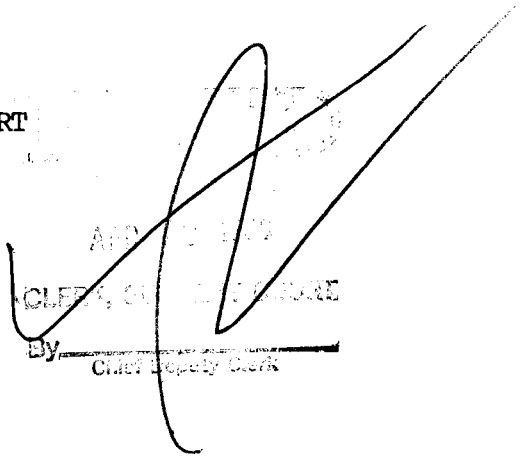
5-2-86

IN THE SUPREME COURT
STATE OF FLORIDA



HILLSBOROUGH COUNTY GOVERNMENTAL EMPLOYEES ASSOCIATION, INC., ET AL.,	:	
Petitioners,	:	
v.	:	Case No. 68,336
HILLSBOROUGH COUNTY AVIATION AUTHORITY, ET AL.,	:	
Respondents.	:	

INITIAL BRIEF OF PETITIONER
FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

The parties to this appeal shall be referred to in this Brief as follows:

Petitioner Hillsborough County Governmental Employees Association, Inc. "HCGEA"

Petitioner Hillsborough County Police Benevolent Association, Inc. "HCPBA"

Petitioner Florida Public Employees Relations Commission "the Commission" or "PERC"

Respondent Hillsborough County Aviation Authority "Aviation Authority"

Respondent Hillsborough County Civil Service Board "Civil Service Board"

The Aviation Authority and the Civil Service Board will be referred to collectively as "the Respondents"

All references to the Appendix will appear in brackets as [A. ___].

All references to the record will appear as (R. ___).

STATEMENT OF THE CASE

This case comes before this Court on appeal from a decision of the Second District Court of Appeal. The District Court of Appeal reversed the order of the Public Employees Relations Commission, in which the Commission had concluded that the Hillsborough County Aviation Authority committed an unfair labor practice by refusing to implement certain portions of its collective bargaining agreements with the Hillsborough County Police Benevolent Association (HCPBA) and the Hillsborough County Governmental Employees Association (HCGEA). Both organizations represent bargaining units of Aviation Authority employees. The Aviation Authority's refusal to implement was precipitated by the Hillsborough County Civil Service Board's refusal to amend its rules to conform to the portions of the agreements at issue. The District Court of Appeal certified the following question to this Court as one of great public importance:

> WHEN PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT WHICH HAS BEEN ENTERED INTO BY A PUBLIC EMPLOYER CONFLICT WITH CIVIL SERVICE RULES AND REGULATIONS AND THE GOVERNMENTAL BODY HAVING AMENDATORY POWER OVER THE CIVIL SERVICE RULES AND REGULATIONS REFUSES TO AMEND THOSE RULES AND REGULATIONS IN SUCH A MANNER AS TO ELIMINATE THE CONFLICT, DOES SECTION 447.309(3) APPLY TO CIVIL SERVICE RULES AND REGULATIONS AND THEREFORE GOVERN THE EFFECTIVENESS OF THE COLLECTIVE BARGAINING AGREEMENT?

The litigation leading directly to this appeal began on October 12, 1984, when the HCPBA and HCGEA filed two unfair labor practice charges alleging that the Aviation Authority's failure to fully implement all provisions in their collective bargaining agreements constituted a violation of Section 447.501 (1)(a) and (c), Florida Statutes (1985). On October 19 the charges were consolidated for hearing. On November 1, 1984, the Aviation Authority filed its answer and affirmative defenses. The Aviation Authority admitted the

material facts alleged in the charge, denied that its conduct constituted an unfair labor practice, and pled certain affirmative defenses, including estoppel by judgment.

Upon motion filed by the parties, the Commission cancelled the scheduled evidentiary hearing and proceeded to adjudicate the charges based upon the facts stipulated by the parties. On February 15, 1985, the Commission issued a proposed order in which it concluded that the Aviation Authority's refusal to implement constituted a violation of Section 447.501(1)(a) and (c). The Aviation Authority filed exceptions to the proposed order which the Commission rejected in adopting the proposed order as its final order on March 25, 1985.

After the Aviation Authority filed a timely appeal to the Second District Court of Appeal, the parties filed a joint suggestion of certification requesting that the District Court of Appeal certify the appeal to the Florida Supreme Court pursuant to Florida Rule of Appellate Procedure 9.125. The District Court of Appeal granted the joint suggestion on April 30, 1985. On May 10, this Court ruled that it was without jurisdiction to accept review since Article V, Section 3(b)(5) of the Florida Constitution restricts review of certified appeals to judgments of trial courts. On May 17, the Hillsborough County Civil Service Board filed a motion to intervene with the Second District Court of Appeal which was granted by order of the court on June 5.

On January 22, 1986, the Second District Court of Appeal rendered its decision. On February 17, 1986, the HCGEA and HCPBA filed a timely petition for review based upon the certified question.

STATEMENT OF THE FACTS

The parties stipulated to the following facts before the Commission: (R. 38-46)

1. On March 13, 1975, Pinellas County PBA filed a representation petition with PERC (Case No. 8H-RC-756-2079) pursuant to Section 447.009(2), Florida Statutes, Ch. 74-100, Laws of Florida (1974) and PERC Rules 8H-3.02-.04, Fla. Admin. Code, seeking to represent certain employees employed by the Hillsborough County Aviation Authority. On June 16, 1975, the parties (PBA and Authority) executed a consent election agreement stipulating that the appropriate employee unit for collective bargaining purposes, was one including all sergeants and patrolmen and excluding all other sworn personnel. The consent election agreement also stipulated to the details of conducting a secret ballot election among the employees in the appropriate unit and the agreement was subsequently approved by the Chairman of PERC.

Pursuant to the consent election agreement and in accordance with PERC 8H-3.28, Fla. Admin. Code, a secret ballot election among eligible employees employed in the appropriate unit was held on July 15, 1975. The results of this election, which were certified on July 16, 1975, by the neutral party conducting the election, indicated that a majority of the unit employees casting valid ballots had designated the Pinellas County PBA as their exclusive agent for purposes of collective bargaining. On July 31, 1975, PERC certified the PBA as the exclusive bargaining agent for all sergeants and patrolmen employed as sworn personnel by the Authority, whereupon the Authority became subject to a statutory duty to bargain collectively in good faith with the PBA regarding wages, hours, and other terms and conditions of employment of the employees in the certified unit pursuant to Section 447.309(1), Florida Statutes.

2. On August 7, 1978, the Pinellas County PBA disclaimed interest in representing the above-mentioned certified unit. Simultaneously, by agreement of the parties, the Hillsborough County PBA, Inc./Florida PBA, pursuant to Section 447.301(1), Florida Statutes (1977), and Fla. Admin. Code Rule 8H-2.05 petitioned PERC for certification and on November 14, 1978, the Commission, pursuant to Section 447.207(b), Florida Statutes (1977), granted certification.

3. Since 1975, the Pinellas County PBA or Hillsborough County PBA and the Aviation Authority have been signatories to a series of collective bargaining agreements. A copy of the most recent collective bargaining agreement is attached hereto as exhibit A. [Exhibit A in record at R-83-116]

4. The Aviation Authority is a public agency created by Chapter 23339, Laws of Florida, Acts of 1945 a Special Act of the Legislature. The Authority is funded by its own revenues. It has the authority to raise revenues, enter into contracts, appropriate funds and generally administer the public aviation facilities in Hillsborough County, Florida.

The Authority consists of five members. One member is the Mayor of the City of Tampa. Another member is a member of the Board of County Commissioners of Hillsborough County and that member is selected by the County Commissioners themselves. The three remaining members are appointed by the Governor. It is not a subdivision of nor is it responsible to Hillsborough County or the Hillsborough County Commission.

5. The Hillsborough County Civil Service Board was created subsequent to the Charter of the Authority under special laws of Florida Chapter 69-1121, 70-1003 and 71-675. The authority for these special acts is set forth in Article 3, Section 14 of the Florida Constitution. Said special acts created and defined the statutory authority of the Civil Service Board. Specifically, the Civil Service Board was given the exclusive power to establish rules and

regulations dealing with rates of pay, hours of work, and other working conditions for employees in the 'classified service.' Its members are appointed by the Governor and by Special Act it was given rulemaking authority over HCAA employees.

6. Pursuant to said authority, the Civil Service Board has adopted a number of rules and regulations covering terms and conditions of employment. A copy of said rules and regulations is attached hereto as Exhibit B. [Exhibit B in record at R-47-82]

7. The Hillsborough County Police Benevolent Association, Inc., is an employee organization within the meaning of Section 447.203(11), Florida Statutes, and the certified bargaining agent for certain law enforcement personnel employed by the Hillsborough County Aviation Authority as set forth in PERC Certification No. 433, as amended.

8. The Hillsborough County Aviation Authority is a public employer within the meaning of Section 447.203(2), Florida Statutes.

9. In July, 1984, the Hillsborough County PBA and the Aviation Authority entered into collective bargaining negotiations.

10. In August, 1984, the Hillsborough County PBA and the Aviation Authority completed collective bargaining negotiations. New benefits secured for bargaining unit members through the bargaining process included:

a. Bumping Rights - Article XIV, Section 2 (Seniority and Layoff)

b. 3 Personal Holidays Designated by Employee - Article XV, Section 2 (Holidays)

c. Additional Hours of Funeral Leave - Article XV, Section 9 (Funeral Leave)

d. $50 Increase Clothing Allowance - Article XV, Section 14 (Uniform Cleaning Allowance)

11. In late August, 1984, the bargaining unit employees represented by the Hillsborough County PBA ratified the collective bargaining agreement.

12. On September 6, 1984, the Aviation Authority ratified the collective bargaining agreement reached with the Hillsborough County PBA.

13. On September 26, 1984, pursuant to Section 447.309(3), Florida Statutes, the Aviation Authority presented to the Hillsborough County Civil Service Board a request that it amend its rules and regulations in order to eliminate conflicts between those rules and regulations and the collective bargaining agreement reached with the Hillsborough County PBA. Those areas sought to be amended were holidays, funeral leave, seniority and layoffs. The proposed amendments to the civil service rules were consistent with the contractual provisions described in Paragraph 10(a), (b) and (c).

14. On September 26, 1984, the Hillsborough County Civil Service Board refused to amend its rules and regulations in order to eliminate conflicts between those rules and regulations and the collective bargaining agreement reached between the Hillsborough County PBA and the Aviation Authority.

15. On October 2, 1984, the Aviation Authority notified the Hillsborough County PBA that based upon the action of the Hillsborough County Civil Service Board, the Aviation Authority refused and would not implement those contractual provisions described in Paragraph 10(a), (b) and (c).

16. The Hillsborough County Governmental Employees Association, Inc. (Hillsborough County GEA) is an employee organization within the meaning of Section 447.203(11), Florida Statutes, and the certified bargaining agent for certain non-clerical and non-administrative personnel employed by the Hillsborough County Aviation Authority as set forth in PERC Certification No. 511.

17. In July, 1984, the Hillsborough County GEA and the Aviation Authority entered into collective bargaining negotiations.

18. In August, 1984, the Hillsborough County GEA and the Aviation Authority completed collective bargaining negotiations. New benefits secured for bargaining unit members through the bargaining process included:

a. Bumping Rights - Article XIV, Section 3 (Seniority and Layoff)

b. 3 Personal Holidays Designated by Employee - Article XV, Section 2 (Holidays)

c. Additional Hours of Funeral Leave - Article XV, Section 8 (Funeral Leave)

d. Clothing Allowance for Tour Guides - Article XII, Section 1 (Uniform Cleaning Allowance)

19. In late August, 1984, the bargaining unit employees, represented by the Hillsborough County GEA, ratified the collective bargaining agreement.

20. On September 6, 1984, the Aviation Authority ratified the collective bargaining agreement reached with the Hillsborough County GEA.

21. On September 26, 1984, pursuant to Section 447.309(3), Florida Statutes, the Aviation Authority presented to the Hillsborough County Civil Service Board, a request to amend its rules and regulations in order to eliminate conflicts between those rules and regulations and the collective bargaining agreement reached with the Hillsborough County GEA. Those areas sought to be amended were holidays, funeral leave, seniority and layoffs. The proposed amendments to the Civil Service rules were consistent with the contractual provisions described in Paragraph 18(a), (b) and (c).

22. On September 26, 1984, the Hillsborough County Civil Service Board refused to amend its rules and regulations in order to eliminate conflicts between those rules and regulations and the collective bargaining agreement reached between the Hillsborough County GEA and the Aviation Authority.

23. On October 2, 1984, the Aviation Authority notified the Hillsborough County GEA that based upon the action of the Hillsborough County Civil Service Board, the Aviation Authority refused and would not implement those contractual provisions described in Paragraph 18(a), (b) and (c).

SUMMARY OF ARGUMENT

The question certified by the Second District Court of Appeal should be answered in the negative. Section 447.309(3), Florida Statutes (1985), does not apply to civil service boards. Rather, Section 447.601 provides a clear indication of the Legislature's intention, that with respect to the determination of wages, hours, and terms and conditions of employment of employees who choose union representation, the collective bargaining process takes precedence over a civil service system. A contrary construction of Section 447.309 (3) would give civil service boards the unbridled discretion to veto numerous provisions in collective bargaining agreements that have been negotiated by public employers and unions that represent public employees. Such discretion may amount to an abridgment of the public employees' collective bargaining rights guaranteed by Article I, Section 6, of the Florida Constitution, thus calling into question the constitutionality of Section 447.309(3). To avoid this constitutional issue, the Court is urged to adopt the Commission's construction of Section 447.309(3) as affirmed by the First District Court of Appeal. Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 7 FPER ¶ 12395 (Fla. PERC 1982), aff'd, 426 So.2d 1017 (Fla. 1st DCA 1983).

The Commission also requests that this Court reverse the Second District Court of Appeal's holding concerning the issue of whether the Aviation Authority committed an unfair labor practice by refusing to implement portions of its collective bargaining agreements with the HCPBA and HCGEA. Contrary to the District Court of Appeal's decision, it was not necessary for the Commission to find that the Aviation Authority's failure to implement was the result of bad faith. A violation of the duty to bargain may be found under certain

circumstances even in the absence of bad faith. Finding no violation in this case would preclude the Commission from utilizing its remedial authority to order implementation of those provisions of the Aviation Authority's collective bargaining agreements at issue.

ARGUMENT I

SECTION 447.309(3) DOES NOT AUTHORIZE A CIVIL SERVICE BOARD TO PREVENT IMPLEMENTATION OF THOSE PORTIONS OF A COLLECTIVE BARGAINING AGREEMENT THAT CONFLICT WITH THE BOARD'S RULES AND REGULATIONS.

The question certified by the Second District Court of Appeal must be answered in the negative. The relevant constitutional and statutory provisions, case law, and policy considerations demonstrate that the Legislature never intended to grant civil service boards the unbridled discretion to prevent the implementation of portions of a collective bargaining agreement entered into by a public employer and a union certified to represent public employees. To construe Section 447.309(3) as granting such power to the Hillsborough County Civil Service Board would possibly render not only the statute unconstitutional but also the Act creating the civil service board as well. The conflict between the rules of the Hillsborough County Civil Service Board and the collective bargaining agreement in this case is only symptomatic of a much broader and basic conflict between the Hillsborough County Civil Service Act, Chapter 82-301, Laws of Florida,[1] and Chapter 447, Part II, which must be resolved in favor of the latter to the extent of the conflict.

A. Section 447.601

Any analysis of legislative intent concerning the relationship between civil service and collective bargaining must begin with Section 447.601, Florida Statutes (1985), which provides:

1/ The Hillsborough County Civil Service Board was initially created by Chapter 69-1121, Laws of Florida. After various amendments, the entire statute was reenacted in Chapter 82-301, Laws of Florida, which was in effect at the time of this litigation. The comprehensive statute has now been reenacted again in Chapter 85-424, Laws of Florida, which took effect October 1, 1985. Generally, for purposes of this appeal there are no significant differences among these three statutes.

> 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]

Consequently, Chapter 447, Part II, was not enacted as a wholesale replacement for civil service systems. However, if a conflict arose between a civil service statute, ordinance, or rule and Chapter 447, Part II, the latter would prevail. See City of Casselberry v. Orange County PBA, 482 So.2d 336, 340 (Fla. 1986).

The manner in which a civil service system, similar to Hillsborough County's, and Chapter 447, Part II, may come in conflict was exhaustively analyzed by the Commission in Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 7 FPER ¶ 12395 (Fla. PERC 1981) [Appendix III], aff'd, 426 So.2d 1017 (Fla. 1st DCA 1983) [Appendix IV]. Like its counterpart in Hillsborough County, the Escambia County Civil Service Board was granted, by special act, pervasive authority to determine the wages, hours, and terms and conditions of employment for employees of the Escambia County School Board, in addition to employees of other public employers in Escambia County. Ch. 79-453, Laws of Fla. The School Board of Escambia County and the union certified to represent a segment of the School Board's employees ratified a collective bargaining agreement which contained a

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2/ The reference to Section 447.301(4) is not clear. This provision states that nothing in Chapter 447, Part II shall prevent a public employee from presenting his or her own grievance to the public employer for adjustment.

pay plan for bargaining unit employees. The School Board refused to implement the pay plan after the Escambia County Civil Service Board had refused to approve it. The negotiated pay plan differed from the plan that the Civil Service Board applied to all other employees it regulated. After the certified union filed an unfair labor practice charge, alleging that the School Board's failure to implement the pay plan violated Section 447.501(1)(a) and (c), the Escambia County Civil Service Board obtained a circuit court injunction prohibiting implementation by the School Board. 7 FPER ¶ 12395 at 876-79.

The Commission began its analysis by focusing upon Chapter 447, Part II. The Act is a comprehensive statutory scheme designed to implement the right of public employees to bargain collectively found in Article I, Section 6 of the Florida Constitution. § 447.201, Fla. Stat. (1985). One of its primary purposes is "to promote harmonious and cooperative relationships between government and its employees." Id. To carry out this purpose, Section 447.301 (2), Florida Statutes (1985), in pertinent part, sets out the following broad guarantees:

> Public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, with the public employer in the determination of the terms and conditions of their employment. . . .

Section 447.501(1)(c) enforces the obligation to bargain by prohibiting public employers from:

> Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.

Collective bargaining is defined in Section 447.203(14), Florida Statutes (1985), to include the execution of a written agreement concerning the negotiated terms and conditions of employment. In this respect, Chapter 447,

Part II, places the same obligation to bargain on a public employer in Florida as is placed upon an employer in the private sector. See 29 U.S.C. § 158(b)(5) and (d). The Commission summarized the operation and effect of Chapter 447, Part II as follows:

> The ultimate effect of Part II of Chapter 447 is the creation of a mandatory procedure for the determination of the wages, hours, and terms and conditions of employment of public employees who are represented by a certified bargaining representative. Prior to the selection of a bargaining representative a public employer may unilaterally - and whenever it wishes - determine and change the wages, hours, and terms and conditions of employment of its employees. But once the bargaining representative has been selected by the employees and certified by the Commission, the public employer's unilateral power to determine and change the wages, hours and terms and conditions of employment in the bargaining unit comes to an abrupt halt . . . In other words, Part II of Chapter 447 purports to establish the exclusive method for determining or changing wages, hours and terms and conditions of employment of public employees who are represented by a certified bargaining representative.

7 FPER ¶ 12395 at 867-68 (footnote with citations omitted). Thus, Chapter 447, Part II, requires public employers to bargain collectively and prohibits changes in wages, hours, and terms and conditions of employment without negotiating such changes with the certified bargaining agent.[3]

In contrast to Chapter 447, Part II, the Escambia County Civil Service Act prescribed a completely different method for determining the wages, hours

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3/ The Commission and the Florida appellate courts have consistently followed the private sector rule that after a union is certified to represent a unit of employees, the employer must negotiate all wages, hours and terms and conditions of employment. It is an unfair labor practice to make such changes without following the procedures in Chapter 447, Part II. E.g., Florida School for the Deaf and Blind v. Florida School for the Deaf and Blind Teachers United, 11 F.L.W. 300 (Fla. 1st DCA Jan. 30 1986); City of Ocala v. Marion County PBA, 392 So.2d 26 (Fla. 1st DCA 1980); School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979). The only exceptions to this rule occur when legislative body action resolves an impasse pursuant to Section 447.403, the certified union waives the right to bargain, or exigent circumstances exist.

and terms and conditions of employment for employees within its jurisdiction. For example, the pay plan for all civil service employees was determined by an annual joint meeting of the Civil Service Board, the School Board and the Board of County Commissioners. Ch. 79-453, § 2, Laws of Fla. The Escambia County Civil Service Board was also authorized to promulgate rules to administer the pay plan and to regulate a broad spectrum of terms and conditions of employment. Ch. 79-453, §§ 2.4, 9, Laws of Fla.

To resolve the conflict between the Escambia County Civil Service Act and Chapter 447, Part II, the Commission relied upon Section 447.601. Concerning this clear statement of legislative intent and the constitutional right of public employees to engage in collective bargaining guaranteed by Article I, Section 6, the Commission held that Chapter 447, Part II prevailed. 7 FPER ¶ 12395 at 871-72. Thus, those portions of the civil service act that concerned the determination of wages, hours, and terms and conditions of employment would apply to all employees within its coverage except those that chose to have these subjects determined by the collective bargaining process. The Commission reasoned that a contrary result might well have rendered the civil service law unconstitutional as a result of its abridgement of collective bargaining rights guaranteed by Article I, Section 6. 7 FPER ¶ 12395 at 871. The Commission applied the well-settled rule of statutory construction that a statute should be construed in such a manner as to preserve its constitutionality. See, e.g., Corn v. State, 332 So.2d 4, 8 (Fla. 1976). However, in light of the outstanding injunction prohibiting the School Board from implementing the negotiated pay plan, the Commission found no unfair labor practice violation. 7 FPER ¶ 12395 at 872.

On appeal, the First District Court of Appeal specifically affirmed the Commission's conclusion that a conflict existed between the Escambia County

Civil Service Act and Part II of Chapter 447, and that, in light of Section 447.601, the latter statute prevailed. Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 426 So.2d 1017 (Fla. 1st DCA 1983). The Court also affirmed the finding of no unfair labor practice because of the pre-existing circuit court's injunction. 426 So.2d at 1019.[4]

Similarly, in this case the Commission found an irreconcilable conflict between the manner in which wages, hours, and terms and conditions of employment are determined by the Hillsborough County Civil Service Act and Chapter 447, Part II. Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, No. CA-84-071, slip op. at 18 (Fla. PERC March 25, 1985) [Appendix II]. The Hillsborough County Civil Service Board possesses jurisdiction over all classified employees of virtually every governmental entity in Hillsborough County that has county-wide authority, including the County School Board, the County, the Aviation Authority, the Port Authority, the Expressway Authority, and all other offices or agencies within the County not specifically excluded. Ch. 82-301, § 6(2), Laws of Fla. Further, any municipality within Hillsborough County may choose to become subject to the provisions of the Civil Service Act. Ch. 82-301, § 4, Laws of Fla.

The pervasive authority possessed by the Civil Service Board in the determination of wages, hours, and terms and conditions of employment is set forth in Section 10 of the Act, which provides in pertinent part:

4/ After the First District Court of Appeal issued its decision, the Circuit Court dissolved its injunction, thereby permitting implementation of the negotiated pay plan. School Board of Escambia County v. Taylor, No. 78-3006 (Fla. 1st Cir. Ct. May 9, 1983).

> From time to time the Board may adopt a uniform personnel program, with rules which shall be uniformly administered and applied including a classification and pay plan, on-the-job training program, examinations, appointments, suspensions, dismissals, vacations, sick leaves, resignations, reinstatements, promotions, transfers and all other required personnel policies and plans.

Ch. 82-301, § 10, Laws of Fla. (emphasis added). The Hillsborough County Civil Service Board has exercised its authority by promulgating extensive personnel rules that uniformly apply to all employees within the Civil Service Board's jurisdiction. (R. 117-194) The subjects covered by the rules include compensation, hours of work, attendance, leaves of absence, separation from employment, and evaluations.

The conflict between the Hillsborough County Civil Service Act and Part II of Chapter 447 is quite apparent. Part II of Chapter 447 contemplates that each public employer in Hillsborough County and the union certified to represent the public employees of that employer will establish the employees' wages, hours, and terms and conditions of employment through collective bargaining. In contrast, the Hillsborough County Civil Service Act provides for uniform wages, hours, and terms and conditions of employment for virtually all employees of public employers that come within the Civil Service Board's jurisdiction. Moreover, the ultimate determination of these subjects is left to the Civil Service Board rather than the negotiating process.

The concept of county-wide uniformity is particularly antithetical to collective bargaining. It prohibits the different public employers within the County from engaging in meaningful collective bargaining with the different unions certified to represent their employees. If a public employer and a union agreed on a subject covered by the Civil Service Board's rules and the Board was willing to amend its rules to conform to the agreement, all other

public employers under the Board's jurisdiction and the unions certified to represent their employees would in effect be required to follow the agreement reached on the subject. They would be prohibited from implementing a collective bargaining agreement which differed from the rule that the Civil Service Board had conformed to the agreement reached by other parties.

For example, if the Civil Service Board had conformed its rules to the agreements reached by the Aviation Authority with the HCPBA and HCGEA on personal holidays, all other unions certified to represent employees within the Civil Service Board's jurisdiction would be hamstrung in their negotiations on this issue. While they could bargain and reach agreements that differed on personal holidays from the agreements reached by the Aviation Authority with the HCPBA and HCGEA, the agreements could not be implemented. Consequently, the concept of civil service uniformity among multiple employers and unions cannot be reconciled with the underlying principle behind Part II of Chapter 447, that each public employer and employee organization will be free to engage in meaningful collective bargaining resulting in an agreement that may provide for unique terms and conditions of employment.

In this instance, Chapter 447, Part II, and the Hillsborough County Civil Service Act do not dovetail, but rather provide overlapping and inconsistent procedures for the determination of wages, hours, and terms and conditions of employment. Consequently, Section 447.601 mandates that the collective bargaining rights of represented employees as set forth in Part II of Chapter 447 take precedence over the Hillsborough County Civil Service Act.[5]

5/ The Michigan Supreme Court has ruled that the Michigan public employee collective bargaining law takes precedence over other conflicting legislation including civil service acts. Local 1383, I.A.F.F. v. City of Warren, 311 N.W.2d 702 (Mich. 1980).

B. Section 447.309(3)

The Respondents will rely heavily on Section 447.309(3) as construed by the Second District Court of Appeal in Pinellas County PBA v. Hillsborough County Aviation Authority, 347 So.2d 801 (Fla. 2d DCA 1977). With all due respect, the District Court of Appeal's construction of Section 447.309(3) in that case is in error, and places the statute in jeopardy of being declared unconstitutional in light of this Court's decisions in City of Tallahassee v. PERC, 410 So.2d 47 (Fla. 1982), and Dade County Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969). Rather, the First District Court of Appeal correctly adopted the Commission's construction of the statute in Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 426 So.2d 1017 (Fla. 1st DCA 1983). It is this construction which the Court should approve in this case.

Section 447.309(3) provides:

> If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power and a proposed amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or adopted and becomes effective, the conflicting provision of the collective bargaining agreement shall not become effective.

In Pinellas County PBA, the Court construed this provision to give the Hillsborough County Civil Service Board the unbridled discretion to determine whether a public employer under its jurisdiction may implement any provision in a collective bargaining agreement that conflicts with the Civil Service Board's rules. If the Civil Service Board refused to amend its rules to conform to the the agreement, the conflicting provision could not be implemented and was in effect rendered void. 347 So.2d at 803.

The Court specifically refrained from determining whether its construction of Section 447.309(3) may render the statute unconstitutional:

> We are not here asked to, nor do we, pass upon the constitutionality of the aforementioned subsection 447.309(3) insofar as it may confer so much unguided discretion on a Civil Service Board as effectively to frustrate the constitutional right of public employees. . .

347 So.2d at 803. However, the Court did observe:

> A public employee's constitutional right to bargain collectively is not and cannot be coextensive with an employee's right to so bargain in the private sector.

Id. In light of these statements and the fact that the Court omitted any consideration of Section 447.601 in its analysis, its construction of Section 447.309(3) is suspect.

The First District Court of Appeal construed Section 447.309(3) in a completely different manner in Escambia County School Board. There, the Court adopted verbatim the following rationale expressed by the Commission:

> The Circuit Court's conclusion that the foregoing language [Section 447.309(3)] resolves any conflict between the subject collective bargaining agreement and the Civil Service Act and rules and regulations is facially very appealing, but it overlooks the underlying reality that the school board and its represented employees can never enter into a collective bargaining agreement which contains any provisions of which the Civil Service Board disapproves. It is our view that Section 447.309(3) was . . . never intended to operate as a wholesale impediment to collective bargaining, especially bargaining about such basic matters as wages and hours. This interpretation of Section 447.309(3) is further supported when it is read in pari materia with Section 447.601, Florida Statutes (1979). It seems clear from a reading of both statutes that Section 447.309(3) must be read as contemplating conflicts between collective bargaining agreements and laws and regulations other than laws and regulations relating to civil service systems.

426 So.2d at 1019, quoting Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 7 FPER ¶ 12395 at 872-73 (Fla. PERC 1981). The Court reasoned that a contrary construction would

"raise grave constitutional doubts" and that Section 447.309(3) should be construed in such a manner "which renders it furthest from constitutional infirmity." 426 So.2d at 1019. In the decision under review, the Second District Court of Appeal appears to recognize the constitutional dilemma created by its construction of Section 447.309(3), by stating:

> Any conclusion that the Pinellas interpretation of section 447.309(3), which provides that an affirmative answer to the foregoing [certified] question, is correct would seem to bring into focus the doubts expressed in Escambia as to the constitutionality of 447.309(3) under that interpretation.

Hillsborough County Aviation Authority v. Hillsborough County Governmental Employees Association, Inc., No. 85-867, slip op. at 11 (Fla. 2nd DCA Jan. 22, 1986) (Appendix I).

The First District Court of Appeal's concern for the constitutional validity of Section 447.309(3) expressed in the Escambia County School Board case was well taken, particularly in light of City of Tallahassee v. PERC, 410 So.2d 47 (Fla. 1982). In City of Tallahassee, this Court held that portions of Section 447.301(2) and 447.309(5), Florida Statutes (1981), were unconstitutional to the extent that the statutes prohibited bargaining over the subject of retirement. 410 So.2d at 490. The Court repeated its holding, first announced in Dade County Teachers Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969), that with the exception of the right to strike, public employees in Florida have the same rights to collectively bargain as employees in the private sector. 410 So.2d at 490. Thus, while the Legislature may properly regulate the right to bargain by statutes implementing Article I, Section 6, it may not abridge that right. Id.

In this case, to construe Section 447.309(3) as the Second District Court of Appeal did in Pinellas County PBA may in fact create an abridgement of the

right to bargain. If the statute were applied to civil service boards, such boards would have the ability to veto a wide variety of provisions in collective bargaining agreements on such critical matters as wages, hours, and other working conditions. In the private sector there is no such third party entity which possesses such pervasive control over what an employer and a union may implement in a collective bargaining agreement. However, if this Court adopts the First District Court of Appeal's construction of Section 447.309(3), then a determination as to the constitutionality of the statute will be avoided.

The Respondents will no doubt take the myopic view that Section 447.309 (3) deals only with implementation of a collective bargaining agreement and therefore does not effect the ability of the parties to bargain. Obviously, the entire bargaining process becomes a sham if the parties are unable to implement their agreement. Further, the civil service board's ability to prevent implementation of an agreement arrived at through negotiations would clearly be contrary to the avowed purpose of Chapter 447, Part II, which is "to promote harmonious and cooperative relationships between government and its employees."

It must be kept in mind that this is not a case where an employer has refused to agree to a union proposal, which is within its right to do,[6] or where implementation is rendered impossible by lack of appropriated funds. § 447.309(2), Fla. Stat. (1985). Rather, the Aviation Authority in this case stands ready and able to implement the provisions in its collective bargaining agreements with the HCPBA and the HCGEA. It is only the Civil Service Board's

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6/ Section 447.203(14) provides that neither party shall be compelled to agree to a proposal or make a concession unless otherwise provided in the Act.

death grip upon the parties' agreements that prevents their full implementation. Moreover, the Legislature certainly considered implementation of a collective bargaining agreement to be fundamental to the bargaining process by enacting Section 447.401, Florida Statutes (1985). This statute requires every collective bargaining agreement to contain a grievance procedure culminating in a final and binding decision by an impartial neutral (arbitration) to resolve disputes over the interpretation or application of a collective bargaining agreement. Thus, whether a restriction concerns the actual negotiation of an agreement or the implementation of an agreement after negotiations are completed is of no consequence in determining if the restriction abridges the constitutionally protected right to bargain.

Unlike City of Tallahassee, where the statutes in question could not be construed in a constitutional fashion, Section 447.309(3) should be construed to avoid any conflict with the right to bargain guaranteed by Article I, Section 6.

C. Article III, Section 14, Florida Constitution

The Respondents have previously asserted that the Commission failed to properly consider Article III, Section 14 of the 1968 Florida Constitution, which 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.

With respect to local government, this Court has construed Article III, Section 14 as permitting the Legislature to establish civil service systems by general or special act. City of Casselberry v. Orange County PBA, 482 So.2d

336 (Fla. 1986); Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979). However, this does not mean that the people of Florida intended to grant to the Legislature the power to enact a law that takes away rights guaranteed by other portions of the Constitution, in this case Article I, Section 6.

The relationship between these two constitutional provisions and the related implementing legislation was analyzed by the Commission in its Escambia County School Board decision, as follows:

> At least with respect to county, district and municipal employees, any conflict or collision between the permission in Article III, Section 14 and the guarantee in Article I, Section 6, must be resolved - on a purely logical basis - in favor of the latter. At the risk of oversimplifying the matter, there can be no doubt that as between a "guarantee" and a "maybe," the former takes precedence over the latter. And it follows naturally that in the construction of statutes implementing these constitutional provisions the same logic would apply. Thus in the event of a conflict between a statute adopted to implement a constitutional guarantee and a statute adopted in the exercise of permissive constitutional power, the former would take precedence over the latter.

7 FPER ¶ 12395 at 870, aff'd, 426 So.2d 1017 (Fla. 1st DCA 1983). Further, the Legislature has eradicated any doubt as to which statute enacted to implement these constitutional provisions would prevail in the event of a conflict by passage of Section 447.601. Thus, Chapter 447, Part II, implementing Article I, Section 6, takes precedences over conflicting legislation implementing Article III, Section 14.

This order of priority is also consistent with the intent behind a local civil service system. The primary focus of a civil service system is to provide job security for employees. Blackburn v. Brorein, 70 So.2d 293 (Fla. 1954); City of Clearwater v. Garretson, 355 So.2d 1248 (Fla. 2d DCA 1978). In Blackburn, this Court stated:

> Civil Service laws for public employees have been widely approved and such laws have served a most useful purpose in giving to such employees security and protection.

70 So.2d at 299. Thus, civil service is a benefit that inures to public employees and not public employers or civil service boards. When a group of public employees chooses collective bargaining as a means to determine their wages, hours, and terms and conditions of employment rather than a civil service board, their choice should be respected. Indeed, the Legislature has already indicated that public employees should be allowed to choose collective bargaining or civil service by its enactment of Section 447.401, Florida Statutes (1985). This statute provides that public employees may file a grievance through a contractual grievance procedure or a civil service appeal, but not both. Consequently, in this instance there is no conflict between civil service and collective bargaining. See City of Casselberry v. Orange County PBA, 482 So.2d 336, 340 (Fla. 1986). Allowing employees to file civil service appeals preserves the purpose behind a civil service system. It is only when a civil service system usurps the authority for determining wages, hours, and terms and conditions of employment, contrary to the procedure set forth in Part II of Chapter 447, that a conflict arises which must be resolved pursuant to Section 447.601.

In light of the foregoing, resolving the conflict in this case in favor of collective bargaining pursuant to Chapter 447, Part II, does not violate Article III, Section 14 of the Florida Constitution.

In summary, the Commission's decision in this case does not emasculate the authority of the Hillsborough County Civil Service Board. The Board will still retain the authority to apply its rules to employees who were not covered by Chapter 447, Part II; to employees who are covered but choose not to exercise their right to union representation; and to subjects that are not mandatorily negotiable, i.e., do not constitute wages, hours, and terms and

conditions of employment. However, when a conflict arises as to the determination of the wages, hours, and terms and conditions of employment of employees who have voted in favor of collective bargaining, the Hillsborough County Civil Service Act must give way to Chapter 447, Part II.[7]

The Commission's construction of Section 447.309(3), when read in pari materia with Section 447.601 and Article I, Section 6, of the Florida Constitution, cannot be characterized as clearly erroneous. Since the Commission is the agency charged with administratively interpreting Chapter 447, Part II, the Court should defer to the Commission's interpretation of Section 447.309 (3) and 447.601. See, e.g., PERC v. Dade County PBA, 467 So.2d 987 (Fla. 1985); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973). Accordingly, the certified question should be answered in the negative: Section 447.309(3) does not prevent implementation of provisions in a collective bargaining agreement that conflict with the rules of a civil service board.

7/ Indeed, the Commission's solution to the conflict is much less radical than proposed by the National Civil Service League in its 1971 Model Public Personnel Administration Law. Among the features of the Model Law were abolishment of the civil service commission and greater emphasis on collective bargaining for public employees. Couturier, Civil Service League Revises Labor Policy, 2 LRMS No. 4 (April 1971) [Appendix V].

ARGUMENT II

THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING THE COMMISSION'S CONCLUSION THAT THE AVIATION AUTHORITY'S REFUSAL TO IMPLEMENT A PORTION OF ITS COLLECTIVE BARGAINING AGREEMENTS WITH THE HCPBA AND HCGEA CONSTITUTED UNFAIR LABOR PRACTICES.

In the decision under review, the Second District Court of Appeal ruled that the Commission was precluded from finding an unfair labor practice based upon the Aviation Authority's refusal to implement certain portions of its collective bargaining agreements with the HCPBA and HCGEA. The Court reasoned that there was no showing indicating the Aviation Authority's refusal was the result of bad faith. On the contrary, the Court noted that the Aviation Authority was following the Court's earlier decision in Pinellas County PBA v. Hillsborough County Aviation Authority, 347 So.2d 801 (Fla. 2d DCA 1977). Hillsborough Aviation Authority v. Hillsborough County Governmental Employees Association, No. 85-867, slip op. at 6 (Fla. 2d DCA Jan. 22, 1986) [Appendix I].

The District Court of Appeal decision is in error on this issue primarily because it is based upon the faulty premise that bad faith is an indispensable element in a violation of Section 447.501(1)(c), Florida Statutes (1985). The Commission will readily concede that the Aviation Authority was not acting in bad faith when it refused to fully implement the collective bargaining agreements at issue. In fact, nowhere in the Commission's order is there any reference to bad faith. The Commission even stated it was sympathetic to the Aviation Authority's dilemma, and tempered its remedy accordingly. Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority, No. CA-84-071, slip op. at 20-21 (Fla. PERC March 25, 1985) [Appendix II]; see also Escambia County Sheriff's Department v. Florida PBA,

376 So.2d 435 (Fla. 1st DCA 1979) (employer guilty of technical refusal to bargain, no requirement to post notice). Nevertheless, the absence of bad faith on the part of the Aviation Authority does not preclude finding of a violation of Section 447.501(1)(a), and (c).

This statutory provision prohibits public employers from:

> Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.

Bad faith bargaining is only one of the three acts that will constitute a violation of the duty to bargain. Therefore, it is not mandatory that the Commission find bad faith in order to conclude that a public employer has committed a violation of Section 447.501(1)(c).

In the private sector bad faith is likewise not an indispensable element in establishing a violation of the duty to bargain. Certain types of conduct are viewed as per se violations of the duty to bargain in which an employer's good faith is not a defense. See The Developing Labor Law at 562-70 (2d ed. 1983). For example, in NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107 (1962), the United States Supreme Court ruled that an employer's subjective good faith was irrelevant when the employer makes a unilateral change in wages, hours, or terms and conditions of employment. The Court reasoned that such a change amounted to a refusal to bargain in fact even though the employer had good faith intentions to negotiate an overall collective bargaining agreement. 369 U.S. at 743. In Pasco County School Board v. PERC, 353 So.2d 108, 126 (Fla. 1st DCA 1977), the First District Court of Appeal adopted the Katz rationale as applicable to Section 447.501(1)(c).

In this case, the Aviation Authority's actions may be characterized as a partial repudiation of a collective bargaining agreement, and thus more in the nature of a refusal to bargain rather than a failure to bargain in good faith.

By referring to the signing of a written collective bargaining agreement in Section 447.203(14), defining the term "collective bargaining", and Section 447.501(1)(c), enforcing the duty to sign an agreement, the Legislature has indicated that the implementation of a negotiated agreement is part of the collective bargaining process. Moreover, if repudiation of an agreement could not be considered an unfair labor practice absent proof of bad faith, the Legislature would not have felt compelled to enact Section 447.309(2), Florida Statutes (1985), which provides that a legislative body's failure to fund a collective bargaining agreement shall not constitute an unfair labor practice.

It could be argued that this case concerns only a routine breach of a collective bargaining agreement which may not be remedied by an unfair labor practice proceeding. See Maxwell v. School Board of Broward County, 330 So.2d 177, 180 (Fla. 4th DCA 1976). However, there are many occasions when a breach of a collective bargaining agreement may also constitute an unfair labor practice. PERC v. District School Board of DeSoto County, 374 So.2d 1005, 1011-12 (Fla. 2d DCA 1979). The instant case does not involve a simple breach of contract based upon a dispute as to the meaning of one or more of the terms of the agreement. Such a contractual dispute would properly be decided by an arbitrator under the grievance-arbitration procedure or a circuit court judge in a civil suit premised on contract rights. Instead, this case concerns the Aviation Authority's repudiation of a portion of its agreements based solely upon an incorrect interpretation of Section 447.309(3). Under these circumstances, the Commission should be allowed to determine whether the Aviation Authority's repudiation constitutes an unfair labor practice because of the Commission's acknowledged expertise in applying and interpreting Chapter 447, Part II. See, e.g., PERC v. Dade County PBA, 467 So.2d 987, 988 (Fla. 1985); City of Clearwater v. Lewis, 404 So.2d 1156, 1161-62 (Fla. 2d DCA 1981).

The District Court of Appeal in the proceedings below has also incorrectly reasoned that its holding in this case was consistent with the First District Court of Appeal's decision in Hotel, Motel, Restaurant Employees and Bartender's Union, Local 737 v. Escambia County School Board, 426 So.2d 1017 (Fla. 1st DCA 1983). In Escambia County School Board, no unfair labor practice was found only because of the outstanding circuit court injunction prohibiting the School Board from implementing the negotiated pay plan. In this case, there was no injunction prohibiting the Aviation Authority from fully implementing its agreements with the HCPBA and the HCGEA. The Aviation Authority's refusal to implement, in reliance upon the Second District Court of Appeal's decision in Pinellas County PBA v. Hillsborough County Aviation Authority, 347 So.2d 801 (Fla. 2d DCA 1977), was voluntary, and not pursuant to a court order as in Escambia County School Board.

Finally, it is important to consider that generally Chapter 447, Part II, including the unfair labor practice provisions, is a remedial statute. Maxwell v. School Board of Broward County, 330 So.2d 177 (Fla. 4th DCA 1976). Unlike a penal statute that must be strickly construed, a remedial statute should be liberally construed to effectuate the purposes of the statute. Neville v. Leamington Hotel Corp., 47 So.2d 8 (Fla. 1950); Canada Dry Bottling Co. v. Meekins Inc., 219 So.2d 439 (Fla. 3d DCA 1969); Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967). As previously discussed, one of the primary purposes of Chapter 447, Part II, is to promote the "harmonious and cooperative relationship between government and its employees." § 447.201, Fla. Stat. (1985). The Commission was created to effectuate this policy by assisting in resolving disputes between a public employer and public employees. Id. The Commission's role would be seriously diminished if it were not allowed to invoke its

remedial authority set forth in Section 447.503(6)(a), Florida Statutes (1985), to order the Aviation Authority to implement both portions of the agreements at issue. The fact that the Aviation Authority relied upon a court decision in its favor should not insulate it from having to fulfill its statutory obligations if that decision is ultimately found to have been incorrect.

Accordingly, the Commission did not abuse its discretion in determining that the Aviation Authority's refusal to implement certain parts of its collective bargaining agreements with the HCPBA and HCGEA constituted an unfair labor practice subject to the Commission's remedial authority. Consequently, the District Court of Appeal's decision reversing the Commission should be quashed and the Commission's decision reinstated.

CONCLUSION

For the reasons set forth herein, the Commission requests this Court to answer the certified question in the negative and hold that Section 447.309(3) does not grant the Hillsborough County Civil Service Board the authority to prevent implementation of provisions in collective bargaining agreements that conflict with Board's rules and regulations. The Commission also requests the Court to reverse the decision of the Second District Court of Appeal and direct the Court affirm the Commission's decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner Florida Public Employees Relations Commssion has been sent by U.S. Mail this 1st day of April, 1986, to the following:

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