IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI, FLORIDA, and FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION,	:	
Petitioners,	:	
v.	:	Case No. 69,469
FRATERNAL ORDER OF POLICE, MIAMI LODGE 20, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1907, AFL-CIO,	:	District Court of Appeal Third District Case No. 85-1040
Respondents.	:	

REPLY BRIEF OF PETITIONER FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

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

Petitioner City of Miami: "City"

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

Respondent Fraternal Order of Police, Miami Lodge 20: "FOP"

Respondent American Federation of State, County and Municipal Employees, Local 1907, AFL-CIO: "AFSCME"

All references to the Appendix will appear as (A __).

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

All references to the supplemental record will appear as (SR __).

All references to the Respondents' Answer Brief will appear as (Resp. B. __).

All references to the Respondents' Appendix will appear as (Resp. App'x __).

I. WHETHER THE PUBLIC EMPLOYEES RELATIONS COMMISSION HAS AUTHORITY UNDER CHAPTER 447, PART II, TO DEFER UNFAIR LABOR PRACTICE CHARGES TO ARBITRATION, AND TO GIVE FINAL AND BINDING EFFECT TO THE ARBITRATOR'S CONTRACT INTERPRETATION.

PERC initially argued that it has such authority. Respondents' central argument in opposition is "that the powers sought to be exercised must be made to affirmatively appear before it can be legally exercised,"[1] and that, because PERC's authority to defer does not appear in Section 447.503, such power is lacking.

PERC submits that Respondents' argument is unpersuasive because it is based upon a faulty premise, which is that Section 447.503 is the only possible source of the authority to defer. In fact, PERC's authority is derived from reading in pari materia several provisions of Chapter 447, Part II: Section 447.201(3), which states that PERC was created "to assist in resolving disputes between public employees and public employers"; Section 447.501(1)(f), which makes it an unfair labor practice for a public employer to refuse to discuss grievances in good faith; Section 447.503(6)(a), which grants PERC broad remedial powers; and, most importantly, Section 447.401, which requires each public employer and employee organization to negotiate a grievance procedure to settle disputes involving interpretation

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[1]Resp. B. 12, quoting from State ex rel. Wells v. Western Union Telegraph Company, 118 So. 478 at 480 (Fla. 1928).

of a collective bargaining agreement and to include as its terminal step final and binding arbitration.

PERC does not seek, as Respondents suggest, to have this court "insert words or phrases in the statute or supply omissions." (Resp. B. 8) The requirement that parties negotiate a grievance procedure terminating in final and binding arbitration is that of the Legislature, and deferral by PERC to that process in appropriate circumstances is a way of accommodating and harmonizing Sections 447.503 and 447.401. It is a reasonable policy[2] which PERC has concluded is consistent with the overall mission of the agency to assist in resolving public labor disputes. § 447.201. In adopting and interpreting such policy, PERC is entitled to considerable deference. See PERC v. Dade County PBA, 467 So.2d 987 (Fla. 1985); School Board of Dade County v. Dade Teachers Association, 421 So.2d 645 (Fla. 3d DCA 1982); Pasco County School Board v. PERC, 353 So.2d 108 (Fla. 1st DCA 1977).

PERC has consistently maintained that its policy of deferral was in general accord with the decisions of the National Labor Relations Board (NLRB) and the federal courts which have reviewed the decisions of the NLRB. PERC and the Florida courts have found decisions under the National Labor Relations Act (NLRA) to be instructive. See City of Clearwater v. Lewis, 404 So.2d 1156 (Fla. 2d DCA 1981). Respondents find certain differences between

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[2]Respondents concede that "the question of deferral is clearly one of policy . . ." (Resp. B. 36)

the NLRA and Chapter 447, Part II, to militate against deferral. However, the distinctions between the two laws, if anything, are supportive of deferral.

Respondents attach significance to the differing roles of the NLRB General Counsel and PERC's General Counsel. Under the NLRA the Board's General Counsel prosecutes a case on behalf of a charging party, whereas under Chapter 447, Part II, a charging party bears the responsibility for prosecuting the case. This difference would seem to argue in favor of deferral to arbitration, for in Florida, when the Commission defers, a charging party has substantially the same responsibility of persuasion before the arbitrator as before PERC. In contrast, when the NLRB defers, a charging party bears an increased responsibility because the NLRB General Counsel does not prosecute the case before the arbitrator as he would in an unfair labor practice proceeding before the Board.

Respondents also note that binding arbitration is mandated by Section 447.401, but is not required by the NLRA. This only adds greater force to the conclusion that deferral by PERC is encouraged even more by the Florida Legislature than deferral by the Board has been encouraged by Congress.

Respondents contend that the NLRB's deferral policy recently has come under judicial criticism. (Resp. B. 19) An examination of the cases relied on by Respondents reveals, however, that the criticism is not directed at the basic policy of deferral, but rather at the standards for deferral used by the Board or the

application of those standards by the Board. No similar criticism of PERC's standards for deferral or application of its deferral policy is warranted, and PERC reiterates its opinion that the policy of deferral is supported by NLRB and federal court decisions.

PERC also disagrees with the Respondents' assertion that "[a] close examination of the treatment of the deferral doctrine on the state level throughout the United States demonstrates substantial support for the position of the [Respondents]." (Resp. B. 22) The "substantial support" to which Respondents allude appears confined solely to Michigan, a fact which PERC first acknowledged in the order under review. The remaining jurisdictions referred to by Respondents simply do not, in PERC's view, provide the kind of support alleged. The New York cases cited by Respondents do not address the issue of whether New York PERB may defer to arbitration. PERC has not previously cited New York cases in support of deferral, but it could have. See Fulton-Montgomery Community College and Fulmont Association of College Educators, 16 PERB ¶ 4561 at p. 4642 (NY PERB 1983) (hearing officer defers to the parties' contractual arbitration procedure). (A 7-11) The Pennsylvania cases cited by Respondents are similarly unpersuasive, for they chiefly concern whether the Pennsylvania PLRB lacks jurisdiction, not whether PLRB may defer.

Notwithstanding the decision in Jefferson Township Board of Education v. Jefferson Township Education Association, 457 A.2d

1172 (N.J. Super. Ct. App. Div. 1982), the New Jersey PERC continues a policy of deferring to arbitration. If this court reads no other opinions, PERC respectfully urges the court to read New Jersey PERC's opinion in Brookdale Community College and Brookdale Community College Administrators Ass'n, 9 NJPER 14122 (NJ PERC 1983). (A 1-6)

The case cited by Respondents from Indiana, Merrillville CTA and Merrillville Community School Corporation, 3 IPER ¶ 10000 (1978) (Resp. App'x 28), was a decision of a hearing examiner who declined to defer because the Indiana Education Employment Relations Board (IEERB) had not yet deferred and "[i]t would ... be presumptuous and ... erroneous for a hearing examiner to recommend deferral in the absence of guidance from the full three member IEERB." Id. at p. 2. PERC's research has revealed no cases in which the IEERB itself has reached the issue. The Maine Labor Relations Board has not, as Respondents argue, recognized an absence of authority to defer. See Maine State Employees Ass'n v. State of Maine, Case No. 86-09 (Maine LRB April 23, 1986) (Board deferred to arbitration, noting that the bargaining agreements were at the center of the dispute). (A 12-18)

PERC previously acknowledged the countervailing view announced by the Michigan Supreme Court in Detroit Fire Fighters Association v. City of Detroit, 293 N.W.2d 278 (Mich. 1980). PERC also previously acknowledged that some states have explicit

provisions authorizing deferral.[3] Precise methods of application of a policy of deferral to arbitration may differ from state to state. Nevertheless, just as is the case under federal judicial decisions, the basic policy has gained wide approval.

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[3] E.g. California and Illinois. (Pet. B. 9) Notwithstanding Respondents' argument to the contrary, PERC stands behind its inclusion of Massachusetts among the states which defer although lacking express authority. Section 8, Chapter 150C, General Laws of Massachusetts, authorizes the Massachusetts Commission to order binding arbitration where the parties lack a contractual provision for binding arbitration. It does not address the authority of the Commission to defer to arbitration upon the filing of an unfair labor practice charge.

II. WHETHER PERC HAS PROMULGATED APPROPRIATE STANDARDS FOR DEFERRAL.

Respondents argue that PERC's development of its deferral policy has been improper because it was done through adjudication rather than rulemaking. Respondents are completely mistaken because they overlook Section 447.207(6), which provides in pertinent part that

> [a]ny Commission statement of general applicability that implements, interprets, or prescribes law or policy, made in the course of adjudicating a case pursuant to s. 447.307 or s. 447.503 shall not constitute a rule within the meaning of s. 120.52(15).

By virtue of the foregoing provision, PERC has express authority to prescribe its policy of deferral in a case without having the adoption of that policy constitute a prohibited means of rulemaking. Thus, PERC committed no error when it deferred Respondents' ULP charges prior to the promulgation of Florida Administrative Code Rule 38D-21.011.

By mentioning this subsequently adopted rule, PERC has not, and does not now, seek retroactive justification for "deferral by adjudication." None is necessary. But the rule constitutes the final stage in the evolution of PERC's deferral policy, and was mentioned in PERC's initial brief only to provide a complete picture of the deferral policy. PERC feels constrained, however, to add one more point regarding the newly promulgated rule in response to Respondents' assertion that PERC "has ignored its obligations to develop policy through rulemaking which it least offers a measure of due process to those about to be deprived of

statutory rights." (Resp. B. 37) The adoption of Rule 38D-21.011 was accomplished in conformance with APA requirements, including full notice, yet the Commission received not a single objection to the proposed rule from any party.

Respondents offer PERC's decision in Manatee Education Association v. Manatee County School Board, 8 FPER ¶ 13202 (1982) (A 19-20), as evidence that PERC's application of its deferral doctrine has been inconsistent. It is entirely possible that a case-by-case analysis of each opinion on deferral rendered over the last nine years might reveal fluctuations in application of that policy.[4] Manatee, however, does not demonstrate any significant deviation in the deferral policy, for Manatee involved issues different from that presented by the instant cases. PERC expressly noted in Manatee that while the School Board's defense there involved solely the application of the reopener provision of the collective bargaining agreement, the unfair labor practice charge itself alleged more, i.e., that the employer had engaged in a course of conduct that was not limited to a refusal to negotiate subjects allegedly covered by the contract. Thus, Manatee differs from the instant cases which exclusively concern whether the terms of the parties' contracts were violated.

One of the prerequisites to deferral by PERC is that the unfair labor practice charge center upon a contract violation.

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[4]PERC has maintained only that its policy has evolved since its adoption in 1977, not that there has been total uniformity.

Underlying this requirement is the recognition that violation of a contract provision may be evidence of a failure to bargain collectively in good faith, in violation of Section 447.501(1)(c). Not every charge alleging such a violation, however, centers upon a labor contract violation. Some Section (1)(c) charges may involve matters such as refusing to meet for bargaining at reasonable times, while others like Manatee may involve a variety of alleged actions by a charged party. The more central the dispate is to an actual contract violation, the stronger is the justification to defer to an arbitrator's contract interpretation, because resolution of the contract violation is more likely to effectively dispose of the alleged statutory violation.

Respondents have accused PERC of "shirk[ing] a statutory responsibility and dump[ing] a question of pure statutory interpretation into the lap of a private party." (Resp. B. 38) In this single statement Respondents have distilled the substance of their erroneous perception of deferral to arbitration. When PERC defers to arbitration, it does not shirk statutory responsibility; rather, it reconciles statutory obligations, recognizing that some issues are both questions of contract interpretation and statutory violation.[5] When both questions are

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[5]It is noteworthy that in PERC v. District School Board of DeSoto County, 374 So.2d 1005 (Fla. 2d DCA 1979), the court concluded that "where the breach of a collective bargaining agreement may also be an unfair labor practice under PERA, the circuit courts nevertheless have jurisdiction to provide a remedy for that breach." Id. at 1012.

present, a proper resolution of the former question by an arbitrator effectively disposes of the latter. In Brookdale Community College and Brookdale Community College Administrators Association, 9 NJPER ¶ 14122 at 270 (NJ PERC 1983), the Public Employees Relations Commission of the State of New Jersey noted that

> in Hackensack v. Winner, 82 N.J. 1, 6 NJPER 11067 (1980), the Supreme Court held that the Commission's "exclusive power" to determine unfair practice charges did not necessarily preclude the exercise of jurisdiction by other agencies over related claims nor did it mandate that the Commission proceed rather than defer to other agencies. Thus, N.J.S.A. 34:13A-5.4(c) is not jurisdictional in a wholly preemptive sense; but rather incorporates relative concepts of comity and deference. Cf. Township of Teaneck v. Local #42, FMBA, 158 N.J. Super. 131, 4 NJPER 4101 (App. Div. 1978); In re Hoboken Teachers Assn, 147 N.J. Super. 240, 3 NJPER 500 (App. Div. 1977) (courts may restrain strikes, despite allegations of refusal to negotiate in good faith within Commission's unfair practice jurisdiction). In addition, in State v. Camden County Board of Chosen Freeholders, 180 N.J. Super. 430 (App. Div. 1981), the Court specifically held that the Commission's "exclusive power" over unfair practice claims did not prevent courts from resolving questions of contractual interpretation. Under these cases, it would be improper to insist that the Commission must process and decide every contractual claim rather than retain jurisdiction and defer to arbitration in the first instance so that the arbitrator's expertise over matters of contractual interpretation can be applied.

The same could be said for the claim presented by the Respondents.

Respondents have failed to refute PERC's assertion that it has adopted an appropriate deferral policy. That policy was one

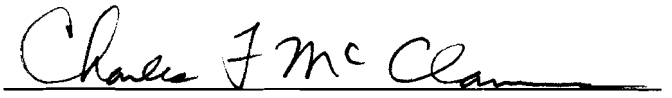
which PERC was authorized to promulgate, even in the absence of a rule. Moreover, it is a policy which is supported by both law and logic.

III. WHETHER DEFERRAL WAS APPROPRIATE IN THESE CASES.

PERC relies on the argument in its initial brief as well as what was said in the final order giving conclusive effect to the arbitrator's awards. (R 309-407)

CONCLUSION

PERC respectfully asks this Court to conclude that PERC has authority under Chapter 447, Part II, to defer unfair labor practice charges to arbitration, and to give final and binding effect to the decision and award of the arbitrator. PERC would further ask the Court to conclude that the Commission has promulgated appropriate standards for deferral, which were properly applied in these cases, and that PERC's final order should therefore be affirmed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Florida Public Employees Relations Commission has been sent by U.S. Postal Service this 30th day of December, 1986, to the following:

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