court of Appeals is in complete harmony with both the Constitution and Florida's statutory scheme. Accordingly, OCPBA will not present argument on those points in this brief.

However, the OCPBA diverges from PERC's agreement with the City that:

> ". . . there is no requirement in part II of Chapter 447 that every collective bargaining [agreement] contain a "just cause" provision." (PERC Br. 10; City Br. 12)

Rather, the OCPBA contends that a correct interpretation of Florida's constitutional and statutory scheme requires the explicit or implicit inclusion of a "proper cause" provision in every collective bargaining agreement.

In considering this contention, it is extremely important to separate the concept of "proper cause" as a limitation upon an employers to discipline right from any particular definition of "proper cause" for bargaining purposes. Moreover, it is important to separate the concept and definition

of "proper cause" in any collective bargaining agreement from the contractual designation of the forum to be used in resolving discipline disputes.

The importance of these distinctions--which at first blush may appear to be abstruse or confusing--is that, in the PBA's view, "proper cause" as a limitation upon an employer's right is an illegal subject of bargaining; the particular form of a "proper cause" provision is a mandatory subject; and the forum used to determine discipline disputes is a permissive subject.

It is for these reasons that the First District's decision is in complete harmony with private sector law, and with Florida's Constitution and statutory scheme.

A. The "Proper Cause" Limitation Upon Discipline is an Illegal Subject of Bargaining.

In addition to mandatory and non-mandatory or permissive subjects of bargaining, there exists in the private sector a third category termed "illegal" subjects. That is, neither party may require that the other agree to contract provisions which are unlawful under the National Labor Relations Act. Meat Cutters Local 421 (Great Atlantic & Pacific Tea Co.), 81 NLRB 1052, 23 LRRM 1464 (1949). See also concurring opinion of Mr. Justice Harlan in Borg-Warner, supra:

> "[o]fcourse an employer or union cannot insist upon a clause which would be illegal under the Act's provisions" (356 U. S. at 360, Note 4)

In requiring the other party to bargain about such a

subject, the insistent party violates the National Labor Relations Act:

> "What the Act does not merit is the insistence, is a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy." National Maritime Union (Texas Co.), 78 NLRB 971, 981-82; 22 LRRM 1289 (1948), enforced 175 F. 2d 686, 24 LRRM 268 (2d Cir. 1949), Cert. denied 338 U. S. 954 (1950).

An illegal subject may never be properly included in a collective bargaining agreement. Honolulu Star-Bulletin, Ltd., 123 NLRB 395, 43 LRRM 1449 (1959); enforcement denied on other grounds, 274 F. 2d 567 (DC Cir, 1959)

§447.209, Fla. Stats. enumerates rights which are granted by the legislature to public employers. These include:

> ". . . it is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation." (emphasis supplied)

It is axiomatic that all rights granted the public employers in the State of Florida flow from the Consitution and

the Florida Statutes. By expressly providing a statutory limitation upon a public employer's right to discipline (which limitation is nowhere else addressed in either the constitution or the statutes), the legislature has withheld from public employers the right to impose discipline other than for "proper cause" within the meaning of the statute; and accordingly, where a collective bargaining agreement exists public employees have the right to challenge disciplinary action which is not taken for "proper cause" in the agreed-upon contractual forum (which will be discussed infra).

In view of the statutory limitation, it is necessary to determine what, if any, meaning that limitation has in the context of collective bargaining. It is also important to determine why the legislature placed that limitation in the Act, which as a whole governs the bargaining relationships between public employers and employee organizations, as opposed to any other chapter in the statutes, or in the constitution.

If the "proper cause" limitation is to be given any meaning within the context of collective bargaining, that meaning must be that the parties, through bargaining, cannot afford the employer any greater right than that which has been granted to it by the legislature.

For these reasons, OCPBA suggests that where one party proposes the inclusion of some form of "proper cause" provision, it is a per se refusal to bargain for the other to either refuse to include "proper cause" in some form, or force the proposing

party to bargain about its exclusion. Indeed, every contract must implicitly or explicitly contain the "proper cause" limitation simply because the legislature has taken away from the parties the authority to do otherwise.

B. The Particular Definition of "Proper Cause" is a Mandatory Subject Which May be Resolved Through the Impasse Resolution Procedures.

The fact that a "proper cause" limitation may be an illegal subject for bargaining does not, however, mean that an employer is compelled to include any particular definition of "proper cause" within the agreement, as the City incorrectly suggests in its brief. Rather, the First District Court of Appeals correctly determined that such definition was a mandatory subject of bargaining which may be resolved through the statutory impasse resolution procedures. 457 So. 2d at 1128

§447.203(14) defines "collective bargaining" as, among other things, the obligations

> ". . . to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part."

As argued above, the "proper cause" limitation upon a public employer's authority to discipline "requires" the parties to agree to its inclusion in any collective bargaining agreement, either explicitly or by necessary implication. But the form of

that limitation is one which the legislature has declared that "neither party shall be compelled to agree."

At this point in the development of Florida law, we suggest it is obvious that what constitutes "proper cause" for discharge is a material term and condition of employment. Public Employees Relations Commission v. District School Board of DeSoto County, 374 So. 2d 1005 at 1013 (Fla. 2d DCA 1979); see also Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So. 2d 903 (Fla. 1969); City of Tallahassee v. Public Employees Relations Commission, 410 So. 2d 487 (Fla. 1982). Material terms and conditions are "mandatory" subjects over which the parties may bargain to impasse, and through the post-impasse resolution procedures, and which shall be included in any collective bargaining eventually arrived at, in accordance with §447.309(5) and §447.403(4), Fla. Stats.. Palm Beach Junior College v. United Faculty of Florida, 425 So. 2d 133 (Fla. 1st DCA 1983)

Accordingly, as long as the parties agree that some form of "proper cause" must appear in the agreement, they may bargain exhaustively over which form is to appear. This distinction lays to rest the City's erroneous argument that the decision of the First District has the necessary effect of requiring the employer, at the time of impasse, to include a particular form of "proper cause" provision which requires disposition through the statutory grievance procedure. Rather, the only requirement created by this distinction is that the parties must necessarily bargain over the contractual forum used to dispose of such

disputes.[2/]

C. The Forum Used to Determine Disputes Concerning Whether "Proper Cause" Exists For the Employer's Imposition of Discipline is a Permissive Subject of Bargaining

The common thread running through the City's argument is that the decision of the First District requires a public employer to arbitrate disputes concerning discharge and demotion. However, as pointed out by PERC in its brief to this Court, that is an incorrect interpretation.

A correct reading of the decision is that while neither party can compel the other to include any specific provision in its contract, nevertheless that party may not insist, to the point of impasse, upon the exclusion of a permissive subject of bargaining (exclusion from grievance procedure).

§447.401 provides in substance that each negotiated collective bargaining agreement must contain a grievance procedure to be used for the settlement of disputes between employer and employee involving the interpretation or application of the agreement, which has as its terminal step final and binding arbitration. The statute further provides that any

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[2/] For example, it may well be that the parties agree, or the legislative body imposes, a definition of "cause" identical to that used by an existing civil service procedure, or by a police standards review board convened in accordance with Chapter 112, Fla. Stats.. But the fact that the standards to be used may be the same does not require resolution of disputes concerning such standard by any particular forum. See §C, infra.

existing grievance procedure (such as in a civil service system) may be the subject of collective bargaining; and any agreement reached shall supersede the previously existing procedure.

But the statute continues to provide that a career service employee shall have the option of utilizing either the contract's grievance procedure or an existing civil service procedure, but not both. Thus, the contractual grievance procedure does nothing to destroy or affect any existing civil service system.

In order to resolve possible conflicts between contractual grievance procedures and existing civil service systems, the legislature has further provided, in §447.601, that Part 2 of Chapter 447 takes primacy over civil service system laws or ordinances or rules and regulations. That declaration makes it clear that the legislature expressly intended a collectively bargained grievance procedure to be the preferable method for resolution of disputes concerning discharge and discipline, which are among the items most often addressed by civil service boards.

But to say that a grievance procedure is preferable to a civil service system does not mean that the parties are absolutely required to arbitrate discharge and demotion disputes if they agree otherwise. That is so simply because §447.309(5) specifically exempts the requirement that terms and conditions of employment found in merit and civil service system rules and

regulations be included in the contract; and §447.401 provides that the grievance procedure in effect when a union is certified "may be" the subject of bargaining.

Taken together, we suggest that complete harmony among all of these sections, and full accord with Article III, §14 of the Constitution and Chapter 166 of the Fla. Stats. is achieved by properly construing bargaining over which particular forum is to be contractually agreed on as a mechanism for resolving such disputes as a permissive subject of bargaining, as was done by the First District in its decision. This is so for the following reasons.

First, as outlined above, the Supreme Court of the United States has long ago declared that bargaining about a subject which is required by statute--as is the greivance-to-arbitration provision--constitutes a permissive subject of bargaining:

> "The statute requires the company to bargain with the certified representative of its employees. It is an evasion of that duty to insist that the certified agent not be a party to the collective bargaining agreement." Borg-Warner, supra, 356 U. S. at 350

Contrary to the City's contention, however, that does not mean that it is automatically required to arbitrate discharge and disciplinary disputes if the parties agree otherwise. Rather, the only limitation imposed is a restriction upon the City's ability to "hard bargain"--that is, it may still offer inducements for the employee organization to agree to resolution

of such disputes through an agreed-upon alternative forum, up to the point of impasse.

Accordingly, either party may bargain about the forum used to resolve such disputes without losing the right, at any time before agreement is reached or impasse is declared, to take a firm position that the matter must be arbitrated. NLRB v. Davison, 318 F. 2d 550, 53 LRRM 2462 (4th Cir. 1963); Kit Manufacturing Co., 150 NLRB 62, 58 LRRM 1140 (1965), enforced, 265 F. 2d 829, 62 LRRM 2856 (9th Cir. 1966). Any other result

> "would penalize a party to negotiations for endeavoring to reach agreement by consenting to bargaining upon issues as to which the Act does not require him to bargain." Kit Manufacturing Co., supra, 150 NLRB at 671

The effect of this distinction was extensively discussed by the First District Court of Appeals in Palm Beach Junior College v. United Faculty of Florida, 425 So. 2d 133 (Fla. App. 1 Dist. 1982).[3/]

The United States Supreme Court has emphatically stated, as a matter of national policy, that the contractual grievance

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3/ Indeed, this Court has held that with the exception of the right to strike, public employees have the same right of collective bargaining as is granted to private employees by §6 of the declaration of rights, Florida Constitution. Dade County Classroom Teachers Association, Inc. v. Legislature, 269 So. 2d 684 (Fla. 1972); City of Tallahassee v. PERC, 410 So. 2d 487 (Fla. 1982) and where a Florida Statute is patterned after a federal law on the same subject, the statute will be given the same construction in the Courts of Florida as the Federal Statute has been given in the Federal Courts, so long as such construction is consistent with the spirit and policy of the Florida Law. Pasco County School Board v. PERC, 353 So. 2d 108 (Fla. 1 Dist. 1977); International Brotherhood of Painters v. Anderson, 401 So. 2d 824 (Fla. 5th Dist. 1981)

procedure is at the very heart of collective bargaining; and that only by contractual resolution of all disputes arising under the contract between the parties could industrial piece and stability be maintained. United Steel Workers of America v. Warrior & Gulf Navagation Co., 363 U. S. 574, at 581 (1960). See also Textile Workers Union v. Lincoln Mills, 353 U. S. 448 (1957) and Rights Under a Labor Agreement Cox, 69 Harvard L. Rev. 609 (1956), cited with approval in Warrior & Gulf.

Indeed the Supreme Court, the Florida Legislature, and the Courts of Florida have universally recognized that the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Textile Workers Union v. Lincoln Mills, supra, 353 U. S. 448 at 455; §447.401. Logic and common sense dictates that a collective bargaining agreement is meaningless unless there exists a meaningful mechanism to enforce it.

Although it is true that under the National Labor Relations Act discharge and discipline provisions constitute mandatory subjects of bargaining upon which neither party is compelled to agree prior to impasse, nevertheless under Florida's statutory scheme the legislature expressly provided the grievance-to-arbitration provision as a tradeoff for the right to strike. Palm Beach Junior College, supra.

In attempting to balance the absence of the right to strike with the union's ability to negotiate, the legislature

defined both rights statutorily granted to employees, and rights and limitations granted to public employers. As seen above, the "proper cause" limitation upon an employer's power to discipline is one such limitation which is integral to that balance and is at the very heart of the grievance machinery which the parties are required to negotiate, just as the grievance machinery itself is at the very heart of collective bargaining.

But in providing for a grievance procedure, the legislature also carefully accommodated existing civil service systems, while at the same time providing for the primacy of the grievance procedure. §447.601.

There is another ingredient, however. §447.301(2) provides, in pertinent part that

> ". . . public employees shall have the right to be represented in the determination of grievances on all terms and conditions of their employment."

Chief among the problems inherent in any civil service system is that a union itself cannot lawfully represent bargaining unit employees before the civil service board, in accordance with this Court's decision in Florida Bar v. Moses, 387 So. 2d 412 (1980), which held that in the absence of enunciated standards, the presentation of matters before a civil service board by a non-lawyer constituted the unauthorized practice of law.

However, it is conceivable that, in return for other inducements, a union may agree that disputes concerning disciplinary matters are best resolved by a civil service board,

within a particular bargaining relationship. If the choice of forum is a permissive subject of bargaining, then the option remains preserved.

But, the construction urged by the City, i. e. that it has a right to force a union to agree to utilize an existing civil service system, would eliminate that choice; and it would create an unconstitutional interpretation of §447.309(5), §447.401 and §447.601 of the Statutes by abridging collective bargaining in violation of Article I §6 of the Constitution. City of Tallahassee,, supra. This potential conflict was addressed and expressly rejected by the First District in its opinion. 447 So. 2d 1130-1131.

For these reasons, OCPBA respectfully submits that not only is the decision of the First District in complete harmony with the Florida Constitution and all pertinent provisions of the statutes, but in addition the City's requested construction would result in an unconstitutional application of the law in violation of Article I §6.

CONCLUSION

The decision of the First District Court of Appeals under review should be affirmed.

DATED this 26th day of July, 1985.

BY: 
Thomas J. Blacek

Attorney for Respondent OCPBA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was to the Public Employees Relations Commission, Suite 100, Koger Executive Center, Turner Building, 2586 Seagate Drive, Tallahassee, FL 32301 and Frank C. Kruppenbacher, Esquire, SWANN & HADDOCK, P. O. Box 640, Orlando, FL 32802-0640 this 26th day of July, 1985.

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BY: Thomas J. Pilacek

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