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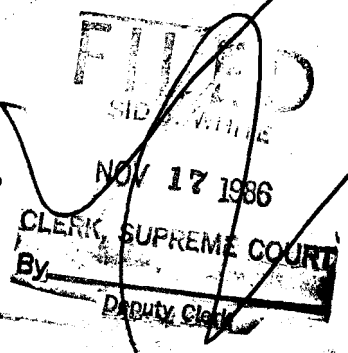

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 69,469
DCA CASE NO. 85-1040

CITY OF MIAMI, FLORIDA, and FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION,

Petitioners,

v.

FRATERNAL ORDER OF POLICE, MIAMI LODGE 20, et al.,

Respondents.

On Appeal From The District Court of Appeal, Third District, State of Florida

INITIAL BRIEF ON THE MERITS

OF

PETITIONER, THE CITY OF MIAMI, FLORIDA

Peter J. Hurtgen
Claudia B. Dubocq

MORGAN, LEWIS & BOCKIUS
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131
(305) 579-0350

November 10, 1986

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STATEMENT OF THE CASE AND OF THE FACTS

This case is before the Court upon the certification by the Third District Court of Appeal pursuant to Art. V, § 3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(v), of the following question of great public importance:

> Whether the Public Employees Relations Commission has authority under Chapter 447, Part II to defer unfair labor practice charges to arbitration and give final and binding effect to the arbitrator's contract interpretation.

(R. 413) (Appendix A)

The facts pertinent to the Third District's opinion and decision to certify the above question to this Court span a period of over four years. They are succinctly set out to emphasize the points relevant to this Court's formulation of an answer to the certified question, and relevant to this Court's review of the Third District opinion.

In June 1982, the City of Miami (Petitioner or the City) apportioned health insurance contribution increases among its employees. The City unilaterally instituted these increases pursuant to specific provisions in the parties' collective bargaining agreements, as follows:

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FOR CONTRACT

ARTICLE XXV

GROUP INSURANCE

The City agrees to pay 100% of the current life insurance coverage provided for employees. Effective November 1, 1981, the City further agrees to pay $18.00 per pay period toward the dependent health coverage where the employee elects to take the dependent coverage, and any increase or decrease in the dependent health care premium will be shared on a percentage basis of what the employer currently pays and what the employee currently pays.

Effective November 1, 1982, the City will pay $21.00 per pay period toward the dependent health coverage where the employee elects to take the dependent coverage, and any increase or decrease in the dependent health care premium will be shared on a percentage basis of what the employer currently pays and what the employee currently pays.

Group Health Insurance coverage for the employee will continue at the current benefit level. The current premium and any increase or decrease in the premium will be shared on the current basis of eighty percent (80%) paid by the City and twenty percent (20%) paid by the employee.

AFSCME CONTRACT

ARTICLE XXVI

GROUP INSURANCE

Section 1. The City agrees to pay 100% of the current life insurance coverage provided for employees. The City further agrees to pay $13.29 per pay period toward the dependent health coverage where the employee elects to take the dependent coverage, and any increase or decrease in the dependent coverage, and any increase or decrease in the dependent health care premium will be shared on a pecentage basis of what the employer currently pays and what the employee currently pays.

Section 2. Group Health Insurance coverage for the employee will continue at the current benefit level. The current premium and any increase or decrease in the premium will be shared on the current basis of eighty percent (80%) paid by the City and twenty percent (20%) paid by the employee.

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(Supp. R. 14, 53-54 188-209; R. 409)[1/]

On August 10, 1982, the issue of deferral to arbitration was first presented in the City's Motion to Dismiss and/or Defer to Arbitration the unfair labor practice charge filed by the Fraternal Order of Police, Miami Lodge No. 20 (FOP or the Union) on July 26, 1982. (R. 1-2; 5-10) The issue was presented again in another substantially similar Motion to Dismiss And/Or Defer to Arbitration filed by the City on September 8, 1982, in response to an unfair labor practice charge filed by AFSCME, Local 1907 (AFSCME or the Union) on August 12, 1982. (R. 26-27; 55-60)

The City argued in both motions that each agreement contained a grievance procedure culminating in final and binding arbitration, that the charges raised disputes which were clearly contractually arbitrable and could be completely resolved in the arbitral forum, that the City would proceed unconditionally to arbitration, and that the parties had consistently adhered to the grievance and arbitration provisions in their respective agreements.

Both of the City's Motions to Defer to Arbitration were granted by separate orders dated September 16, 1982 (FOP) and October 5, 1982 (AFSCME). (R. 88-89; 93-94) In each order PERC

1/ References to the Record on Appeal shall be indicated by "(R. ___)"; References to the Supplemental Record on Appeal shall be indicated by "(Supp. R. ____)."

noted that deferral is a matter committed to its sole discretion and that the requisites to a grant of deferral were present.

The Unions then sought appellate court review of PERC's order deferring the unfair labor practice charges to arbitration, arguing that deferral was inappropriate. The First District Court of Appeal treated the Unions' Notice of Appeal as a Petition for Certiorari. The Unions' Petitions for Certiorari were denied. (Supp. R. 95-96)

The Unions then proceeded to the arbitral forum. In his November 15, 1983 Award, Arbitrator Stuart A. Goldstein recognized that the disputes before him had originated as unfair labor practice charges which were deferred by the Commission. He, therefore, initially reviewed his authority as Arbitrator in such a situation under relevant PERC decisions, and determined it to be the authority to interpret the parties' collective bargaining agreements. He specifically noted that the Commission defers to arbitration only those cases whose central issue is one of contract interpretation. (Supp. R. 197-198)

The Unions thereafter moved the Commission to review Arbitrator Goldstein's award in accord with PERC's reservation of jurisdiction to do so which was part of its order on deferral. (R. 3-8) The Unions sought a full Commission hearing, arguing that the arbitration award was somehow repugnant to the Public Employees Relations Act (PERA or the Act). The City moved to dismiss arguing that the Commission's deferral order was clearly

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appropriate in the first instance. (R. 14-19) This became even more obvious in the arbitral forum where the Unions were unable to offer any evidence that would create an even colorable question as to the contract's interpretation.

PERC unanimously concluded that all deferral prerequisites had been met and that the arbitration award effectively disposed of the unfair labor practice charges, thereby deserving conclusive effect. Accordingly, the Commission dismissed the unfair labor practice charges. (R. 169) The Unions excepted to the Commission's legal determinations that, inter alia, deferral is an authorized act, that the parties agreed to be bound by arbitration and that the arbitrator's award is not repugnant to the Florida Public Employees Relations Act. (R. 180-192)

An evidentiary hearing was then scheduled specifically on the issue of "whether the Unions . . . through their collective bargaining agreements or otherwise, had agreed to be bound by the arbitration award to which [the Commission has] been asked to defer." (R. 198) The hearing was waived, and the hearing officer prepared his recommended order based upon the parties' stipulated record. The hearing officer concluded that the Unions had indeed "agreed to be bound by the arbitration award[s] to which [the Commission has] been asked to defer." (R. 347) The Unions excepted to the recommended order and argued that the hearing officer departed from the essential requirements of law in finding, inter alia, that the parties had agreed, through

their collective bargaining agreements, to be bound by the challenged arbitration award, and, again, that deferral to arbitration was appropriate. (R. 368-369)

PERC issued its final order on April 18, 1985, dismissing the unfair labor practice charges yet again and giving conclusive effect to the arbitration award which it found had effectively disposed of those charges. (R. 390-407)

The Unions appealed the Commission's order to the Third District Court of Appeal, which filed its opinion on August 5, 1986. (R. 408-411) (Appendix B) The Court found that PERC had jurisdiction of the Unions' unfair labor practice charges. (R. 410) Further, concerning the Commission's authority to defer the charges to arbitration, the Court concluded:

> A review of the enabling statutes [Ch. 447 Part II Florida Statutes (1981)] fails to reveal any authority, either express or implied, granting unto the Commission the power to defer a cause to arbitration. There being no statutory grant of power to delegate to arbitration, the Commission cannot, on a case by case basis, bring into existence such a power, notwithstanding its alleged adoption of and reliance on the pronouncements of the National Labor Relations Board. (citation omitted).

(R. 411). The Court ordered PERC to conduct a de novo hearing on the unfair labor practice charges.

All parties moved the Court for rehearing or clarification of its Order. These motions were denied on September 15, 1986. (R. 412) PERC and the City also filed a

suggestion to the Court to certify a question of great public importance to the Supreme Court of Florida. The Court granted the suggestion and on September 15, 1986, certified the aforementioned question to this Court.

The Petitioners herein timely filed their Notice to Invoke Discretionary Jurisdiction with the District Court of Appeal on October 8, 1986. This brief on the merits is submitted pursuant to the briefing schedule established by this Court on October 15, 1986.

ARGUMENT SUMMARY

The Commission has clear authority to defer an unfair labor practice charge to arbitration. Section 447.401, Fla. Stat. (1985), is specific legislative endorsement of the strong labor policy which favors the arbitral process as a means of dispute resolution. The Florida legislature has also granted PERC broad authority to carry out PERA's purposes, whether by rulemaking or adjudication, especially as those purposes center around the elimination of unfair labor practices. Parallel legislation in the private sector and in other public sector jurisdictions has yielded agency and court decisions which overwhelmingly favor deferral as a means of resolving certain unfair labor practice charges. Finally, in accord with these statutory grants of authority, PERC has developed and applied clear and consistent standards by which it determines whether an

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unfair labor practice charge may be appropriately deferred to arbitration.

Having established PERC's authority to defer unfair labor practice charges to arbitration, the Commission was also correct in ordering deferral in the instant case. The issues in the unfair labor practice charges concerned specific provisions of the parties' labor agreements. Deferral to arbitration where conduct allegedly violates a collective agreement and constitutes an unfair labor practice has long been the policy of PERC and the National Labor Relations Board. Furthermore, all parties clearly agreed to be bound by an arbitration award based on the presence in their collective agreements of grievance machinery as is statutorily required in Florida.

Finally, the arbitration award is not repugnant to PERA. The proceedings were fairly conducted, and the arbitrator considered all unfair labor practice issues under relevant Commission precedent. PERC's post-arbitral deferral order, therefore, is consistent with PERA's purposes and policies.

ARGUMENT

I.

PERC HAS CLEAR AUTHORITY TO DEFER AN UNFAIR LABOR PRACTICE CHARGE TO ARBITRATION.

The question before this Court which was certified by the Third District Court of Appeal as one passing upon a question of great public importance is:

> Whether the Public Employees Relations Commission has authority under Chapter 447, Part II to defer unfair labor practice charges to arbitration, and give final and binding effect to the arbitrator's contract interpretation.

(R. 4, 13) (Appendix A). Broadly, then, the focus of this appeal is the extent of the explicit and implicit statutory powers, duties and authority of the Florida Public Employees Relations Commission.

It has been noted that administrative agencies, as creatures of statute, possess only the power which their enabling statutes confer upon them. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973). Nevertheless, broad grants of discretionary authority often accompany the statutory creation of an agency. See McDonald v. Department of Banking and Finance, 346 So.2d 569, 577 (Fla. 1st DCA 1977), pet. for rev. on remand denied, 361 So.2d 199 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1370 (Fla. 1979) (where the court recognized its "responsibility ... to allow the agency full statutory range for its putative expertise and specialized experience" particularly where the statutory criterion under consideration are "highly charged with policy considerations for which the Department is responsible...." 346 So.2d at 583-584).

Similarly, Chapter 447, Part II, Florida Statutes, the Public Employees Relations Act, delegates broad authority to PERC to carry out the Act's stated purpose:

> [T]o provide statutory implementation of S. 6, Art. I of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually, and to protect the public by insuring, at all times, the orderly and uninterrupted operations and functions of government.

Section 447.201, Fla. Stat. (1985). Florida courts have often recognized the broad authority of PERC to define and implement the substantive rights of public employees under PERA. Board of Regents v. Public Employees Relations Commission, 368 So.2d 641 (Fla. 1st DCA), cert. denied, 379 So.2d 202 (Fla. 1979); Pasco County School Board v. Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1977); City of Clearwater v. Lewis, 404 So.2d 1156 (Fla. 2d DCA 1981).[2/]

2/ For this reason, the cases cited in the opinion of the Third District Court of Appeal are inapposite. (R. 411) (Appendix B) Each purportedly illustrates administrative action in excess of the statutory powers granted to a specific agency. A closer reading of these decisions, however, reveals that the Third District has attempted to apply a set of precedents addressing general administrative authority to a case which should be covered by the distinct, insular body of labor law. In addition, these cases are factually distinguishable from the instant matter in that each involves a clearly unauthorized usurpation of power by the agency. Florida Bridge Company v. Bevis, 263 So.2d 99 (Fla. 1978) (PSC directive regarding extraordinary maintenance account far exceeded statutory authority to fix and regulate tolls and charges of Florida toll bridges); Cape Coral, supra (Supreme Court rejected PSC's argument that its jurisdiction could not be altered by legislative enactment); Edgerton v. International Company, 89 So.2d 488 (Fla. 1956) (Hotel and Restaurant Commission's commencement of license revocation proceedings was (Continued)

Likewise, PERC has wide discretion concerning unfair labor practice charges. In reference to an unfair labor practice charge arising out of PERC's interpretation of the mutual aid and protection guarantee of Section 447.301(3), Fla. Stat. (1985), the court notes in City of Clearwater:

> In remedying unfair labor practices, [PERC] is entitled to order such action 'as will best implement the general policies expressed in this part.' § 447.503(6)(a), Fla. Stat. (1977). These provisions indicate a legislative intent to delegate to PERC a range of discretion within which to make policy determinations necessarily involved in the interpretation and application of . . . Section 447.301(3). Thus, an expert tribunal such as PERC is entitled to substantial deference in recognition of its special competence in dealing with labor problems.

Id., 404 So.2d at 1161-1162. See also Duval County School Board v. Public Employees Relations Commission, 353 So.2d 1244 (Fla. 1st DCA 1978) and School Board of Escambia County v. Public

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without authority where notice thereof was received by the licensee one day later than required by statute); Gulfstream Park Racing Association, Inc. v. State Department of Business Regulation, Division of Pari-Mutuel Wagering, 443 So.2d 113 (Fla. 3rd DCA), aff'd., Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983) (Pari-Mutuel Commission's delegation of one of its non-delegable functions to a subordinate division was without authority where statute clearly prohibited such action); and Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 371 So.2d 152 (Fla. 1st DCA 1979) (agency's interpretation of ambiguous clause in a condominium agreement was without authority where this power rested solely in the judiciary).

Employees Relations Commission, 350 So.2d 819 (Fla. 1st DCA 1977).

PERC's broad authority over unfair labor practices must be juxtaposed against the statutory mandate that "[e]ach public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes . . . involving the interpretation or application of a collective bargaining agreement." Section 447.401, Fla. Stat. (1985). The grievance procedure must culminate in final and binding arbitration pursuant to the statute. In enacting this section the Legislature expressed its approval of arbitration as a preferred method of dispute resolution. Arbitration is a preferred procedure because, since the arbitrator is chosen by the parties and through a procedure created by them, it is more likely to produce mutually acceptable solutions. Moreover, questions turning essentially on construction of contract language are specifically required to be decided by the arbitrator. This section, then, specifically fosters PERA's purpose "to promote harmonious and cooperative relationships between government and its employees." Section 447.201, Fla. Stat. (1985). Implicitly, if not explicitly, therefore, PERC has been legislatively empowered to delegate its unfair labor practices to arbitration.[3/]

3/ Viewed in this light, the issue is not whether PERC possesses authority to defer, but rather is how that lawful authority may be exercised. PERC may temporarily relinquish its unfair labor practice authority in an (Continued)

Well-reasoned policy considerations also support the desirability of Commission deferral. Of prime importance is that the parties utilize their mutually formulated grievance procedure to settle their disputes. This will promote peaceful and stable labor-management relations by eliminating the disruptive impact of intervention by an administrative agency into disputes that arise "at home." As noted by the National Labor Relations Board in United Technologies Corp., 268 N.L.R.B. 557 (1984):

> 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. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [NLRA] for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract . . . . Since in most cases deferring to arbitration will encourage collective bargaining, the Board, in carrying out the Act's purpose, should see that full play is given to the arbitral process.

Id. at 559-560. See also Briggs, The National Labor Relations Board's Policy Of Deferring To Arbitration, 13 Fla. St. U.L. Rev.

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effort to encourage utilization of the parties' dispute-resolution machinery. Furthermore, PERC may exercise this authority either through rulemaking or adjudication. See In Re PERC Rule 38D-21.011, 12 F.P.E.R. ¶ 17219 (1986); §§ 447.207(1) and 447.207(6), Fla. Stat. (1985).

1141 (1986); and Hayford and Wood, Deferral To Grievance Arbitration In Unfair Labor Practice Matters: The Public Sector Treatment, Lab. L. J., p. 679 (October 1981).

Further policy considerations concern "the ability of arbitrators to produce the most acceptable solutions to workplace-related disagreements in the shortest period of time." Hayford and Wood, supra, at 681. The arbitrator's award is also accorded a greater degree of finality than is an unfair labor practice determination. The arbitrator's award, moreover, is likely to be more acceptable since it is not only based on the parties' agreed upon grievance procedure, but also because the arbitrator will use his greater expertise in drawing from "the law of the shop" in fashioning his award.

Finally, deferral avoids fragmentation of issues and frees the agency's resources for attention to other cases. Absent a deferral policy, parties may be forced to resolve the same issue before the agency and an arbitrator.[4/] Deferral encourages greater consistency and avoids such forum shopping.

4/ The fact that PERC hears and determines an issue which essentially turns on contract construction does not prevent an arbitrator, who has primary jurisdiction to interpret the contract, from rendering a different interpretation and ordering a "final and binding" result which is different from that ordered by PERC. Each order would be reviewable in the District Court of Appeal; the PERC order pursuant to § 447.504, Fla. Stat. (1985), and the arbitral decision pursuant to Fla. R. App. P. 9.030(b)(1)(A), following a final order of the circuit court pursuant to § 682.13, Fla. Stat. (1985).

PERC's authority to defer, moreover, is not the action of a renegade agency. Numerous other state labor boards have adopted deferral policies. All have drawn upon the well-established deferral doctrine developed in the private sector by the National Labor Relations Board (the Board or NLRB) under the National Labor Relations Act (NLRA).

The NLRA, as PERA, contains no specific provision authorizing deferral of unfair labor practice charges to arbitration. See, Vause, PERC Deferral To Arbitration, Fla. B. J. (November 1982). It has been observed that the Board's deferral policy, then, is quite broadly "an exercise of the Board's discretionary power to administer, develop, and enforce national labor policy." Zimmerman, Comment: The Teamster Joint Grievance Committee And NLRB Deferral Policy: A Failure To Protect The Individual Employee's Statutory Rights, 133 U. Penn. L. Rev. 1453 (1985). More specifically, the Board is statutorily given several tasks which at time overlap.[5/]

5/ Zimmerman, supra, remarks on the lack of specific rules to implement deferral in the general Congressional policy guidelines with which the NLRB has been provided. This, he opines, is cause for the Board to meander in the development of a deferral policy and

> illustrate[s] the Board's discretionary power as well as the role of politics in the formulation of Board policy. The Board, like many administrative agencies, develops policy through adjudication rather than rulemaking, and, indeed, frequently in its history, Board members have simply overruled the prior policy

(Continued)

Just as has PERC, the Board has been given the difficult task of adjudicating unfair labor practices allegedly in violation of the NLRA, while arbitration is the favored means of resolving contractual disputes. Frequently, however, actual cases do not fall neatly into one or the other category of either contract or statutory interpretation. Thus has the Board developed its deferral policy both because it is difficult to separate the two types of claims and because the Board is concerned that when it and an arbitrator decide parallel issues, resources overlap. Zimmerman, Comment, supra. The Board's pre-arbitral and post-arbitral deferral policies, therefore, are premised on the Board's belief that the activity comprising the unfair labor practice is covered by the NLRA and the parties' collective agreement.

The proper focus, then, is on the substantial similarities between the NLRA and PERA. Both acts have as their focus the maintenance of peaceful and stable labor relations. See 29 U.S.C. §§ 141, 151 and § 447.207, Fla. Stat. (1985). Moreover, Section 447.501, defining employer and union unfair labor practices, is closely patterned after many provisions of Sections 8(a) and 8(b) of the NLRA. Florida courts have long recognized the striking similarity in language and purpose between the NLRA and PERC and have expressly observed:

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and begun anew. The history of deferral policy is illustrative of this phenomenon.

> If a Florida statute is patterned after a federal law, on the same subject, it will take the same construction in the Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject.

Pasco County School Board, 353 So.2d at 116. See also International Brotherhood of Painters and Allied Trades v. Anderson, 401 So.2d 824 (Fla. 5th DCA), pet. for rev. denied, 411 So.2d 382 (Fla. 1981). PERA having been so patterned after the NLRA, the Commission may correctly adopt the well-established deferral doctrine which grew up under the NLRA because of the preference for arbitration as a means of fostering stable labor relations. See United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). (Collectively referred to as the "Steelworkers Trilogy"). As stated by Mr. Justice Douglas for the Court in United Steelworkers of America v. Warrior and Gulf Navigation Co.:

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

Id. 363 U.S. at 581. This case, along with the other two Steelworkers Trilogy cases, formed the genesis of a doctrine of judicial self-restraint in cases subject to grievance arbitration.

The Board's seminal post-arbitral deferral decision is found in Spielberg Manufacturing Company, 112 NLRB 1080 (1955). There an agreed upon arbitration procedure was recognized as preferable to other processes in adjudicating unfair labor practices. Id., 112 NLRB at 1082. Later, in Collyer Insulated Wire, 192 NLRB 837 (1971), the Board rendered its seminal decision on pre-arbitral deferral. The Collyer doctrine was specifically approved in Arnold v. Carpenters' District Council, 417 U.S. 12 (1974), where the Supreme Court stated:

> Indeed Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure . . . The Board's position harmonizes with Congress' concern that, '[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .' § 203(d) of the LMRA, 29 U.S.C. § 173(d). [citations omitted]

Id., 417 U.S. at 16-17.

Clearly, PERA is modeled after the NLRA, both of which contain unfair labor practice provisions and focus on the preservation of harmonious labor relations. The private sector has

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long-favored the grievance arbitration process as a method of dispute resolution which will foster the NLRA's purposes. This approach is specifically adopted in Section 447.401, Fla. Stat. (1985). By judicial directive, it has been determined that PERC and the courts are to look to parallel legislation in other jurisdictions when interpreting PERA. PERC reviewed and found a well-established and well-reasoned deferral doctrine which would be appropriately applied in the public sector.

Finally, other public sector jurisdictions with state labor laws similar to PERA have also established policies of deferral absent a specific statutory provision therefor. Hayford and Wood state in their article on public sector deferral, supra, that the public employee relations boards which have addressed the deferral issue "have uniformly held that the discretion to defer, where appropriate, is inherent in their statutory grant of jurisdiction over unfair labor practice charges." Id. at 683.[6/]

6/ Michigan's Supreme Court is the highest state court to determine that its state labor board was without authority to defer unfair labor practice charges to arbitration. See Detroit Fire Fighters Association v. City of Detroit, 408 Mich. 663, 293 N.W.2d 278 (Mich. 1980). Unlike the Florida Act, however, the Michigan Employment Relations Act contains no reference to a purpose of providing for arbitration in the public sector. In this circumstance, the obvious parallel to the NLRA disintegrates. Clearly, the Michigan Commission was not faced, as are the Board and PERC, with the task of balancing the statutorily advocated arbitral and agency forums in a way that will effectuate national and state labor policies.

II.

PERC HAS DEVELOPED AND APPLIED CONSISTENT STANDARDS BY WHICH IT DEFERS UNFAIR LABOR PRACTICE CHARGES TO ARBITRATION.

The Commission has developed consistent standards, initially through adjudication and recently through the adoption of Fla. Admin. Code Rule 38D-21.011, in determining whether pre-arbitral and post-arbitral deferral of unfair labor practice charges are appropriate. At the pre-arbitral stage, PERC considers the following four criteria in determining whether to defer:

> (1) Will the interest of the involved employees be adequately protected in arbitration?
>
> (2) Does the parties' relationship reflect labor stability rather than a rejection of the principles of collective bargaining or a repudiation of the labor agreement and its grievance-arbitration provisions?
>
> (3) Is the respondent willing to unconditionally proceed to arbitration over a dispute covered by the labor contract?
>
> (4) Does the allegation in the charge center on a labor contract violation rather than upon a question of law under Chapter 447?

Broward County Sheriff's Department, 8 F.P.E.R. ¶ 13116 (1982); and Brevard County School District, 12 F.P.E.R. ¶ 17155 (1986). Assuming that the Commission issues an order of pre-arbitral deferral, however, it retains jurisdiction of the case to assure

that the following criteria are met for purposes of determining whether post-arbitral deferral is appropriate:

> (a) the dispute was promptly settled or resolved.
>
> (b) the grievance arbitration proceedings were conducted fairly; and
>
> (c) the result reached by the arbitrator was not repugnant to Chapter 447, Part II.

City of Lake Worth, 12 F.P.E.R. ¶ 17067 (1986). If the post-arbitral criteria are met, PERC may issue an order dismissing the unfair labor practice charge.

Clearly, the Commission remains responsible at all times for unfair labor practice charges which have been deferred. Arbitration is a component part of the Commission's authority to process unfair labor practice charges.

In its application of these standards, PERC has consistently deferred to arbitration its consideration of unfair labor practices where conduct arguably violates a collective agreement and constitutes an unfair labor practice, and where the arbitrator has met the Commission's post-arbitral deferral standards.[7/] Thus, PERC has declined to defer where it is

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7/ In light of the development by PERC of a consistent and firmly rooted deferral policy which parallels the approach in the private sector, it is apparent that the Commission's decision in Jackson County Education Association v. School Board of Jackson County, 3 F.P.E.R. 276 (1977), has been at least implicitly overruled. Also, see footnote 5, supra.

alleged that an employee was discriminatorily threatened, harassed and retaliated against by a public employer because the employee persisted in processing grievances for bargaining unit employees, Broward County Sheriff's Department, supra; where the primary issue involved an employee strike, City of Hollywood, 7 F.P.E.R. ¶ 12045 (1980); where resolution of the unfair labor practice charge required determination of the statutory scope of bargaining and waiver of the union's bargaining rights, Manatee Education Association, FEA/United, AFT, AFL-CIO v. Manatee County School Board, 8 F.P.E.R. ¶ 13202 (1982); where the respondent to an unfair labor practice charge provided no allegations or evidence which would satisfy any of the Commission's deferral criteria, Hollywood Fire Fighters Local 1375, AFL-CIO v. City of Hollywood, 8 F.P.E.R. ¶ 13186 (1982); where the issue was not considered by the arbitrator, Dade County P.B.A. v. City of Homestead, 7 F.P.E.R. ¶ 12079 (1981); where the charge questioned whether the State unlawfully interfered with statutorily protected activities, State of Florida, 10 F.P.E.R. ¶15058 (1984); where the union was not relying on a contractual basis for a refusal to bargain charge and where the issue was not contractually grievable, Lake Worth Utilities Authority, 10 F.P.E.R. ¶ 15134 (1984); where the charge alleged that the school district unlawfully demoted an employee in retaliation for his protected activity implicating interference with statutory rights, Seminole County School District, 11 F.P.E.R. ¶ 16249

(1985); and where the arbitrator failed to consider whether an employee's protected activity was a motivating factor in the state's decision to terminate the employee, State of Florida, 11 F.P.E.R. ¶ 16150 (1985).

In sum, the Commission's development and application of a consistent policy of deferral is a reasonable exercise of its discretion and authority under Part II of Chapter 447.

III.

DEFERRAL TO ARBITRATION IS APPROPRIATE IN THE INSTANT CASE.

Finally, since PERC possesses the statutory authority to develop a deferral policy, it is necessary to focus upon the appropriateness of deferral in the instant case. In making its initial pre-arbitral deferral decision in the instant case, PERC determined that the disputes were covered by the arbitration provisions of the respective parties' labor contracts. The allegations in the charge primarily involved a contract dispute, the resolution of which necessitated construction of various provisions of the parties' agreements. Thus, while the Unions' allegations in the unfair labor practice charges invoked the statutory duty to bargain, the ultimate dispute concerned the extent to which that bargaining duty had been fulfilled and limited by the collective bargaining agreements. Since the subjects over which the Unions sought to compel negotiation were specifically addressed in the parties' collective bargaining

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agreements, PERC determined the unfair labor practice charge to be no broader than the arbitrable grievance and that all issues were capable of resolution by the arbitrator. In fact, the Unions' claims that the City unlawfully increased the employee-paid portion of the insurance costs relate exclusively to the contract language pursuant to which the City acted. A more dramatic example of the wisdom and propriety of deferral to arbitration than the one presented in this case is hardly possible.

Having exercised its discretion to defer, the Commission also retained jurisdiction to assure itself that the arbitrator considered and resolved the unfair labor practice charge, that the arbitration proceedings were conducted fairly and regularly and that the arbitrator's award was not repugnant to PERA. (R. 163; 398) It has never been disputed that the proceedings were fair and regular. (R. 163)

The Commission fully reviewed the Arbitrator's award in its determination that post-arbitral deferral was appropriate. (R. 162-170) In pertinent part Commissioner Grizzard stated:

> With regard to the third preliminary question, whether the unfair labor practice issues were presented to and considered by the arbitrator, our review of the arbitrator's opinion and award leaves no doubt that this prerequisite for deferral to an arbitration award has been met . . . In the present case . . . the arbitrator stated the issue as follows:

> Do the collective bargaining agreements in Article XXVI of the AFSCME Agreement and Article XXV of the FOP Agreement authorize the City to apportion percentages of increases in medical benefit costs to employees respectively.
>
> . . . The arbitrator discussed this issue as a possible unilateral change and breach of contract, in light of contractual language and bargaining history, and he considered whether the 'clear and unmistakable' evidence demonstrated a waiver by the charging parties of the right to bargain over medical insurance premium increases . . . <u>These contractual issues clearly encompass the statutory unfair labor practice issues raised in these charges, and these issues were presented to and considered by the arbitrator</u>.

(R. 166-167)

Thus, did the Commission decide that the arbitration award is not repugnant to PERA. The arbitrator based his discussion of the issues involved on Commission precedent, thoroughly citing numerous PERC decisions. He also applied the Commission's "clear and unmistakable" waiver standard and examined contractual language in other PERC decisions to determine which language would in fact constitute a waiver. (R. 167) The Commission's post-arbitral deferral order, therefore, is entirely consistent with the purposes and policies of PERA.

CONCLUSION

Based on the foregoing argument and authority, Petitioner requests the Court to answer the certified question in

the affirmative, vacate the opinion of the Third District Court of Appeal and uphold the Order of the Public Employees Relations Commission which determined that deferral was appropriate in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief was mailed to ROBERT D. KLAUSNER, ESQ., Attorney for Respondents, 1922 Tyler Street, Hollywood, Florida 33020, and to CHARLES F. McCLAMMA, Staff Counsel, Florida Public Employees Relations Commission, Suite 100 - Turner Building, Koger Center, 2586 Seagate Drive, Tallahassee, Florida 32301, this 10th day of November, 1986.

Claudia B. Dubocq

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