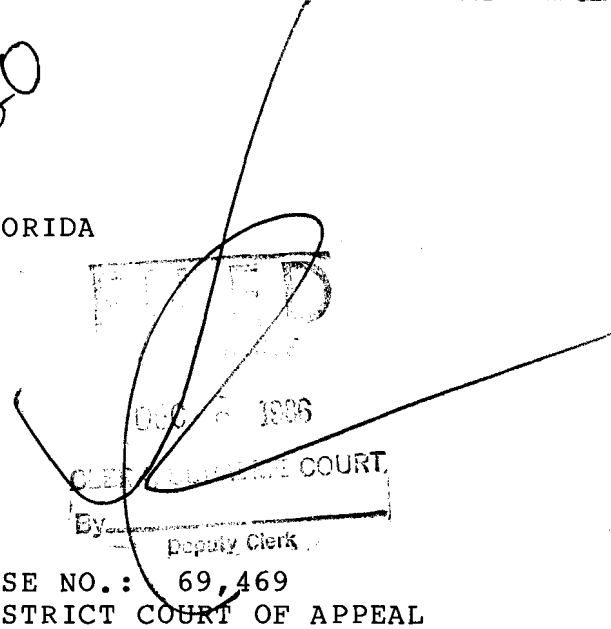
IN THE SUPREME COURT OF FLORIDA



CITY OF MIAMI, FLORIDA, and FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION, Petitioners, vs. FRATERNAL ORDER OF POLICE, MIAMI LODGE 20, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1907, AFL-CIO, Respondents.	CASE NO.: 69,469 DISTRICT COURT OF APPEAL THIRD DISTRICT CASE NO.: 85-1040

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BRIEF OF RESPONDENTS,
FRATERNAL ORDER OF POLICE, MIAMI LODGE 20,
AND
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 1907, AFL-CIO

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STATEMENT OF THE CASE AND FACTS

On June 24, 1982, the Miami City Commission adopted an increase of approximately fifty-nine percent (59%) in the premiums to be paid by employes for group insurance benefits contained as a part of the collective bargaining agreement between the Fraternal Order of Police (FOP) and the City of Miami. These increases were retroactive to March 7, 1982 (Supp. R. 1-2).

Because the increase in premiums was unilaterally adopted without any immediately preceding collective bargaining negotiations, the FOP filed unfair labor practice charges against the City on July 26, 1982 (Supp. R. 1-2).

The June 24th increases also unilaterally affected the health insurance premiums paid by employees represented by Local 1907, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) (Supp. R. 26-27). No bargaining occurred with AFSCME immediately preceding the premium increase. As a result, on August 12, 1982, AFSCME filed unfair labor practice charges identical to those filed by the FOP alleging violations of Florida Statutes, Section 447.501(1)(a) and (c) (Supp. R. 26-27).

In due course, the Public Employees Relations Commission (PERC) issued notices of sufficiency on both unfair labor practice charges and evidentiary hearings were scheduled pursuant to Florida Statutes, Section 447.503, and Florida Administrative Code, Section 38D-14.01 (Supp. R. 3, 4, 28, 37).

The City filed motions to defer the unfair labor practice charges to arbitration (Supp. R. 5-25) and the Commission ultimately granted those orders (Supp. R. 88-89) over the objections of AFSCME and the FOP (Supp. R. 38-41, 84-87).

Judicial review of the deferral orders was sought by way of petition for certiorari which was denied on the basis that review of final agency action could provide an adequate remedy (R. 1-2).

Following the conclusion of those judicial review proceedings, a consolidated arbitration hearing was held (Supp. R. 97-187).

On November 15, 1983, the arbitrator granted the FOP's grievance in part and denied it in part. AFSCME's grievance was denied in its entirety (Supp. R. 188-209).

On March 5, 1984, AFSCME and the FOP filed motions for review of the arbitration awards requesting the Commission to set aside the awards and to reinstate the unfair labor practice proceedings (R. 3-8).

On August 15, 1984, the Commission consolidated the two cases and proposed to defer and give conclusive effect to the arbitration awards which would have had the practical effect of dismissing the unfair labor practice charges (R. 162-170).

On September 10, 1984, AFSCME and the FOP filed requests for oral argument, along with exceptions for the proposed order (R. 174-192).

On October 5, 1984, on the basis of those exceptions,

the Commission directed an evidentiary hearing to be scheduled (R. 194-197).

On December 7, 1984, the parties provided the Hearing Officer with a stipulated evidentiary record and thereafter filed proposed recommended orders (R. 216-232; 254-265).

On January 18, 1985, the Hearing Officer issued a recommended order proposing to dismiss the unfair labor practice charges (R. 331-364).

In February, 1985, the parties filed exceptions to the Hearing Officer's recommended order. On April 18, 1985, the Commission entered a final order deferring to the arbitration awards and dismissing the unfair labor practice charges (R. 390-407).

Following the decision by PERC, an appeal was taken to the District Court of Appeal, Third District of Florida. On August 5, 1986, the Court of Appeal issued an opinion overturning the order of the Commission based on the absence of any statutory authority for PERC to defer unfair labor practices to arbitration (R. 408-411).

On September 15, 1986, the question of PERC's authority to defer was certified by the Court of Appeal to the Supreme Court as a question of great public importance and this brief follows (R. 413).

SUMMARY OF ARGUMENT

Section 447.503 expressly provides that unfair labor practice charges are to be expeditiously resolved by PERC in accordance with the hearing procedures established in that statute. Nowhere in Section 503 is any power granted to PERC, either expressly or impliedly, to delegate the responsibility to an arbitrator.

As a creature of statute, PERC has only those powers granted to it by the legislature. Any doubt as to the existence of a power in an administrative agency is to be resolved against the existence of that power.

The instant case involves a simple question of statutory interpretation. The starting point in any statutory analysis is the intent of the legislature. Section 447.503 gives a rare expression of unambiguous legislative intent. That provision is crystal clear in placing upon PERC the exclusive common non-delegable responsibility of processing and adjudicating unfair labor practices.

The Third District Court of Appeal correctly recognized that PERC is the same as any other administrative body. It is bound by whatever limitations the legislature places upon it. If PERC feels that it needs additional powers, it properly directs that wish to the legislature. The court correctly recognized that PERC's usurpation of power in the absence of legislation was an ultra vires act and properly overturned.

The opinion of the Third District Court of Appeal is consistent with long-standing precedent in this State and our sister States. The rule, rather than the exception, for State public employee labor boards is that once an action is found to state a prima facie case for an unfair labor practice charge, it cannot be delegated to an arbitrator. PERC made such a finding in this case and, accordingly, its deferral was inappropriate.

Even assuming PERC had the power to defer, its development of a deferral policy by adjudication, rather than rule, is also unlawful. PERC rejected its first deferral rule because it lacked statutory authority. Despite no statutory changes, PERC recreated a deferral policy by adjudication. This is contrary to the requirements of Florida law and is sufficient in and of itself to warrant reversal.

Lastly, deferral, even if permissible, was inappropriate in this case. PERC found the charges to constitute a prima facie case under Chapter 447. This alone prevents delegation. Further, the contracts to which PERC would defer give the unions the choice of remedy. By requiring deferral, PERC ignored the contracts that its deferral policy purports to defend.

Accordingly, the District Court of Appeal correctly overturned PERC's order. This case is no different than any other involving an administrative agency overstepping its authority. The decision of the Third District Court of Appeal should be affirmed and this Court should decline to answer the certified question.

ARGUMENT

THE PUBLIC EMPLOYEES RELATIONS COMMISSION LACKS THE AUTHORITY TO DEFER UNFAIR LABOR PRACTICE CHARGES TO ARBITRATION

A. Rules of Statutory Construction

The starting point in any statutory analysis is, of course, the language of the statute. Where the language used by the legislature makes clear the legislative intent, it is incumbent upon the courts to give effect to that intent. Baruzza v. Suddath Van Lines, Inc., 474 So.2d 861 (Fla. 1st DCA 1985). The court therefore concluded:

> "Thus, in those instances where the language of a statute clearly limits the application to a particular class of cases, leaving no room for doubts as to the meaning of the legislature, the statute may not be enlarged or expanded to cover cases not falling within its provisions." Id. at 864.

The Supreme Court has repeatedly held that courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. Holly v. Auld, 450 So.2d 217 (Fla. 1984). This court further went on to hold that it is not the court's duty or perogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. Id. at 219.

The case before this court concerns an effort by the Public Employees Relations Commission to shift to private arbitrators the exclusive non-delegable duty of the Public

Employees Relations Commission to resolve unfair labor practice charges under Florida Statutes, Sections 447.501 and 447.503. The precise language at issue are the provisions of Florida Statutes, Section 447.503 which state in pertinent part:

> "It is the intent of the legislature that the Commission act as expeditiously as possible to settle disputes regarding alleged unfair labor practices. To this end, violations of the provisions of Section 447.501 shall be remedied by the Commission in accordance with the following procedures and in accordance with Chapter 120; however, to the extent that Chapter 120 is inconsistent with the provisions of this section, the procedures contained in this section shall govern."

It is abundantly clear from the foregoing statutory provision that the legislature has expressed an intent that unfair labor practices be resolved quickly and that they be resolved by the Commission. Nowhere does it state that the Commission, in resolving these disputes, may delegate to anyone else its exclusive duty in this regard. Any other interpretation flies in the direct face of express legislative intent.

It is a general principle of statutory construction that the mention of one thing implies the exclusion of another. Tower-house Condominium, Inc., v. Millman, 475 So.2d 674 (Fla. 1985). In Millman, the court was concerned with a Condominium Association's power under the Condominium Act to purchase property. The court held at Page 676 that the Petitioner could exercise only those powers enumerated under the Act. The Association could grant itself, through its Declaration of Condominium and By-Laws, only those powers not inconsistent with the Act. Id. at 676.

The court went on to note that had the Condominium Association had the inherent power to purchase real property, there would have been no necessity for a legislative grant of such power. The legislature found it necessary to authorize these particular purchases and in allowing the Association sufficient power to accomplish that specified purpose, implicitly refused to grant any broader exercise of the power. Id. at 676.

Similarly, Section 447.503 expressly states the legislative intent as to how unfair labor practice disputes will be settled. It also states that the Commission shall settle them. Had the legislature intended the Commission an inherent power to delegate that duty to another, it would have so stated.

Section 447.503 goes on in great detail to describe the manner in which unfair labor practice complaints are received, investigated, processed, heard and ultimately decided. Nowhere is there any mention of deferral to arbitration.

It is interesting to note, however, that in Section 447.503(2), the Commission has the power to delegate to an agent the determination of the initial sufficiency of a charge. Again, having expressed the single instance in which the Commission may delegate its power to resolve unfair labor practice charges, the legislature has necessarily excluded any other instances of delegation.

Courts, in construing statutes, may not insert words or phrases in the statute or supply omissions that to all appearances were not in the mind of the legislators when the law was enacted. Special Disability Trust Fund v. Motor and Compressor Company, 446

So.2d 224 (Fla. 1st DCA 1984). When there is any doubt as to legislative intent, the doubt should be resolved against the power of the court to supply missing words. Id. at 226.

It must at all times be remembered that the Public Employees Relations Commission is an administrative body created by statute. In fact, the Commission was created as a direct result of the efforts to establish standards and guidelines governing collective bargaining by public employees and to implement the rights guaranteed by Article I, Section 6, of the Constitution of Florida. Dade County Classroom Teachers Assn. v. Florida Legislature, 269 So.2d 684 (Fla. 1972); Florida Statutes, Section 447.201.

The Third District Court of Appeal correctly recognized in its opinion in this case:

> "PERC, as with any other administrative agency, derives its authority or responsibility from its enabling statutes and does not have the right to delegate that authority beyond that which is specifically authorized by said enabling statutes. See, Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); Edgarton v. International Company, 89 So.2d 488 (Fla. 1976); Gulfstream Park Racing Association, Inc. v. State Department of Business Regulation, Division of Pari-Mutuel Wagering, 443 So.2d 113 (Fla. 3d DCA 1983)." Slip Opinion, Pages 3 and 4.

This court has long held that where there is any doubt as to the lawful existence of a particular power in an administrative agency, that doubt must be resolved against the exercise of that power. Edgarton v. International Company, supra, at 490.

In State of Florida v. Office of the Comptroller, 416 So.2d 820 (Fla. 2d DCA 1982), the Second District Court of Appeal held:

> "It is a fundamental rule of law that administrative agencies and state officers possess only such authority and power as may be conferred upon them by law." (Emphasis added.)

The phrase "by law" has previously been determined by the courts of this State to mean a general or special law that has been enacted by the State legislature. Wait v. Florida Power and Light Company, 372 So.2d 420 (1979); Ison v. Zimmerman, 372 So. 2d 431 (Fla. 1979).

In Florik v. Florida Land Sales Board, 206 So.2d 41 (Fla. 2d DCA 1967), the Court of Appeals expressed serious concern over the authority of the Florida Land Sales Board to appoint monitors to oversee the operation of a private corporation for the purpose of seeing to it that it complied with the Board's orders. Id. at 45. The court noted that if a regulatory board had such implied power to defer its authority to others, a "dangerous situation would exist". If such powers are implied in an administrative agency, then probably all other such bodies in the State would have similar implied authority. Id. at 45. See, also, Gulf American Corp. v. Florida Land Sales Board, 206 So.2d 457 (Fla. 2d DCA 1968).

A similar result has been reached by this Supreme Court. In Florida Drycleaning and Laundry Board v. Economy Cash and Carry Cleaners, Inc., 197 So. 550 (Fla. 1940), this court held that an administrative board may not delegate the exercise of its

sovereign power to any of its employees. While the board or commission might possess the authority the delegate to a duly authorized representative the duty of conducting a hearing and making recommendations, that body cannot delegate to another the power vested in it under the law to determine the issues de novo. See, also, Tamiami Trail Tours v. Carter, 80 So.2d 322, 327 (Fla. 1954); Sullivan v. Mayo, 106 So.2d 4, 6 (Fla. 1st DCA 1958).

More recently, in Systems Management Associates, Inc. v. State Department of HRS, 391 So.2d 688 (Fla. 1st DCA 1980), the court held that in the absence of a statute or law of procedure, Hearing Officers could not entertain motions for reconsideration in proceedings for rule determinations and an appeal not filed within thirty (30) days of the rendition of the original order was deemed untimely and dismissed. The court held that had it found an implied power in the agency to consider motions for reconsideration in the absence of any statutory authorization, the jurisdiction of another body, that of the Appellate Court, would have been infringed upon. See, Hall v. Career Service Commission, 478 So.2d 1111, 1113 (Fla. 1st DCA 1985).

The Appellees urge this court to deviate from the foregoing clearly enunciated standards and overturn the District Court of Appeal opinion by finding an implied power in PERC to defer unfair labor practice charges to arbitration. As authority for that proposition, PERC cites the decision of this court in Coca-Cola Company, Food Division, v. Department of Citrus, 406 So.2d 1079 (Fla. 1981), wherein a court discussed the doctrine of implied powers in administrative agencies.

Reliance on Coca-Cola, supra, is inappropriate for several reasons. Firstly, Section 447.503 contains both a direct and unambiguous expression of legislative intent and a specific statutory formula for the implementation of that intent. That alone is sufficient to cut off further judicial inquiry.

Beyond that, PERC and the City would urge the Commission to find that the power to defer is a "clear and necessary implication" from the provisions of the statute. City Gas Company v. Peoples Gas System, 182 So.2d 429, 436 (Fla. 1965). This assertion, however, states only half of the judicial equation. In City Gas, supra, at Page 437, the implied powers doctrine is drawn from an earlier decision of the Supreme Court in State ex rel. Wells v. Western Union Telegraph Company, 118 So. 478 (Fla. 1928). In Wells, the court considered the power of the State Railroad Commission to regulate the telegraph industry. In setting forth the scope of those powers, the court held:

> "The powers of the Railroad Commission are restricted to those conferred by the express terms of the statute, or those which may be reasonably implied from such express terms. State ex rel. Burr v. Jacksonville Terminal Company, 90 Fla. 721, 106 So. 576. So far as we have been able to find, the decided tendency of modern decisions, in construing statutes defining the powers and duties of administrative boards or commissions, is to hold that the powers sought to be exercised must be made to affirmatively appear before it can be legally exercised. Board of Railroad Commissioners of Oregon v. Oregon Railway and Navigation Company, 17 Or. 65, 19 P. 702, 2 L.R.A. 195, 25 R.C.L. 791." Id. at 480. (Emphasis added.)

Thus, the implied powers doctrine which the Appellees would urge upon the court has not been completely or accurately

stated. While some necessarily implied powers exist to avoid an absurd result within a statutory framework, the decided tendency is to find an affirmative appearance of that power before it can be exercised. The clear language of Section 447.503 affirmatively establishes the absence of that intent.

It is undisputed that PERC has exclusive jurisdiction over interpretation of the Public Employees Relations Act (PERA) through unfair labor practice proceedings under Section 447.503. Maxwell v. School Board of Broward County, 330 So.2d 177 (Fla. 1976). PERC itself has held that it may not lawfully delegate to an arbitrator the responsibility to resolve and enforce the statutory rights under Chapter 447. City of Hollywood, 7 FPER 12045 (1980); City of Homestead, 7 FPER 12079 (1981).

It is significant that neither the City or the Commission can adequately explain PERC's deviation from its own earlier decision, finding that it not only lacked the authority to defer cases to arbitration by virtue of policy, but even lacked the authority to promulgate rules for deferral. In Jackson County School Board, 3 FPER 276 (1977), PERC considered the legality of former Florida Administrative Code, Section 8H-4.18, which provided for deferral to arbitration if the issues raised in an unfair labor practice complaint were susceptible to resolution under the grievance/arbitration procedure of the collective bargaining agreement.

At Page 279, the Commission expressly held that the grievance/arbitration procedure established under Section 447.401 and the Commission's unfair labor practice procedure as

established under Section 447.503, were separate and distinct and could not be co-mingled. In striking down Section 8H-4.18, the Commission held:

> "Neither statute permits the General Counsel to pass judgment on the fairness or completeness of the final and binding arbitration process, nor do they permit the Commission to substitute one statutory process for another by deferring to arbitration. Florida Administrative Code Rule Section 8H-4.18 lacks statutory authority and is invalid." Id. at 279.

Some four years after the commencement of this action, PERC reenacted a deferral rule. Florida Administrative Code Section 38D-21.011 (1986). Yet, since the Jackson County decision, no legislative changes have occurred within Chapter 447 which would alter the basis upon which the Commission determined the absence of authority to promulgate such a rule.

The holding in Jackson County School Board, supra, is consistent with the general law of the State. Whether a deferral policy is wise or desireable is a question for PERC to address to the legislature and not to the courts.

Justice Overton, in a special concurrence in Towerhouse Condominium, Inc., supra, noted that condominium property ownership was a creature of statutory law and relatively new. The same may be said for public employee collective bargaining in Florida. Justice Overton noted that the court had no authority to change or rewrite the law but urged the legislature to examine the particular circumstances of that case to determine if a change in the law was advisable. Such should be the result in the instant case. That is, that the question of the wisdom or desireability of the

deferral policy should be directed to the legislature rather than an agency attempting to usurp a power to itself and then ask a court to assist it in rewriting the law.

Accordingly, the decision of the Third District Court of Appeal should be affirmed and the court should decline to answer the certified question.

B. The Provisions of PERA as Compared With the National Labor Relations Act and the Laws of the Various States Militate Against PERC's Authority to Defer.

Notwithstanding the absence of statutory authority to defer, PERC and the City would urge the Commission to rewrite the law by finding that the adoption of the deferral policy is necessary to fulfill the statutory objectives of Sections 447.401 and 447.503.

The Commission bases its deferral doctrine on that established by the National Labor Relations Board in the decisions of Spielberg Manufacturing Company, 36 LRRM 1152 (1955) (post-arbitration deferral) and Collyer Insultated Wire, 77 LRRM 1931 (1971) (pre-arbitration deferral). In those decisions, the National Labor Relations Board adopted a policy of deferral to arbitration of unfair labor practice charges if certain prerequisites were met. Distinctions between Chapter 447 and the National Labor Relations Act, however, provide further support for the absence of the Commission's authority to defer to arbitration.

Under the unfair labor practice provisions National Labor Relations Act (29 U.S.C. Section 160), no private remedy is created for an injured person. Under the NLRA, the National Labor

Relations Board's General Counsel determines whether to issue a complaint, the theory upon which the complaint shall proceed, and acts as the prosecuting authority during the burden of proof on behalf of the charging party. Containair Systems Corp. v. NLRB, 521 F.2d 1166 (Fla. 2d Cir. 1975).

By contrast, Section 447.503 permits an aggrieved party to file its own complaint and upon a determination of sufficiency by the Commission, the charging party then proceeds to a hearing, bearing its own costs and legal representation responsibilities. The Commission provides for the Hearing Officer and the full Commission provides final agency action for determination of the ultimate issue. Nowhere in the structure of PERC is the office of the General Counsel substantially comparative to the NLRB's General Counsel for the purpose of filing and pursuing unfair labor practices.

In Pasco County School Board v. Florida PERC, 353 So.2d 108 (Fla. 1st DCA 1977), the Court of Appeals considered a challenge to the actions of the General Counsel in prosecuting an unfair labor practice charge pursuant to former Florida Administrative Code, Section 8H-4.08. At Note 1 on Page 114, the court noted the distinction between PERA and the NLRA regarding the authority of the General Counsel to issue complaints and prosecute them. The court specifically declined to express an opinion as to whether or not the authority to prosecute unfair labor practice charges was a valid delegation of authority in light of the failure of the objecting party in Pasco County to timely challenge the administrative rule.

In the current administrative rules of the Commission, found in Chapter 38D of the Florida Administrative Code, there is no longer a section analogous to Rule 8H-4.08. Specifically, Chapter 38D-21 limits the General Counsel's function to determining the prima facie sufficiency of an unfair labor practice charge, subject to Commission review and thereby set in motion the adjudication process. This is consistent with the express legislative grant of authority under 447.503(2) for the Commission "or an agent designated by it for such purpose" to review the charge and determine its sufficiency. Further, Section 38D-21.08 specifically places the burden of presenting sufficient evidence to establish the allegations of unfair labor practice charges on the charging party. Therefore, the rules of the Commission, as they have evolved, clearly indicate a move away from the NLRA standard for the processing of unfair labor practices. Similarly, the role of grievance arbitration in the private sector is different from that under PERA. Binding arbitration of grievances is statutorily mandated by Section 447.401. Public employees in Florida are constitutionally forbidden to strike. Article I, Section 6, Constitution of Florida (1968). Therefore, the existence of the grievance procedure is not then truly the product of negotiations. In fact, a grievance procedure will be deemed included in a contract, whether the parties negotiated or not. PERC v. School Board of DeSoto County, 374 So.2d 1005 (Fla. 2d DCA 1979). By contrast, the NLRB has held that its practice of deferral is for the purpose of highlighting the national policy in supporting contracts that end with agreements not to strike. Roy

Robinson Chevrolet, 94 LRRM 1474, 1475 (1977). Therefore, the raison d'etre for arbitration in the private sector is to have a substitute for the right to strike during the life of a collective bargaining agreement.

Under the NLRA, it is the government, rather than one of the parties to the collective bargaining agreement, which initiates, prosecutes and determines an unfair labor practice charge. Under PERA, it is the parties who initiate and prosecute the charges with the Commission simply acting in its statutory role of determining the presence or absence of a violation. There is no difference betweens the function of an arbitrator who determines the presence or absence of a breach of the collective bargaining agreement. Therefore, unlike the NLRA, unfair labor practice charges under PERA are simply a collateral means to the same goal as may be had through the election of arbitration.

This court has recognized that the legislature intended for there to be such collateral means of vindicaton of employee rights in the enactment of Chapter 447. In addition to providing a specific remedy for unfair labor practices under Section 447.503, the legislature did not require that all grievances be resolved under Section 447.401. In AFSCME Local 1363 v. Florida PERC, supra, the District Court of Appeal affirmed an order of PERC finding that while grievance procedures are a mandatory inclusion in all collective bargaining agreements, parties could agree to exclude matters from the grievance procedure. Id. at 482.

The Supreme Court affirmed this holding in City of Casselberry v. Orange County PBA, 482 So.2d 336 (Fla. 1986), that

a union and public employer could exclude aspects of their collective bargaining agreement from the final and binding arbitration procedure and utilize an alternative dispute resolution procedure such as a Civil Service Board.

The foregoing analysis is significant in that 447.401 does not have the exclusivity of approval that both PERC and the City would suggest.

The NLRB's deferral policy upon which PERC and the City so heavily rely has itself come under serious judicial criticism in recent months. In Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit noted that the NLRB has a statutory duty to enforce the National Labor Relations Act and exclusive jurisdiction to decide unfair labor practices. The Board may not avoid this responsibility through a far-reaching deferral policy which apparently presumes that an unfair labor practice claim has been resolved through arbitration.

The court reached its conclusions based upon the standards established by the United States Supreme Court in a series of cases beginning with Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011 (1974), that an employee whose grievance was dismissed at arbitration nevertheless could bring a Title VII claim arising from the same underlying facts. The court recognized that the arbitrator's competenence lies in the law of the shop, and not in the law of the land and accordingly held that an employee may still assert statutory claims independent of any rights created under a collective bargaining agreement. 94 S.Ct. at 1024.

Following Alexander was the decision in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 1011 S.Ct. 1437 (1981), wherein the Supreme Court rejected the contention that arbitration of wage claims precluded a later suit under the Fair Labor Standards Act based on the same underlying facts. 101 S.Ct. at 1447-48. The court reached this conclusion based upon the fact that deferral to arbitration should not apply where claims are based on statutes designed to provide minimum substantive rights. This was held particularly true where the statute provides an individual remedy to the worker.

This is of particular significance in light of PERA which provides under Section 447.503 an individual remedy which is clearly absent a private sector worker under the National Labor Relations Act.

Most recently, the Supreme Court reiterated its holdings in Alexander and Barrentine in McDonald v. City of West Branch, Michigan, 466 U.S. 284, 104 S.Ct. 1799 (1984), wherein the court held that an earlier arbitrable finding did not preclude a civil rights action under 42 U.S.C. Section 1983. The McDonald court held that its limitation of deferral in Alexander and its preclusion of deferral altogether in Barrentine was

> "...based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforced and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." 104 S.Ct. at 1803.

The Eleventh Circuit in Taylor, supra, also relied on the recent decision in McNair v. United States Postal Service, 768

F.2d 730 (5th Cir. 1985), citing four factors to support the need for independent access to the protection of statutory rights:

> "(1) An arbitrator, schooled primarily in the law of the shop, may lack the expertise to resolve complex statutory questions;
>
> (2) Because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforces statutes;
>
> (3) The union which generally controls the grievance process, because its interests are not necessarily identical to those of its employees, may not adequately protect their statutory rights; and
>
> (4) Arbitrable fact-finding generally is not equivalent to judicial fact-finding."
> 786 F.2d at 1521.

It is clear that the Florida legislature intended the rights created under Section 447.501 to be adjudicated by PERC, pursuant to the provisions of 447.503. The fact that an unfair labor practice may also include the elements of a contractual grievance is irrelevant to the fulfillment by PERC of its obligations under the statute.

PERC has the exclusive right to determine, under Section 447.503(2), whether or not the facts as alleged constitute a prima facie unfair labor practice. At that stage, PERC could easily determine that a matter was simply a question of a breach of a contract rather than a breach of statutory rights. This did not occur in the instant case.

From the first instance, PERC found the allegations of a unilateral change in a term and condition of employment (increase of insurance premiums) to state a prima facie case for violation of Florida Statutes, Section 447.501(1)(a) and (c). The Third

District Court of Appeal also recognized that the instant facts met the criteria of an unfair labor practice and that PERC had jurisdiction of the cause. Having made such a finding, PERC is then obligated to proceed forward with its statutory responsibilities under Section 447.503. Any other conclusion renders invalid clear legislative language, which is something that a court cannot properly do.

PERC and the City have cited to the court a number of jurisdictions where deferral to arbitration has been approved. A closer examination of the treatment of the deferral doctrine on the State level throughout the United States demonstrates substantial support for the position of the FOP and AFSCME in the instant case. The Supreme Court of Michigan considered the question of deferral to arbitration in the case of Detroit Firefighters Association v. City of Detroit, 293 N.W. 2d 278 (Mich. 1980). Like Florida, Michigan's Public Employees Relations Act places upon the Michigan Employee Relations Commission (MERC) the mandatory obligation to process unfair labor practice charges in the same fashion as provided in Section 447.503. Id. at 280.

While the City would suggest that Michigan does not a statutory arbitration procedure, it neglects to point out that there is a specific compulsory arbitration act for police and fire, M.C.L. Section 423.231 et seq. Id. at 281. Under Michigan's arbitration act, not only is grievance arbitration provided for, but unions have the right to final and binding arbitration in the formation of their contracts, something which public employees in the State of Florida lack. Therefore, under Michigan's Public

Employee Labor Relations System, arbitration is given an even more exalted and important status than that contained in the State of Florida.

The Michigan Supreme Court noted that the legislature intended to provide public employees in Michigan with nearly the same collective bargaining rights as are possessed by private sector employees, except with the constitutional right to strike. Id. at 282. This is identical to the findings of this Supreme Court concerning the legislature's extension of bargaining rights to public employees in Florida. That is, public employees in Florida were intended to have the same collective bargaining rights as their private sector counterparts, except the right to strike. Dade County Classroom Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969); City of Tallahassee v. PERC, 393 So.2d 1147 (Fla. 1st DCA 1981), aff'd, 410 So.2d 487 (Fla. 1981).

In pursuit of that legislative policy, as expressed in Michigan's PERA, the court held:

> "Toward that end, the legislature has, through PERA, assured public employees of protection against unfair labor practices, and of remedial access to a state-level administrative agency with special expertise in statutory unfair labor matters. The additional safeguards that MERC must comply with the APA, and make findings in support of those decisions which are reviewable under the competent, material and substantial evidence standard have been provided. These processes seem well designed to promote and maintain the confidence and high moral of public employees, who, being prohibited from striking, must rely heavily on the statutory protections afforded under PERA. The alternative of Collyer-Spielberg deferral to private arbitration of public employee unfair labor practice charges is, under any circumstances, antithetical to these legislatively provided means for resolution of such charges under PERA.

> Finally, in our analysis, it is emphasized that we find no legislative intent forbidding or discouraging voluntary private arbitration of public employee grievancer disputes. Rather, we read PERA and related state statutes as manifesting a clear legislative intent that once a party to a public sector employment collective bargaining relationship invokes MERC's jurisdiction under PERA, that party's complaint should be resolved by MERC in accordance with the statutory process." Id. at 282-283.

Given the remarkable similarity between the legislative intent as expressed in Michigan's PERA and by its Supreme Court in City of Detroit, supra, the foregoing analysis in declining to approve a deferral doctrine is most appropriate for adoption by this court.

In Jefferson County Board of Supervisors v. New York State PERB, 330 N.E. 2d 621 (Ct.App.N.Y. 1975), the court expressed cognizance of the fact that the New York legislature has mandated that PERB "shall exercise exclusive non-delegable jurisdiction" of the powers conferred upon it. Moreover, PERB may not disregard an explicit legislative directive under the statute. Id. at 624. Under Florida law, PERC also has the exclusive non-delegable responsibility to process unfair labor practices under 447.503.

More recently, the New York Court of Appeals in Collins v. Manhattan and Bronx S.T.O.A., 465 N.E. 2d 811 (Ct.App.N.Y. 1984), concerned itself with the obligation of a public employer to bargain with its employees before making a unilateral change in a term and condition of employment. The court noted that such

claims would be committed to the "exclusive non-delegable jurisdiction" of the Public Employee Relations Board. Id. at 817. The same reasoning applies in the instant case whereby the FOP and AFSCME complained of a unilateral change by the City of Miami in its insurance program and sought to have that heard under the exclusive non-delegable jurisdiction of PERC.

In its brief, PERC cites, among the State authorities upon which it relies, the decision of the New Jersey Public Employees Relations Board in Town of Harrison, 8 NJPER 13051 (1982). The holding in Town of Harrison would appear to be called in question, however, by a decision of the Superior Court of New Jersey, Appellate Division, in Jefferson Township Board of Education v. Jefferson Township Education Association, 457 A.2d 1172 (N.J. Super. A.D. 1982). In Jefferson Township, supra, arbitration was sought of a grievance alleging discrimination against a busdriver for participation in union activities. The State Public Employees Relations Commission was asked to restrain arbitration as the matter was an unfair labor practice, rather than a breach of the collective bargaining agreement. PERC refused to restrain arbitration and the Appellate Court reversed. The court noted that N.J.S.A. 34:13A-5.4(c) expressly confers upon New Jersey's PERC the "exclusive power" to prevent public employers and public employee organization from engaging in unfair labor practices as defined in that statute. Id. at 1174. Moreover, the court noted that the statute establishes "precise procedures for a hearing before the Commission or any designated agent thereof". The court specifically held that the words

"designated agent" did not confer upon PERC legislative permission to surrender its authority to an arbitrator. Rather, it referred to a duly authorized Hearing Officer who might make a recommendation to the Commission, which itself must make the final binding decision. Id. at 1174. The New Jersey court's holding is further significant in that New Jersey's statute is quite similar to Florida's in containing strong language providing for final and binding arbitration of disputes covered by the terms of the collective bargaining agreement. Id. at 1175, relying upon N.J.S.A. 34:13A-5.3. In the final analysis, the court held that the legislature had preempted unto the State Public Employee Relations Commission the exclusive power over unfair labor practice complaints and thereby precluded deferral to arbitration. The court held:

> "The legislature obviously believed that the existence or occurrence of unlawful practices called for the expert handling of a specialized administrative agency such as PERC and that in these matters that agency's jurisdiction was indeed to be preferred even to that of the courts." Id. at 1175.

The same result has been reached by the courts in Pennsylvania. In Pennsylvania Labor Relations Board v. General Braddock Area School District, 380 A.2d 946 (Comm.Ct.Pa. 1977), that tribunal held that jurisdiction to determine and prevent unfair labor practices from occurring was in the Pennsylvania Labor Relations Board and "nowhere else". Id. at 950. As a result, the court concluded that the Board need not wait to investigate charges of unfair labor practices merely because a collective bargaining agreement existed under which a grievance

procedure was available for determination of issues similar to those upon which the charges were based.

In 1983, the same court reaffirmed its position in Commonwealth v. Commonwealth of Pennsylvania Labor Relations Board, 459 A.2d 452 (Comm.Ct.Pa. 1983). Here, the court considered a charge of a unilateral change in a term and condition of employment without collective bargaining. The court noted that such a charge was within the exclusive jurisdiction of the Board, notwithstanding the existence of a grievance arbitration procedure. Id. at 456.

In reaching this conclusion, the Board took specific notice of the Collyer-Spielberg doctrine established by the National Labor Relations Board. In declining to adopt the deferral policy based on differences between the Pennsylvania Labor Relations Act and the National Labor Relations Act, the court cited with approval Cowden, "Deferral to Arbitration by the Pennsylvania Labor Relations Board", 80 Dickenson Law Review, 666 (1977).

In that excellent treatise, the author noted:

> "Although arbitration has great importance to the scheme of PERA, nothing in the Act supports a finding that the legislature preferred arbitration to resolution of a dispute in an unfair labor practice proceeding, which is the basis of the NLRB's adoption of the Collyer doctrine. Moreover, an examination of the provisions of PERA reveals that the PLRB is vested with exclusive authority to remedy unfair labor practices and that when there is a conflict between PLRB adjudications and arbitration awards, PLRB adjudication prevail. But most importantly, PERA contains a provision specifically directing the State Board to exercise the powers and to perform the duties entrusted to it.

> Thus, the inescapable conclusion is that PERA creates two systems by which labor disputes involving related contractual and statutory issues may be resolved. PERA gives an aggrieved party a choice of forums or permits them to pursue relief in both forums, and appears to bar the PLRB from depriving the party of that choice." Id. at 681.

Again, both the State court and a learned author have examined a public employer labor relations act virtually identical to that established in Florida, including a requirement for final and binding arbitration of contractual grievance claims. Notwithstanding the existence of the grievance/arbitration procedure, both the court and the author found no expression of legislative intent to dislace the exclusive authority of the Public Employee Relations Commission to consider and adjudicate unfair labor practices. Pennsylvania courts, as did the Third District Court of Appeal in the instant case, properly recognized that unfair labor practices are to be resolved by the Board created to adjudicate them and no one else. The fact that related contractual issues are involved may mean that another forum is available but does not authorize the State agency to disclaim its statutorily mandated responsibilities. See, also, City of Coatesville v. Commonwealth Labor Relations Board, 465 A.2d 1073 (Comm.Ct.Pa. 1983); City of Harrisburg v. Capital City Lodge 12, FOP, 471 A.2d 166 (Comm.Ct.Pa. 1984).

In two states, the Public Employee Relations Boards recognized their own limitations on the power to defer. In Merryville Community School Corporation, 1978 Indiana Public Employee Reporter 10,000, the Indiana Education Employment Relations Board

found it inappropriate to defer to arbitration an unfair labor practice charge noting that the Board was mandated by Section 11 of the Indiana Education Employees Relations Act to remedy unfair labor practices. More recently, the Maine Labor Relations Board in Bangor Firefighters Association v. City of Bangor, Case No. 84-14 (1984), recognized an absence of authority to defer unfair labor practice charges to arbitration.

In City of Bangor, supra, the question presented was whether or not the City violated its duty to bargain by making a unilateral change in a term and condition of employment relating to light duty assignments for firefighters in receipt of workers' compensation payments. The City contended that the agency had no jurisdiction over the matter because the union did not pursue its grievance to arbitration or, in the alternative, that the Board should have deferred the unfair labor practice charge to arbitration. In dismissing both contentions as meritless, the Board held:

> "The claim is meritless because the filing of the grievance pursuant to contract and the filing of a prohibited practice as a complaint pursuant to the Act are separate and independent causes of action which may be pursued successively. See, e.g, Lewiston Firefighters Association v. City of Lewiston, 354 A.2d 154, 168 (Me. 1976). Our jurisdiction is established according to the standards set forth in the Act, and hardly is contingent upon what a party has or has not done pursuant to a contract. See, e.g., Teamsters Local 48 v. City of Bangor, MLRB No. 80-46 at 2 (October 6, 1980). In particular, there is no requirement that a party exhaust its contract remedies before filing with this Board. Equally specious, is the City's claim that we should defer to arbitration. Since the union decided not to take its grievance to arbitration, a decision which is entirely within its discretion, there is nothing to which we can defer." Id. at

The remaining cases relied upon by PERC from other jurisdictions are inapplicable in the instant case because of very significant differences between the enabling legislation in those jurisdictions and PERA.

In Massachusetts, Chapter 150E, General Laws of Massachusetts, there is a specific provision in Section 8 that the Massachusetts Labor Relations Commission has the authority to order arbitration. In a 1981 amendment creating Section 11, specific statutory authority was created to defer refusal to bargain cases to arbitration. Unlike Massachusetts, however, Florida has no such statutory authority. On the contrary, refusal to bargain cases are traditionally deemed unfair labor practice charges considered by PERC.

In its Administrative Rules and Regulations, the Massachusetts Labor Relations Commission may refuse to issue an unfair labor practice charge pending the resolution of a pending arbitration decision. See, Section 1504, Rules of the Commission. In Section 16.02, a procedure is established for ordering binding arbitration. Again, Florida's PERC has no such administrative rule or regulation.

Under Section 89.14 of the Hawaii Labor Relations Act, the statutory language regarding unfair labor practice processing is couched in precatory terms, as opposed to the mandatory language in Florida Statutes, Section 447.503. In addition, the Hawaii decision cited by PERC involved deferral based upon a trial

court decision rather than upon any adoption of the NLRB deferral doctrine.

Under Section 273-A(6), New Hampshire Revised Statutes, parties are statutorily required to exhaust all other remedies before an unfair labor practice charge may be heard by the State's Public Employee Relations Board. Under Section 304.1(a) of the New Hampshire Code of Administrative Rules, a statement of other available remedies and the reasons for not exhausting them is required to be filed with the Board prior to the pursuit of any unfair labor practice. Again, no such comparable requirement exists in Florida.

Lastly, under the Vermont and Washington cases cited, the union had, in both cases, voluntarily submitted the grievance to arbitration prior to seeking an additional remedy under their respective unfair labor practice procedures. In the instant case, the Miami FOP and AFSCME were, by their own collective bargaining agreements, limited to a single choice of forum, be it arbitration or action before PERC. No grievance nor arbitration was ever sought by the unions in the instant case. Rather, a voluntary choice was made to forego the grievance arbitration procedure and to elect the contractually agreed upon election of remedy to pursue the unfair labor practice charges before PERC.

Perhaps most illustrative of the proper source for deferral doctrine for a State Public Employee Labor Relations Commission is that found in the State of California.

Both the California law governing employment relations in school districts and among the State Civil Service specifically

contain legislative deferral provisions. The Education Employees Relations Act (EERA) provides in pertinent part:

> "The Board shall not do either of the following...(2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary." California Government Code, Section 3541.5(a).

Similarly, the State Employees Employees Relations Act, Government Code Section 3514.5, contains the identical language. Accordingly, the California Public Employees Relations Board has specifically adopted administrative rules pertinent to the issue of deferral as permitted by statute. See, PERB Rule 32620.

The development by California's PERB of a deferral policy is therefore clearly a product of a proper grant of authority by the legislature. Florida's PERC, by contrast, has no such specific grant. An assumption of that right by PERC without any such intent being expressed by the Florida legislature constitutes the very usurpation of power by an administrative agency frowned upon by the courts of this State, including the District Court of Appeal in the instant case.

C. Summary.

It is established peradventure that deferral to arbitration is an act outside the lawful power of PERC in the absence of a legislative enactment or properly constituted rule. Further, the existence of substantial differences between the NLRA

and PERA render it inappropriate to blindly follow NLRB decisions. See, City of Winter Park v. Laborers' International Union, supra; Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133, 138 (Fla. 1st DCA 1983), approved in relevant part, 475 So.2d 1222 (Fla. 1985).

Therefore, the District Court of Appeal properly found PERC's deferral to arbitration to be an ultra vires act. Moreover, the act of deferral to arbitration is an express derogation of the statutory mandate contained in Section 447.503. Having found the unfair labor practice charges in the instant case to be sufficient, PERC is obligated to hold the evidentiary hearing itself pursuant to the provisions of 447.503 and was properly found by the Court of Appeal to have shirked its lawful responsibility.

Accordingly, the decision of the District Court of Appeal should be affirmed and the court should decline to answer the certified question.

II. PERC'S DEVELOPMENT OF THE DEFERRAL STANDARD HAS NOT BEEN APPROPRIATE

Both PERC and the City suggest that the development of the deferral standard currently used by PERC has been appropriate and consistent. Neither is true.

Assuming, solely for the purposes of argument, that PERC did have the power to defer to arbitration, its development of the deferral rule through adjudication has clearly been improper.

It is significant that PERC's earliest attempts to deferral occurred through the promulgation of Rule 8H-4.18, Florida Administrative Code. As earlier noted, the Commission

itself recognized in 1977 that it lacked the statutory authority for the promulgation of any deferral rule. Jackson County School Board, 3 FPER 276 (1977).

Since that time, PERC has deferred cases by developing the doctrine through adjudication rather than rule-making. Therefore, what the Commission recognized it could not lawfully do by rule, it has attempted to do even without the due process strictures required under the law-making process.

It was not until four years after the commencement of this case that PERC attempted to again promulgate a deferral rule. Section 38D-21.011 (1986) was promulgated in an apparent effort to "bootstrap" the case-by-case adjudication of the deferral doctrine into the legitimacy of a proper administrative rule. Such a practice is not generally approved. See, Fresno Unified School District v. National Education Association, 177 Cal. Rptr. 888 (5th DCA 1981). (Mere contractual violations may not be bootstrapped into unfair labor practices.)

In enacting its deferral doctrine in the instant case without any attempt at rule-making, the Commission has, in fact, interpreted PERA in a fashion directly contrary to the intent of the legislature. This is a result which the courts of this State have long sought to avoid. Radio Telephone Communication, Inc. v. Southeastern Telephone Company, 110 So.2d 599 (Fla. 1964).

What PERC has done is to perform rule-making by adjudication, an action which is generally disfavored. Chapter 447 repeatedly calls for unfair labor practice charges and other statutory questions under PERA to be resolved in accordance with

the procedures of the Commission. Section 447.207(1), which empowers the Commission to engage in rule-making, is clearly the statutory intent behind the adoption of substantive procedures. That is, PERC is no different than any other State agency in that the implementation of its powers must be made by rule, rather than case-by-case determination.

PERC, as any other Commission or Board, has a responsibility to "structure its discretion progressively by vague standards, then definite standards, then broad principles, then rules". McDonald v. Department of Banking and Finance, 346 So.2d 569, 580 (Fla. 1st DCA 1977). See, also, General Development Corp. v. Division of State, 353 So.2d 1199 (Fla. 1st DCA 1977).

When an agency neglects its rule-making power and attempts to promulgate policy of general applicability on an ad hoc basis by orders in particular cases, courts must order rule-making as a predicate for further action and, if necessary, courts must invalidate agency action taken without rule-making. General Development, supra, at 1209. When an agency's incipient policies permissibly developed through orders, it is the duty of the courts to require the agency to expose and elucidate its reasons for discretionary action. Id. at 1209; See, also, McDonald, supra, at 584.

In Anheuser-Beusch, Inc. v. Department of Business, 393 So.2d 177 (Fla. 1st DCA 1981), the court held:

> "Agencies may expound statutes given in their charge by rules or by orders or by both rules and orders. The model of responsible agency action under the APA is action faithful to the statutory processes and limitations foretold to the public as fully as practicable by substantive rules, and refined and adapted to particular situations through orders in the individual cases." Id. at 1181.

The question of deferral to arbitration is clearly one of policy by the Commission's own admission. In the case of policy-making, rules are clearly preferable to orders.

The doctrine of deferral to arbitration is more than just procedure. Instead, it is a substantive determination of rights which then takes a question of statutory interpretation and reduces it to one of mere contract interpretation. The reason why rule-making is preferable in such circumstances was succinctly stated by the court in Anheuser-Busch, supra:

> "To make a substantive rule, an agency must think comprehensively, risk rebuff by the legislature's Administrative Procedures Committee, Section 120.545, and be willing to live with the basic policy choice, making refinements by adjudication, until that choice is changed by more rule-making."

The logic behind rule-making is simple. It allows an agency to fully inform itself of the matters bearing on the proposed rule and allows the public and groups having particular interest or information to participate in the rule-making process. Balino v. Department of HRS, 362 So.2d 21, 24 (Fla. 1st DCA 1978). PERC itself has recognized that rule-making is the most appropriate method of instituting policy changes. In Re Petition of Florida PBA, 10 FPER 15073 (1984).

PERC, therefore, has demonstrated not only an attempt to usurp power prohibited to it by statute, but in exercising that usurped power, has ignored its obligations to develop policy through rule-making which at least offers a measure of due process to those about to be deprived of statutory rights.

Therefore, assuming solely for the purposes of argument that PERC did have the power under Chapter 447, Part II, to defer unfair labor practices to arbitration, its failure in the instant case to do so my means of rule-making would in and of itself be fatal to the deferral order in the instant case. Thus, the Third District Court of Appeal was correct in its refusal to sustain the deferral order.

The Petitioners also contend that PERC's application of the deferral doctrine has been consistent. This is not the case.

The City relies on the decision in Manatee Education Association v. Manatee County School Board, 8 FPER 13202 (1982) wherein PERC declined to defer to arbitration where the issue involved was a refusal to bargain. The Commission noted that:

> "While an arbitrator may determine whether specific topics are encompassed by the re-opener provision, it is not his province to determine whether the topics were within the statutory scope of bargaining, waived by the MEA, properly raised before the Special Master, or lawfully determined by the legislative body. Finally, the arbitrator lacks authority to determine whether the School Board's conduct constitutes a violation of Section 447.501(1)(a) and (c), Florida Statutes, 1981. Such a determination depends on the interpretation of the statutory bargaining obligation which is within the sole discretion of the Commission." Id. at 375.

The instant case involves a refusal of the City of Miami to engage in collective bargaining with its employee organizations over a unilateral change in a term and condition of employment without bargaining with the FOP and AFSCME. The sole and only defense of the City in that cause was that the contract constituted a clear and unmistakeable waiver of the City's obligation to bargain. Under the doctrine, as set forth in Manatee County, supra, the issue then devolved around a question of whether the City's conduct constituted a violation of Section 447.501(1)(a) and (c). PERC found the allegations under such charges to be sufficient, yet deferred the entire matter to an arbitrator, notwithstanding the fact that such determinations are within the sole discretion of the Commission. This may hardly be said to be a consistent application of policy. See, also, City of Hollywood, 7 FPER 12045 (1980); City of Homestead, 7 FPER 12079 (1981).

In the instant case, PERC simply shirked a statutory responsibility and dumped a question of pure statutory interpretation into the lap of a private party. It is not consistent with legislative intent, with judicial interpretation, nor with the Commission's own pronouncements regarding its responsibilities in deferral actions. Again, this alone could have served as a lawful basis for denial of the right to defer.

Lastly, PERC suggests that because there has been no legislative action since its deferral policy, that that is somehow tacit approval of the actions of the Commission. The same might be said of PERC's recent adoption of a deferral rule through Section 38D-21.011. That is, perhaps PERC has recognized that its

case-by-case adjudication and application of the deferral doctrine in the absence of a rule was improper and has now attempted to place a band aid upon an open wound in the heart of labor relations in the State of Florida.

The Third District correctly found PERC lacked the authority to defer and this Honorable Court should affirm the order below and decline to answer the certified question.

III. DEFERRAL IN THE INSTANT CASE WAS NOT PROPER

At the heart of the Spielberg doctrine, so heavily relied upon by the Petitioners, is the National Labor Relations Board's statement that deferral to the contractual grievance arbitration procedure will be granted because of the underlying principle:

> "...that parties who have agreed upon an arbitration procedure for resolution of their disputes should honor their contractual commitment instead of utilizing...processes for adjudication of unfair labor practices that are susceptible by resolution to their agreed-upon procedures." See, Croatian Fraternal Union of America, 232 NLRB 1010 (1977).

In its order of October 5, 1984, the Commission noted that the agreement of all parties to be bound by an arbitration award is a condition precedent to the proper exercise of the deferral doctrine. At no point in these proceedings were AFSCME or the FOP ever in agreement to be bound by the arbitration awards and the Commission's finding to that effect in its final order was not supported by competent, substantial evidence nor by the law. It is significant to note at the outset that no grievance was ever filed by the unions in this case. Rather, only unfair labor practice charges were filed in accordance with the exclusive

election of remedy procedures contained in the respective collective bargaining agreements of the FOP and AFSCME (R. 218-232).

The unions have contended from the beginning and continue to contend that the issues in this cause were not nor have ever been appropriate subjects for deferral to arbitration. Moreover, having agreed to the inclusion of an exclusive election of remedy to be made by the employee organizations alone, the City clearly and unmistakeably waived its right to utilize the deferral doctrine.

As previously noted, the first criterion set forth by the NLRB in Spielberg, is that all parties agreed to be bound by the arbitration award.

Given the fact that AFSCME and the FOP appealed to the Commission, to the District Court of Appeal and to the Supreme Court prior to being forced into the arbitration proceeding which was then returned to the Commission, disapproved by the District Court of Appeal and now sought to be reinstated in this court, it can hardly be said that the FOP and AFSCME have agreed to any arbitration proceeding. On the contrary, the unions were dragged "kicking and screaming" to an arbitration that they neither sought to have nor agreed should have occurred. In fact, the Third District Court of Appeal agreed with the unions that the arbitration should not have occurred. Therefore, deferral to the arbitration award by the Commission constitutes a direct deviation from the Spielberg standard. See, also, Wertheimer Stores Corp., 33 LRRM 1398. See, also, Frank Rooney, Inc., v. Charles Ackerman

of Florida, 219 So.2d 110 (Fla. 3d DCA 1969) (arbitration agreements are strictly construed).

Therefore, inquiry into any of the other Spielberg criteria; whether the arbitration was fairly or regularly conducted or whether the arbitration was repugnant to the Act, become virtually irrelevant.

In addition to the failure to secure the agreement of all parties to be bound by the award, PERC failed to recognize that the arbitrator did not fully and directly determine the statutory issues. The unions continue to maintain, as they have throughout these proceedings, that the issue contained in the unfair labor practice charge was one always within the exclusive jurisdiction of the Commission. City of Homestead, supra; City of Hollywood, supra; Manatee County School Board, supra; Maxwell, supra.

In Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977), the Court of Appeals held that the purpose of arbitration machinery is not to oust the NLRB from its jurisdiction to adjudicate unfair labor practices. Further, the NLRB should not defer from exercising authority over unfair labor practices because of the existence of the arbitration machinery, when the issue presented involves primarily a statutory rather than contractual or factual issue. Therefore, in order to defer to an arbitration award, the arbitrator must have "clearly decided" the unfair labor practice issue. Id. at 538. See, also, Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

The power of the National Labor Relations Board is not affected by any other means of adjustment, including arbitration. NLRB v. South Central Bell, 111 LRRM 2609 (5th Cir. 1982). Thus, an arbitration award which limits the scope of inquiry to less than that which the agency is permitted to inquire is repugnant to the Act and properly set aside. Id. at 2615. See, also, NLRB v. Magnetics International, Inc., 699 F.2d 806, 809; Servair, Inc. v. NLRB, 726 F.2d 1435, 1438 (9th Cir. 1984).

It can hardly be said to encourage labor stability to deprive unions of their contractually bargained for election of remedies. By forcing AFSCME and the FOP into arbitration proceedings, which neither union desired nor felt would adequately address their statutory concerns, the Spielberg requirement for all parties agreeing to be bound obviously was not fulfilled.

PERC erroneously found that the election of remedy language contained in the union contracts does not clearly and unambiguously place within the exclusive control of the unions the right to choose the remedy. Specifically, the FOP contract provides:

> "It is further agreed by the employee organization that employees covered by this agreement shall make an exclusive election of remedy prior to filing a second step grievance or initiating for reddressing any other forum." FOP contract, Article 6.

Substantially similar language appears in the AFSCME agreement in Article 15.

Even more importantly, the collective bargaining agreements further provide in their respective grievance procedures:

> "The elction of remedy form will indicate whether the aggrieved party or parties wish to utilize the grievance procedure contained in this agreement or process the grievance, appeal or administrative action before a governmental board, agency or court proceeding. Selection of redress through the grievance procedure contained herein shall preclude the aggrieved party or parties from utilizing the grievance procedure for the adjustment of said grievance."

What the foregoing language clearly and unambiguously states is that the choice of forum for redress of a labor dispute is solely that of the aggrieved party. Any other construction ignores the plain language of the contract.

PERC adopted without significant discussion the finding that the purpose of the election of remedy language was to protect the City from multiple claims in multiple forums over the same cause of action. The unions do not quarrel with having the right to litigate in a single forum. What is unambiguous in the contract, however, is that the aggrieved parties, by they individuals or unions, have the right to select the forum of choice. Were the language in the FOP and AFSCME contracts to be confined solely to Title VII cases as the PERC order suggests, the contract should have so stated that any other grievance may be resolved exclusively out of the grievance procedure and that the parties waive the right to proceed before any court or forum for any matter covered under the collective bargaining agreement. Such language, however, does not appear in the contracts.

At the heart of the Spielberg doctrine held so dearly by the City and PERC, is the underlying principle that the deferral should respect the dispute resolution procedure agreed upon by the

parties in their collective bargaining agreements. In a recent decision of PERC in IBEW 323 v. Lake Worth Utilities Authority, 10 FPER 15134, the Commission relied upon the NLRB precedent established in United Technologies, 115 LRRM 1059 (1984), wherein the Board held:

> "It is fundamental to the concept of collective bargaining that the parties to a collective bargaining agreement are bound by the terms of their contract.
>
> * * *
>
> Certainly great damage could be done to the entire system of grievance arbitration and to the process of collective bargaining if the parties believe they could ignore an agreed-upon method of settling disputes."

Moreover, the Board went on to state that it would refuse to defer to arbitration where "the respondent's conduct constituted a rejection of the principles of collective bargaining". Id. at 1052.

As discussed earlier, parties to a collective bargaining agreement may agree to deviate from the grievance arbitration procedure so long as that agreement is mutual. AFSCME Local 1363, supra; City of Casselberry, supra. Against this background, it becomes clear that the unions and the City agreed in their contracts to a dispute resolution procedure to permit the employee organization the choice of the resolution of a dispute, so long as the election of remedies was an exclusive one. As earlier noted, the particular language in the contracts clearly invoked a waiver by both parties. The City has waived the right to choose the forum and the unions have agreed that once they choose, for

example, to pursue a case before PERC, they may not thereafter attempt to relitigate the cause through the grievance procedure.

For PERC to have deferred in light of such language makes the contractual language itself illusory. Despite the clear language permitting the choice of forum to be that of the union, the ability of the City to then defer the matter back to a forum other than that chosen by the union returns to the City the choice of the forum. In return for this "Catch-22", PERC held that the union gave up the right to seek relief in any other forum. The unions did not so agree; rather, they agreed to seek relief either under the grievance arbitration procedure or, in the alternative, to a court, board or agency. The union gets one bite of the proverbial apple; but in return, the union selects which apple it shall bite. This is clearly consistent with the argument earlier discussed in Alexander v. Gardner-Denver, supra; Barrentine, supra, and McDonald, supra, wherein the United States Supreme Court has noted that statutory rights are not properly adjudicated by arbitrators.

By including an election of remedy in their collective bargaining agreements, the City of Miami has bargained for itself the right to face a challenge to its management decisions in only a single forum. In return for that security, the City has given the union the right to choose the place where that battle shall occur. Therefore, the City has clearly and unmistakeably waived the right to seek deferral to another forum, once the employee organization or an individual employee has made an election of remedy. Palowitch v. Orange County School Board, 367 So.2d 730

(Fla. 4th DCA 1979); City of St. Petersburg Beach, 10 FPER 15211 (1984).

The inclusion of an election of remedy procedure is neither repugnant to PERA or to the general law of the State. As noted by the Commission in AFSCME Local 1363, 8 FPER 13278 (1982):

> "We have in prior decisions encouraged parties to provide their own solutions to settle disputes." Id. at 490.

PERC has also stated that those dispute resolution procedures will not be set aside or ignored unless they contravene the public interest. Id. at 490. Notwithstanding that holding, what PERC did was ignore the right of the unions, earned in their contract, to select a remedy.

This Supreme Court and two of the District Courts of Appeal have held that where a party has an option to choose between one of two alternative remedies, the individual should be permitted to pursue that which is most complete and expeditious to the choosing party. Plasman v. Roach, 43 So.2d 11 (Fla. 1949). The election of remedy is the choice of the complainant and the party may pursue any theory, provided that a cause of action has been stated. Pan American Bank of Miami v. Osgood, 383 So.2d 1095 (Fla. 3d DCA 1980); S & W Motors v. Mack Trucks, Inc., 198 So.2d 70 (Fla. 1st DCA 1967).

In issuing notices of sufficiency on both the FOP and AFSCME unfair labor practice charges, PERC agreed that a cause of action was stated. Having made out such a prima facie case, the choice is that of the complainant.

Private sector arbitration decisions also support the unions' position. In Woodward Company, 61 LA 259 (Marlatt, 1973), an identical arbitration clause to that in the instant case was contained in the parties' agreement. An employee instituted a complaint before the Equal Employment Opportunity Commission and also sought arbitration. The arbitrator held that the EEOC action constituted an election of remedy precluding arbitration. Id. at 259.

PERC itself has held that an election of remedy procedure is not repugnant to PERA. In Broward County School Board, 8 FPER 13283 (1982), the Commission held at Page 508:

> "Our decision to permit a limited waiver of the statutory to resolve disputes through the grievance procedure is reinforced by our knowledge, gained through the review of numerous collective bargaining contracts in cases that we have considered, that parties often agree to such a waiver. The parties find such a procedure helpful in reaching agreements; thereby promoting harmonious labor relationships. We fail to see why they should be discouraged from using it.
>
> Harmonious labor relations should not be advanced by compelling parties to a collective bargaining agreement to arbitrate contractual disputes that they voluntarily agree are better handled through another appropriate mechanism." (Emphasis added.)

If the stated purpose of the deferral doctrine is to allow the agreed-upon dispute resolution procedure of the parties to be utilized, how then can it logically be permitted as a vehicle for the repudiation of contracts? To permit deferral in the instant case constitutes a "rejection of the principles of collective bargaining" condemned by the NLRB in United Technologies, supra, and adopted by PERC in Lake Worth Utilities,

supra. See, also, Killearn Properties, Inc. v. City of Tallahassee, 366 So.2d 172 (Fla. 1st DCA 1979).

The courts of this State have held that municipalities are bound to follow their agreements the same as any other party. City of Miami v. Bus Benches, 174 So.2d 49 (Fla. 3d DCA 1965). This court has also held that once a party to a collective bargaining agreement has made its choice, it is bound by it. Koenig v. Tyler, 360 So.2d 104 (Fla. 3d DCA 1978).

In summary, PERC and the City speak from both sides of the mouth. On the one hand they laud the deferral doctrine as being the protector of the sanctity of contract. At the same time, PERC and the City repudiate the agreed-upon dispute resolution procedure in order to obviate a mandatory statutory responsibility to decide unfair labor practice cases. Thus, in its rush to protect its deferral policy, PERC has sacrificed both logic and law.

The District Court of Appeal was correct when it recognized that the instant cases were unfair labor practice charges and that once having so determined, PERC was bound to hear them under the provisions of 447.503. Accordingly, the decision below should be affirmed and the court should decline to answer the certified question.

CONCULSION

Few doctrines are more clearly rooted in Florida law than the separation of powers. Administrative agencies, as creations of statute, have only the powers granted to them by the legislature. The District Court of Appeal correctly recognized that PERC's attempt to defer arbitration in light of the clear legislative mandates of Section 447.503 was an ultra vires act and properly overturned.

Even assuming that the power to deferral could somehow be found to exist, PERC again violated the law in attempting to create that doctrine through case-by-case adjudication.

Lastly, the use of the deferral doctrine in the instant case is unconscionable where to do so would require the repudiation of the very contracts which the deferral doctrine is supposed to protect.

WHEREFORE, for the foregoing grounds and reasons, the decision of the District Court of Appeal, Third District of Florida, should be affirmed and the court should decline to answer the certified question.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to PETER J. HURTGEN, ESQ., of MORGAN, LEWIS & BOCKIUS, 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131, and to CHARLES F. McCLAMMA, ESQ., of the PUBLIC EMPLOYEES RELATIONS COMMISSION, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32301, this 5th day of December, 1986.

ROBERT D. KLAUSNER