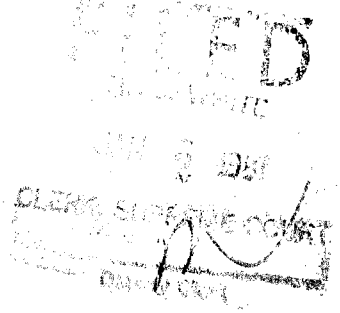

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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

REPLY BRIEF

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

December 30, 1986

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MORGAN, LEWIS & BOCKIUS
3200 MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131 · TELEPHONE (305) 579-0300

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ARGUMENT SUMMARY

Respondents have distorted the issue -- whether PERC has the statutory authority to defer unfair labor practice charges to arbitration. They would have the Court look solely to the language of § 447.503 to answer the certified question. Case law as well as common sense advise against such a narrow focus. Indeed, the language and intent of the whole of Part II of Chapter 447 provide implicit authority for PERC's deferral policy. Respondents would prohibit agencies from acting on statutorily implied grants of power. They would shackle administrative agencies from taking any action absent an explicit statutory provision therefor.

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 exclusively concerned the application of provisions of the parties' labor agreements. Deferral to arbitration where conduct relates directly to a collective agreement 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 which is statutorily required in Florida. The election of remedies provisions in the parties' labor agreements protect the City from multiple forum litigation but the City may waive that protection. The election of remedies provisions, however, do not deprive the Commission of its deferral authority. PERC's jurisdiction exists exclusive of any provisions in a collective bargaining agreement.

MORGAN, LEWIS & BOCKIUS
3200 MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131 · TELEPHONE (305) 579-0300

ARGUMENT

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

Respondent's argument on this point is deceptively misleading. It is narrowly focused on only one section of a statute which must be read in pari materia, and it distorts and misapplies basic principles of statutory interpretation.

Respondents have characterized this case as

> 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.

(R.B. 6-7)[1/] This case concerns no such effort. Once an unfair labor practice charge is filed, the Commission's jurisdiction attaches. Assuming an order of deferral is later entered, PERC does not relinquish its jurisdiction over the unfair labor practice charge until it has examined the arbitrator's award in accord with its post-arbitral deferral standards.

Even if Respondents' characterization of the issue herein is given credence, however, PERC certainly has the implicit authority to develop a deferral policy, and Respondents are merely attempting to impermissibly limit the terms of Part II of Chapter 447.

1/ References to the Brief of the Respondents shall be indicated by "R.B. ___."

In fashioning their argument against PERC's authority to defer, Respondents narrowly focus solely on § 447.503, Fla. Stat. (1985). (R.B. 4; 7-8; 12-14) This narrow focus contravenes the basic maxim of statutory interpretation which requires that statutes be construed in their entirety and as a whole. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So.2d 522 (Fla. 1973). The legislative intent behind the enactment of Chapter 447, Part II should be determined by viewing the statute in pari materia, that is, the entire statute must be considered and effect given to each of its provisions and parts. Pertinent to this Court's analysis, then, in addition to § 447.503, are § 447.201, the statement of the legislature's purpose in enacting the Public Employees Relations Act (PERA), and § 447.401 which requires collective bargaining agreements to contain a grievance and arbitration procedure. When so viewed, it is clear, as the City has already argued, that PERC's discretion to defer is implicit and inherent in its statutory grant of jurisdiction over unfair labor practice charges.[2/] (P.B. 8-19)[3/]

It follows that Respondents' reliance on a variety of methods of statutory construction is unwarranted. Indeed, Respondents initially note at page 6 of their brief that "courts are without power to construe an unambiguous statute in a way

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2/ In view of the fact that PERC's power to defer affirmatively appears in Part II of Chapter 447, then, the City has completely and accurately stated the implied powers doctrine, contrary to Respondents' assertion. (R.B. 12-13)

3/ References to the City's Initial Brief shall be indicated by "P.B. ____."

which would extend, modify or limit its express terms or its reasonable and obvious implications (emphasis added)." Pages 7 through 13 which follow, then, are an unnecessary treatise on statutory construction because there is no statutory ambiguity. As stated by Florida courts:

> [S]uch rules [of statutory construction] should be used only in case of doubt and should never be used to create doubt, only to remove it.

Englewood Water Dist. v. Tate, 334 So.2d 626, 628 (Fla. 2d DCA 1976); State v. Egan, 287 So.2d 1, 4 (Fla. 1973). Respondents' arguments on the issue of whether PERC has the statutory authority to defer are merely an attempt to create doubt where it does not otherwise exist.[4/] By clear and necessary implication based on §§ 447.201, 401 and 503, PERC has the statutory authority to defer unfair labor practice charges to arbitration, where appropriate. Respondents' foray into statutory interpretation is

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4/ Likewise have Respondents attempted to create an issue concerning the permissible source of administrative authority. (R.B. 10) The real issue is how PERC's lawful authority to defer may be exercised and Respondents fail to explain why PERC may not temporarily stay its unfair labor practice authority to encourage use of the parties' own dispute-resolution procedures. The authorities cited by Respondents in their argument regarding the phrase "by law" are inapposite. Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979), addressed only the issue whether "by law" includes both general and special legislative acts, without reference to whether judicial or quasi-judicial law is included in that phrase. Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979), concerned only whether the phrase "provided by law" in a statute had the same meaning as "deemed by law". In State Dep't. of Citrus v. Office of Comptroller, 416 So.2d 820 (Fla. 2nd DCA 1982), the Comptroller's application of a newly revised administrative rule was far in excess of its statutory authority.

simply unnecessary and irrelevant to the resolution of the issue at hand.

The substantial similarities between the National Labor Relations Act (NLRA) and PERA must be reemphasized. And as in the public sector, the deferral doctrine developed by the National Labor Relations Board (the Board) represents an accommodation of its dual responsibility to prevent and penalize unfair labor practices and to encourage the private settlement of labor disputes. Taylor v. N.L.R.B., 786 F.2d 1516, 1519 (11th Cir. 1986). That the exercise of its deferral policy by the Board has been recently criticized in Taylor, supra does not aid in the instant inquiry concerning the existence of authority to defer. The soundness of the Board's power to defer remains and has been specifically endorsed by the Supreme Court in William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16 (1974). What continues to be disputed, according to the court in Taylor, are the circumstances under which that power is exercised. Taylor, supra, at 1519. Specifically, the Taylor court criticized the Board's post-arbitral deferral criteria, as established in Olin Corp., 268 N.L.R.B. 573 (1984). According to the court:

> The Board may not avoid this responsibility [to enforce the NLRA and decide unfair labor practices] through a far-reaching deferral policy which apparently presumes that an unfair labor practice claim has been resolved through arbitration.

Id. at 1520. The Court's express concern, then, was that the unfair labor practice charge be resolved in arbitration. It is in this light that the Taylor court examined the decisions of the

Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) and McDonald v. City of West Branch, 466 U.S. 284 (1984). Each of these decisions stands for the proposition that certain statutory claims may be asserted independently of an agreement to arbitrate. The actual significance of these decisions, contrary to Respondents' contention at page 20, is that PERC also declines to defer to arbitration those unfair labor practice charges that allege a violation of statutorily guaranteed rights under Part II of Chapter 447, and do not center on the parties' collective bargaining agreement. (P.B. 21-23). The fact that an unfair labor practice "also include[s] the element of a contractual grievance" is certainly relevant to the fulfillment by PERC of its obligations under PERA given the Act's express requirement in § 447.401 of arbitration as a means to resolve contractual disputes between the parties. (R.B. 21) It is error to state, moreover, as do Respondents, that as part of its sufficiency determination PERC could have simply found that the instant charge was a contractual breach rather than an unfair labor practice charge. It is elementary that unfair labor practice charges may involve elements of both a contractual and statutory breach. (R.B. 21; P.B. 16)

Respondents' also attempt to draw a direct parallel between the instant case and the decision of the Michigan Supreme Court in Detroit Firefighters Ass'n., Local 344 v. City of Detroit, 408 Mich. 663, 293 N.W.2d 278 (Mich. 1980).[5/] The fact

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5/ The City reiterates that this decision represents the (Continued)

that Michigan has established compulsory arbitration procedures for police and fire personnel does not call into question the validity of the City's assertion that "the Michigan ... Act contains no reference to a purpose of providing for arbitration in the public sector." (P.B. 19, f.n. 6) These compulsory procedures concern themselves:

> with 'interest' arbitration (i.e., contract formation) involving primarily economic issues, as opposed to the statutory rights involved under PERA . . .

Id. 293 N.W.2d at 282. Michigan does not mandate contract grievance arbitration. Contract-making type of arbitration, furthermore, is clearly irrelevant to a deferral policy and is patently distinguishable from the arbitration provisions established and encouraged in Florida and under the NLRA, and which gave rise to the deferral doctrine.

Respondents also refer to two decisions of the New York courts which contain broad statements concerning the "exclusive non-delegable jurisdiction" of that state's public labor board. (R.B. 24-25) These cases do not address the issue of deferral. Nevertheless, the New York Public Employees Relations Board has apparently embraced the deferral doctrine. Matter of New York City Transit Authority, 4 N.Y.P.E.R.B. ¶ 3031; State of New York v. Public Employment Relations Board, 116 A.D.2d 827, 497 N.Y.S.2d 491 (N.Y. App. Div. 1986).

In sum, the substantial similarities between the NLRA and PERA render it appropriate for PERC to premise its deferral

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only treatment of the deferral issue by the highest court of any state.

policy on the decisions and rationale of the Board when appropriate. Further, the affirmative appearance of PERC's statutory power to defer having been established, it is neither wise nor desirable that the legislature visit the issue. The certified question should, therefore, be answered in the affirmative.

II. PERC'S DEVELOPMENT AND APPLICATION OF THE DEFERRAL STANDARD HAS BEEN APPROPRIATE AND CONSISTENT.

Having established ample statutory authority for PERC's power to defer, Respondents nevertheless contend that PERC may adopt such a policy only through formal administrative rulemaking and that the development of a deferral rule through adjudication is improper. (R.B. 33-37) This argument is lacking in merit because the Commission has clear authority to develop a deferral policy through adjudication. Respondents have overlooked § 447.207(6), Fla. Stat. (1985), which states, in pertinent part:

> (6) . . . Any commission statement of general applicability that implements, interprets, or prescribes law or general policy, made in the course of adjudicating a case pursuant to . . . S. 447.503 [charges of unfair labor practices] shall not constitute a rule within the meaning of S. 120.52 (15). [emphasis added]

Clearly, the legislature has exempted PERC from the requirement that statements of general applicability be adopted by rule rather than by adjudication.

PERC has gone through precisely the process desired by Respondents in developing its deferral policy. Respondents cite McDonald v. Dep't. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), as authority for their contention that:

> PERC . . . has a responsibility to 'structure its discretion progressively by vague standards, then definite standards, then broad, principles, then rules.' [McDonald, id. at 580]

(R.B. 35) This is exactly the process PERC has gone through in developing its deferral policy from 1978 until the formal adoption of Fla. Admin. Code Rule 38D - 21.011 in 1986. (See PERC Initial Brief at pages 15 through 18 for a full exposition of this process).

Respondents also suggest that PERC's application of the deferral doctrine has not been consistent and in support cite to the Commission's decision in Manatee Education Association v. Manatee County School Board, 8 F.P.E.R. ¶ 13202 (1982). According to Respondents, PERC should have declined to order pre-arbitral deferral here as in the Manatee County decision because each case involved a violation of § 447.501(1)(a) and (c). (R.B. 37-38) Respondents have contorted the definition of "consistent" and would require PERC to refuse to defer to arbitration every time an unfair labor practice charge alleges a refusal to bargain and a violation of § 447.501(1)(a) and (c). Whether deferral will occur or not must depend upon the specific facts of the claim, not a generic rule that all refusal to bargain charges will be treated the same. What is consistent is PERC's examination of each request to defer an unfair labor practice charge to arbitration under the same deferral criteria. That the Commission refused to defer in Manatee County, but did not refuse in the instant case is simply probative of its careful and individualized application of each case's specific facts to the Commission's deferral criteria. In contrast to the instant case,

Manatee County presented the Commission with "issues ... [in excess of] those which may properly be resolved through the arbitral process." Id. at 375. Consistent application of the deferral criteria to individual cases, therefore, does yield different results. Respondents completely miss the mark on this point.

III. DEFERRAL IS APPROPRIATE IN THE INSTANT CASE.

There is no dispute that Respondents have each agreed in their respective grievance arbitration clauses, to be bound by an arbitrator's award. This agreement, moreover, is statutorily required, since such provision must be incorporated in every labor agreement between a Florida public employer and its employees pursuant to § 447.401, Fla. Stat. (1985). Respondents essentially contend, however, that an order of deferral must be predicated on an agreement to be bound to a specific arbitration award. (R.B. 39) Such a view would permit a party to avoid the grievance arbitration procedure at any time. The grievance/arbitration procedure and the post-arbitral deferral criteria established in Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955), look to an overall commitment to be bound to the grievance arbitration process.

Respondents argue that they were forced to arbitration against their wills. (R.B. 40; 42) The existence of opposition, however, is not dispositive of the issue of whether a party has agreed to be bound to arbitration.[5/] Were it otherwise, a party would be free to frustrate the statutorily mandated grievance

MORGAN, LEWIS & BOCKIUS
3200 MIAMI CENTER, 100 CHOPIN PLAZA, MIAMI, FLORIDA 33131 · TELEPHONE (305) 579-0300

arbitration process simply by opposing deferral in a particular case. The irrelevance of opposition to deferral analysis, moreover, is especially appropriate in the instant case, where deferral was accomplished prior to the arbitration proceeding.

The Commission has repeatedly held that a union's opposition to going forward with grievance arbitration does not control or effect the analysis of whether deferral is appropriate in a given case. See, e.g., Local 754, IAFF v. City of Tampa, 10 F.P.E.R. ¶ 15129 (1984); Cocoa Fire Fighters, Local 2416 v. City of Cocoa, 9 F.P.E.R. ¶ 14284 (1983).

Adoption of the Respondents' arguments on this issue would virtually nullify PERC-deferred arbitration proceedings and would undermine the entire basis of contractual grievance arbitration. A party would be free to oppose pre-arbitral deferral, take its chance in the subsequent arbitration, and then be free to accept or reject the result based solely upon its satisfaction with the outcome of a given case. However, if the result were unfavorable, that party could claim it was not bound since it had not "agreed" (i.e., chosen) to arbitrate. Having agreed to a mutually binding process, parties are simply not free on a case-by-case basis to decide whether to fulfill their contractual promise and abide by the arbitration result.

This rule also applies in the private sector. In the pre-arbitral context, the National Labor Relations Board focuses

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5/ The City does not enjoy being in any forum on the issue of the insurance rate increase, particularly when its labor contracts specifically authorized the action it took, however, its desires in this regard have been irrelevant for four years.

on whether a charge involves conduct which is arguably within the coverage of a binding grievance arbitration procedure. The fact that a charging party has framed the issue in statutory, rather than contractual terms, is not dispositive. See Roy Robinson, Inc., 228 N.L.R.B. 828 (1977). The presence of the binding grievance arbitration process is the key, not whether a charging party wishes to employ it in a particular case. United Technologies, 268 N.L.R.B. 557 (1984).

Respondents also argue that the election of remedies provisions in their agreements gives them, as the aggrieved parties, the exclusive right to the choice of a forum in which to secure that remedy. In return, they continue, the City need only litigate in a single forum. Thus, they conclude, the City has waived the right to select a forum once an election of remedy has been made. (R.B. 42-45) To hold otherwise, urge Respondents, permits the City to repudiate its collective bargaining agreement. Respondents' arguments ignore the purpose of the election of remedies provisions, as well as their effect on post-arbitral deferral analysis.

The sole purpose of the election of remedies provisions agreement which the City sought and obtained from Respondents, is to permit the City to avoid litigation in multiple forums. These provisions, therefore, are not a right surrendered by the City, and bestowed upon the Unions and/or employees. Rather, these provisions, sought and obtained by the City, are a benefit to the City which it alone can waive. Thus the aggrieved party may choose the forum in which to pursue relief and thereby give up the right to simultaneously or later arbitrate the same claim.

This is nothing less than the City's contractual right to foreclose grievance arbitration remedies in those circumstances. The City is always free to waive that benefit, however, as it may voluntarily waive other contractual rights. For example, the City could agree to accept and process an untimely grievance, thereby waiving its right to insist upon adherence to the contracts' grievance handling provisions. When the Commission analyzes cases in the pre-arbitral context, just such a waiver is required of a respondent before the matter will be deferred to arbitration. It is thereby clear that the election of remedies provisions provide no contractual right to the unions (or employees) which is impaired by Commission deferral.

The Respondents' position is further flawed because it misconceives the basis of the entire deferral doctrine by viewing it as a process which the City can employ to frustrate their choice of forums. However, the Commission has long held that no party has a right to deferral, since "the (process) is a matter of policy, the application of which is committed to the sound discretion of the Commission." Palm Beach County Ass'n. of Fire Fighters, Local 1612 v. Palm Beach County, 9 F.P.E.R. ¶ 14128 (1983). Thus, contrary to Respondents' premise, the City has never exercised any "right" to compel deferral. To the contrary, in the pre-arbitral context the City simply asked the Commission to exercise its discretion and permit the matter to be submitted to an arbitrator for an interpretation of the controlling contract language. PERC then analyzed the dispute and determined that deferral in this instance served important policy considerations.

This distinction has also been recognized in the private sector. In Local 2188, IBEW v. N.L.R.B., 494 F.2d 1087, 1089 (D.C. Cir.), cert. denied, 419 U.S. 835 (1974), the court explained:

> It should be understood that the Collyer decision and those now under review are not based upon any right of the employer to compel the union to utilize grievance procedures rather than file charges with the Board. Rather, they proceed from the Board's asserted power to withhold its processes when to do so will best serve the policies of the Federal labor laws.

Similarly, Commission deferral policy does not turn only on what will serve the individual interests of the parties in a given dispute, but rather upon the determination that withholding Commission processes will best serve the policies of Chapter 447.

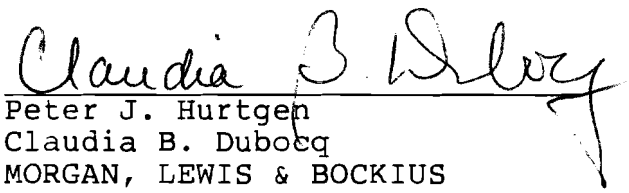
The Respondents claim that the election of remedies provisions take this case outside the general rule, since they provide a special "alternative" avenue of relief which the unions alone can choose to follow. Once chosen, the Respondents insist that their otherwise clear agreement to be bound by arbitration is inapplicable. However, all Florida public employees and their unions have the identical statutory right to seek PERC relief by filing unfair labor practice charges, regardless of the grievance arbitration provisions contained in their labor agreements. Nevertheless the Commission, as well as the Board in private sector cases, still has the well-recognized discretionary authority to withhold adjudication and require use of the grievance arbitration mechanisms. The mere fact that it is not the forum desired or initially selected does not extinguish the otherwise acknowledged commitment to be bound by the subsequent arbitration

result. Simply put, the election of remedies provisions are superfluous to the resolution of the issue of whether the Respondents agreed to be bound by arbitration. The provisions neither add to, nor detract from their statutory right to seek Commission relief. Nor do they deprive PERC of its authority to then withhold adjudication pending arbitration in an appropriate case. The Commission is the guardian of its jurisdiction; not the parties acting through their collective bargaining agreement.

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,



Peter J. Hurtgen
Claudia B. Dubocq
MORGAN, LEWIS & BOCKIUS
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131
(305) 579-0350

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 30th day of December, 1986.

Claudia B. Dubocq

Claudia B. Dubocq

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