IN THE SUPREME COURT OF FLORIDA

F.O.P., MIAMI LODGE 20,	)	
	)	
Appellant	)	
vs.	)	CASE NO. 77-394
CITY OF MIAMI,	)	
	)	
Appe11ee	)	

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT
STATE OF FLORIDA

BRIEF OF AMICUS CURIAE, FLORIDA LEAGUE OF CITIES, INC. ON BEHALF OF THE CITY OF MIAMI

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STATEMENT OF CASE AND FACTS

The Appellee, City of Miami, was the Respondent in the action before the Public Employee Relations Commission. The Appellant, Fraternal Order of Police, Miami Lodge 20, was the charging party. The Florida League of Cities, Inc., is an amicus curiae, pursuant to the Order dated April 2, 1991, and represents the interests of the municipalities of the State of Florida. In this brief, the Appellee will be referred to as "the City", the Appellant will be referred to as "the F.O.P.", the amicus, Florida League of Cities, Inc., will be referred to as "the League." The League will accept the Statement of Case and Facts adopted by the Appellee.

SUMMARY OF ARGUMENT

While § 447.209, Fla. Stat. (1983) and § 447.309(1), Fla. Stat. (1983) can be interpreted to be in conflict, both sections must be read in conjunction with each other so that they both are rendered meaningful. The only way to resolve the apparent conflict between an employee's right, through representation, to bargain collectively wages, hours, and terms and conditions of employment and the management's prerogatives reserved to the public employer is to establish a case by case balancing test to determine which right should prevail.

To refuse to do so gives undue deference to an employee's right to bargain over the management prerogative preserved by § 447.209, Fla. Stat. (1983), when supported by strong governmental policy.

The ability to ensure that the City's police officers are drug free is integrally related to the internal security of the police department, as well as being imperative if the City is to uphold its public trust by supplying adequate levels of police service. These concerns are encompassed within managerial rights protected pursuant to § 447.209, Fla. Stat.

Clearly, the District Court of Appeal, Third District, sitting en banc entered a correct and well reasoned opinion which should be upheld and the court's question answered in the affirmative.

ARGUMENT

I. AS PRESENTED BY THE FACTS IN THIS CASE OR IN ANY CASE, THE COMPULSORY DRUG TESTING OF POLICE OFFICERS IS NOT A MANDATORY SUBJECT OF COLLECTIVE BARGAINING WHEN THE RIGHT TO NEGOTIATE A CONDITION OF EMPLOYMENT IS BALANCED AGAINST A MANAGERIAL PREROGATIVE SUPPORTED BY GOVERNMENTAL POLICY.

§ 447.309(1), Fla. Stat., (1983) guarantees public employees the right, through representation, to "bargain collectively in the determination of the wages, hours, and terms and conditions of employment." § 447.209, Fla. Stat., (1983) guarantees "the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations."

Correct statutory construction requires when an apparent inconsistency exists between two statutory sections, it is the duty of the court to read the statutes so as to harmonize and reconcile their provisions. Woodgate Development Corp. V. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977); Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1965), cert denied, 376 So.2d 74 (Fla. 1979). The court should not give undue deference to one provision of a statute which would render the other statute meaningless but rather should attempt to give effect to both statutes. State v. Dingman, 294 So.2d 325 (Fla. 1974); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); State Department of Public Welfare v. Galilean Children's Home, 102 So.2d 388 (Fla. 2d DCA 1958).

In the instant case, the only effective way to give meaning to the two statutory sections in question, is to adopt "the balancing of interest analysis" on "a case to case" basis.

Applying such a balancing test rather than giving undue deference to "the employee's right to bargain" clearly dictates "that the police department's overriding interest in the integrity of it's police officers (as well as the department's overriding interest in the physical and mental and physiological capabilities of the officer to handle the many potentially dangerous and inflammatory situations which a police officer will face) would outweigh the union's interest in treating this subject (e.g. chemical testing for drugs) as a condition of employment." Commissioner Shelly's dissent (R.544). See also Police Officer's Local 364 V. LRC, 391 Mass 429, 462 N E.2d 96 (1984) and City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 5th DCA 1985).

While the court below recognized that compulsory drug testing arguably is a term or condition of employment, it also correctly opined that the subject is a managerial prerogative. City of Miami v. F.O.P., Miami Lodge 20, 571 So.2d 1309 (Fla. 3d DCA 1989), rev'd on rehearing, 571 So.2d 1320, 1323 (Fla. 3d DCA 1991).

To remedy the dilemma and after distinguishing School Board v. Indian River County Education Association, 373 So.2d 412 (Fla. 4th DCA 1979), the court properly embraced the balancing test stating: "Our research reveals that many courts and labor boards have recognized that, in the absence of specific legislation delineating subjects of mandatory bargaining [as we find in Ch. 446, Fla.

Stat.(1983)] the balancing test is the preferable mode of analysis in order to accomplish the delicate task of accommodating union and employer **interests."** 571 So.2d at 1323 (footnote omitted).

The court goes further to discuss the weight of the governmental policy supporting the position of the management, the city.

> Thus, in order to determine whether the subject of drug testing is mandatory or permissive, we must balance the interest of the City and the public against the interests of the employee public officers .... [T]he rationale behind the concept of mandatory collective bargaining is to ensure "decisions that are better for both management and labor and for society as a **whole**." ... Will submitting the subject of drug testing to the mandatory bargaining process result in decisions which are ultimately better for society as a whole, and which will result in the more effective and efficient operation of the police force? We think not.

Id. at 1324 (citations omitted and emphasis added).

The facts in the instant case reveal that the weight to be given the interests of "the society as a **whole,"** as represented by governmental policy, is essential to the outcome of the issue at hand. Although all public employees are charged with upholding the public interest, this case does not affect an average public employee. Instead, the matter involves public servants who have as their utmost responsibility the direct and primary responsibility for ensuring the safety of the public at-large. "[A] drug impaired police officer not only poses the danger of failing to protect the public, he or **she** could in fact, endanger **it."** Id. at 1325 (citations omitted).

Clearly, the managerial prerogative supported by the strong governmental policy of comfort that its police force is not

operating in a drug impaired state outweighs the right of the police officers, who represent the governmental employee charged with protecting the public from harm, to bargain over a subject which may result in the diminution of the security of the public as a whole as well as the individual police officer.

ARGUMENT

II. AS PRESENTED BY THE FACTS IN THIS CASE OR IN ANY CASE, THE COMPULSORY DRUG TESTING OF POLICE OFFICERS IS A MANAGERIAL RIGHT AND PROTECTED FROM THE COLLECTIVE BARGAINING BY § 447.209, FLA. STAT. (1983).

A management right is one that goes to the "core of entrepreneurial concern@@r "are fundamental to the basic direction of a corporate enterprise." Fibreboard Paper Products Corp. v. NLRB 13, 379 U.S. 203, 223, 85 S.Ct 398, 13 L.Ed.2d 233, 246 (1964).

§ 447.209, Fla. Stat. recognizes that there are certain of these managerial prerogatives which are essential to the provision of essential governmental services. These rights include to "set standards of service to be offered to the public" and to "exercise control and discretion over its organization ..." § 447.209, Fla. Stat.

To identify these essential managerial prerogatives, it is important to look at the nature of the entity and determine the importance of the right it is attempting to exercise in connection with the ability to conduct its essential business. Newspaper Guild of Greater Philadelphia Local 10 V. NLRB, 636 F.2d 550 (D.C. Cir. 1980).

The ability to provide adequate levels of police protection goes to the very core of the reasons for establishing municipalities. One of the first powers given to municipalities and what is expected by the public is the ability to provide capable police protection. State v. City of Jacksonville, 50 So.2d

532 (Fla. 1951). The ability to ensure that its police officers are drug free and capable of performing their duties at adequate levels is fundamental to the corporate existence of a municipality and therefore constitutes a managerial right pursuant to s 447.209, Fla. Stat. See City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 5th DCA 1985).

It has been held that the integrity of the police is so important that the use of polygraphs during an internal investigation is a managerial right that is not subject to mandatory bargaining. In Re Police Officers' Local 364 v. LRC, 391 Mass 429, 462 N.E. 2d 96 (1984).

Examination for drug usage is even more important in assuring the adequacy of police service for the public. Integrity is not the only issue.

> The nature of a police officer's or fire fighter's duties involves so much potential danger to both the employee and the general public as to give the city legitimate concern that these employees not be users of controlled substances.
>
> Their work requires and the safety of the public demands complete mental and physical functioning of these officers ... [T]he effects [of drug usage] ... can include impairment of physical function, auditory and visual perception changes. Other controlled substances produce similar effects. Moreover, as pointed out by the trial court, police officers who are sworn to enforce the laws lose credibility and public confidence if they violate the laws they are sworn to enforce. The City therefore has the right to insist that its law enforcers not be law breakers.

475 So.2d at 1326.

Police officers are involved in making numerous important

discretionary decisions; arrest or not arrest; shoot or not to shoot; chase or not to chase are a few. Physical dexterity is important. Public confidence is essential.

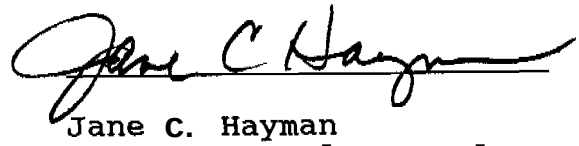
Recent events in Miami demonstrate the adverse effects which may result from police involvement with drugs.

The ability to weed out drug users is essential to guaranteeing standards of service to the public. The abrogation of the ability to test chemically those officers who are reasonably suspected of using drugs would be an abrogation of the public trust. 475 So.2d at 1322. The ability to conduct such tests are clearly managerial rights within the meaning of § 447.209, Fla. Stat.

CONCLUSION

Based upon the cases, authorities and policies cited herein, the League respectfully requests this Honorable Court to answer the certified question in the affirmative and affirm the decision of the District Court of Appeal, Third District, ~~en banc~~.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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