IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,394

FRATERNAL ORDER OF POLICE,
MIAMI LODGE 20,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

On Certification From The Court Of Appeal
For The Third District

BRIEF OF AMICUS CURIAE

FLORIDA PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

ON BEHALF OF THE RESPONDENT

CITY OF MIAMI

MORGAN, LEWIS & BOCKIUS
Attorneys for Amicus Curiae
Florida Public Employer Labor
Relations Association

Terence G. Connor
Wayne D. Rutman

5300 S.E. Financial Ctr.
200 S. Biscayne Blvd.
Miami, Florida 33131
(305) 579-0300

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MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD. MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

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MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

STATUTES

MISCELLANEOUS

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5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

CERTIFIED QUESTION

As presented by the facts in this case, is the compulsory drug testing of police officers a mandatory subject of collective bargaining or, in the alternative, may a governmental entity require its police officers to submit to drug testing without having first entered into collective bargaining regarding the subject?

STATEMENT OF THE CASE AND OF THE FACTS

This case presents the question whether Florida public employers have the right to require their sworn police officers to submit to drug testing without first having to engage in collective bargaining. Answering in the affirmative, the en banc Third District Court of Appeal determined that drug testing is not a mandatory subject of bargaining under the Florida Public Employees Relations Act, and certified this issue to the Court as being one of great public importance.

While the Florida Public Employer Labor Relations Association ("FPELRA") will defer to Respondent to point out the specific inaccuracies contained in Petitioner's Statement of Facts, amicus believes that a concise synopsis of the record facts underlying this dispute is appropriate to its brief. These facts, drawn from a municipality's "real life" efforts to curb drug abuse within its police force, are necessary to place in context the overriding public policy concerns that are at the heart of the Association's position in this case.

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305)579-0300

In June of 1985, two incidents of illegal drug use involving City of Miami police officers were reported to the Miami Police Department.[1/] One report was from a restaurant employee who stated that he had just seen a Miami police officer "snort" cocaine in the men's room of his Miami restaurant. (R. 139) The other report was from an eyewitness who had seen a Miami police officer purchase marijuana while his partner waited in their police car. After obtaining corroborating evidence, the police department ordered the three identified officers to submit to urinalysis tests for the presence of drugs. The alleged cocaine user refused his test and was relieved of duty. The other two officers submitted to the test under protest, the results of which have not been released pending the outcome of this litigation.

Shortly thereafter, the Fraternal Order of Police, Miami Lodge 20 ("the FOP"), the union representing the officers, filed unfair labor practice charges against the City of Miami. Seeking injunctive relief, the FOP claimed that the City had refused to bargain and had interfered with the employees' rights. The hearing officer from the Public Employees Relations Commission ("PERC" or "the Commission") agreed with the FOP that drug testing was a mandatory subject of collective bargaining under Chapter 447, Florida Statutes (1983), but determined that the City had not committed an unfair labor practice because the

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1/ Except where otherwise noted, these facts are drawn from the appellate decision, City of Miami v. Fraternal Order of Police, Miami Lodge 20, 571 So.2d 1309 (Fla. 3d DCA 1989).

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9300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

FOP had waived its right to bargain about drug testing when it agreed to contractual terms allowing the City to "examine" police officers **and** "establish, implement and maintain an effective internal security program."

On appeal from both parties, PERC concluded that drug testing was a mandatory subject of bargaining but, contrary to the hearing officer, found that the FOP had not waived its right to bargain about drug testing. Finding that the City had committed the unfair labor practices proscribed by Section 447.501(1)(a) and (c), Florida Statutes (1983), the Commission ordered the City to cease and desist from unilateral testing and ordered the three officers reinstated to their prior status.

Following PERC's decision, the City appealed to the Third District Court of Appeal, an appeal which amicus joined. While a three-judge panel of the Court initially affirmed the Commission's holding, the Court, sitting en banc, reversed it. Finding the Commission's construction "clearly erroneous and not consistent with legislative intent," the Court determined that drug testing is not a mandatory subject of bargaining under PERC, and that the City therefore did not commit an unfair labor practice by testing the three officers. Upon motion, the Court on January 22, 1991 certified this question to the Supreme Court as one of great public importance.

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305)579-0300

INTEREST OF AMICUS CURIAE

The Florida Public Employer Labor Relations Association is an association of personnel and labor relations officers of various local government agencies throughout the state. Many of its members are required to bargain with unions representing their employees in various job classifications, including law enforcement personnel and other safety sensitive classifications.

As an association of local municipalities, FPELRA is fully aware of the public necessity of maintaining a drug-free workforce for Florida's citizens -- particularly where police officers are concerned. As the Court is no doubt aware, detecting and eliminating drug use among employees is an overwhelming challenge. The position taken by the Petitioner labor organization would greatly hamstring the efforts of FPELRA members to fight the drug war effectively in "their own backyard," while doing little to advance legitimate bargaining objectives. Therefore, FPELRA respectfully asks this Court to affirm the en banc decision of the Court of Appeal.

ARGUMENT SUMMARY

FPELRA supports the arguments made in the City of Miami's brief, but argues specifically that in "balancing" public employees' bargaining rights against the right of Florida's citizenry to enjoy a drug-free public workforce, the public interest must prevail.

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

ARGUMENT

A. The Court Below correctly Applied a Balancing Test to Weigh the Respective Interests of the City and Its Employees.

As has been noted in the proceedings below, an inherent conflict exists between the provisions of Florida Statute Section 447.309(1) and Florida Statute Section 447.209. While Section 447.309(1) guarantees public employees the right to "bargain collectively in the determination of the wages, hours, and terms and conditions of employment," Section 447.209 guarantees the right of the public employer to unilaterally "direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons."

As might be expected, disputes arise in public employment -- such as has occurred here -- where the "managerial prerogative" established in Section 447.209 comes into conflict with the right of public employees to collectively bargain concerning the terms and conditions of their employment. In such circumstances, the courts must adopt some means of balancing these important yet competing interests.

Clearly, Petitioner's argument to this Court that the right of Florida public employees to collectively bargain with their employer may never be infringed by the "managerial prerogative" is not supportable. While no Florida court has previously developed a precise test for ascertaining whether a particular subject should be considered a "mandatory" as opposed

to a "permissive" subject of bargaining, several courts have noted that not every issue which arguably impacts "a term or condition of employment" is "mandatory."

For example, in Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133, 137-38 (Fla. 1st DCA 1982), affirmed in part, reversed in part on other grounds, 475 So.2d 1221 (Fla. 1985), the court stated that subjects so "fundamental to the basic direction" of the public employer or issues which impinge only "indirectly upon employment security" may be treated as non-mandatory or permissive subjects of bargaining. Similarly, the Fifth District has noted that issues which only "indirectly, incidentally, or remotely relate" to conditions of employment are not mandatory subjects of bargaining. City of Orlando v. Florida Public Employees Relations Commission, 435 So.2d 275, 279 (Fla. 5th DCA), review denied, 443 So.2d 980 (Fla. 1983), quoting Westinghouse Electric Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967).

While Florida law is clear that not all disputes which touch upon the terms and conditions of public employment are mandatory subjects of bargaining, the law is less clear on how to resolve seeming conflicts between collective bargaining rights and management prerogatives. As noted by the Court below, "[n]o Florida case has adequately discussed the analysis to be utilized in determining whether a subject must be collectively bargained when that subject both directly relates to employment security or

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

conditions of employment and also directly relates to the functioning of the enterprise." City of Miami, 571 So.2d at 1323. However, as will be explained below, ample authority from related public employment cases in other jurisdictions supports the "balancing test" approach adopted by the lower court in this action.

Indeed, at least two other states have used a balancing approach to determine the very same issue now before this court: that a public employer's unilateral implementation of a drug testing policy is not a mandatary subject of bargaining. In Amalsamated Transit Union Div. 1279 v. Cambria County Transit Authority, Case No. PERA-C-88-133W (PLRB 1989), the Pennsylvania Labor Relations Board balanced the employees' interest in job security versus the county's fundamental interest in operating a safe transit system. Finding the "paramount interest" to be that of the public "in ensuring safe mass transportation," the Pennsylvania Board determined that the county did not have to bargain concerning the implementation of a unilateral drug testing program.

Similarly, in AFSCME v. The Illinois State Labor Relations Board, 546 N.E.2d 687 (Del. App. 1st Dist. 1989), a Delaware appellate court determined that a public employer was within its management prerogative to unilaterally implement a drug testing program among prison guards. The court determined that while the testing program did impact upon the guards' terms and conditions of employment, such impact did not outweigh

management's right to curb illegal conduct which affects the employees' ability to perform their jobs. Id. See also, Local 346, International Brotherhood of Police Officers v. Labor Relations Commission, 391 Mass. 429, 462 N.E.2d 96 (1984) (balancing test used to determine that town's interest in requiring police suspected of criminal activity to submit to polygraph tests outweighed officer's interest in bargaining); Township of Bridgewater V. P.B.A. Local 174, 190 N.J.Super. 258, 482 A.2d 183 (App.Div. 1984) (police department's right to insure that its officers are physically fit prevails over officer's bargaining rights where department implemented new physical fitness and agility test); San Jose Peace Officer's Association, 78 Cal.App.3d 935 (1978) (police department's new use of force policy not a mandatory subject of bargaining).

Given these persuasive and well reasoned precedents from other jurisdictions, and given the sound reasoning of the en banc court below in reconciling this precedent with existing Florida law, FPELRA asks this Court to explicitly adopt the "balancing test" approach as the means of determining whether drug testing is a mandatory subject of bargaining under the Florida Public Employees Relations Act. For the reasons stated below, amicus argues that in balancing these competing interests, public policy compels the unilateral right of Florida public employers to adopt and maintain effective drug screening programs for their employees.

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305)579-0300

B. The "Balance of Interests" Weighs strongly In Favor of a Municipality's Unilateral Right to Establish an Anti-Drug Policy for its Police Force.

Once a balancing test is employed, the determin tion of whether drug testing is a mandatory or permissive subject of bargaining hinges on the weight of the respective interests of the City, the police officers and the public. See First National Maintenance Corp., 452 U.S. *666, 678*, 101 S. Ct. 2573, 2580 (1981) (rationale behind mandatory collective bargaining is to ensure "decisions that are better for both management and labor and for society as a whole"). As stated by the Court below, 571 So.2d at 1324, the question can be summarized as follows:

> 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?

At least on the facts presented, requiring a local government to ignore clear and reliable reports of drug use by its police officers until it has exhausted bargaining and impasse procedures would only serve to undermine the effective and efficient operations of the state's public safety forces.

In balancing the City's and the public's interest in a drug-free work force against the right of police officers to bargain collectively, this Court must consider the special nature of police work. Police officers are members of a "quasi-military organization called upon for duty at all times, armed almost all times, and exercising the most awesome and dangerous power that a

democratic state possesses with respect to its residents -- the power to use force to arrest and detain them." Policeman's Benevolent Association of New Jersey, Local 318 v. Township of Washington, 850 F.2d 133, 141 (3d Cir. 1988). Accordingly, the public is entitled to expect absolute trust and confidence in the integrity and fitness of its police force. Simply put, there must be "zero tolerance" for illegal drug use among the ranks of municipal police officers.

This point is made even stronger when one considers the special dangers associated with drug-impaired or drug-dependent police officers. As the Court is no doubt aware, the nature of police work often puts officers in contact with controlled substances. Moreover, as the court below noted, "impairment of judgment induced by illegal drug usage presents the potential, if not the strong probability, that the affected police officers may become involved in doing things which are contrary to the purposes of legitimate police work." City of Miami, 571 So.2d at 1325. Accordingly, it cannot be seriously disputed that both the City of Miami and Florida's citizenry have a paramount interest in taking reasonable measures to maintain the integrity of the police force and insure that its police officers are absolutely free of corruption and impairment caused by drug use.[2/]

Recognizing the unimpeachability of this position, the Petitioner has backed away from a frontal challenge to the right

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2/ The same would apply with perhaps equal force to teachers, nurses, doctors, traffic controllers, etc.

of Florida public employers' to enforce a drug-free workforce through appropriate means of verification such as drug testing. Rather, the FOP now focuses its argument on its right to have input into the drug testing policies adopted by public employers through the collective bargaining process. After all, argues the union, what harm can be caused by simply "negotiating" about drug testing programs? Moreover, the FOP suggests, cities can always impose their own resolution of bargaining disputes through the impasse procedures set forth in Fla. Stat. § 447.403.

In advancing this position, however, the FOP intentionally overlooks the very real harm that does come through drug-test bargaining: delay in the implementation of effective testing programs, and the eventual dilution of the effectiveness of such programs through "political" compromise.

Delay, of course, is the immediate result (if not objective) of any union request for drug test bargaining. As previously noted in FPELRA's brief to the court below, requiring every municipality to bargain with its police officers over proposed drug testing rules would seriously delay the implementation of effective drug screening programs throughout Florida's law enforcement community. Moreover, in many cases, public employers have collective bargaining agreements which preclude contract reopeners prior to expiration. Accordingly, in the several months or years before these contracts expire, an adverse ruling from this court would mean that these jurisdictions could not lawfully require a drug test from any

MORGAN, LEWIS & BOCKIUS
5300 SOUTHEAST FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • TELEPHONE (305) 579-0300

police officer reasonably suspected of engaging in substance abuse.

But even aside from this delay -- and the likelihood that some drug-using officers will remain on duty in the meantime -- the real long-term danger posed by bargaining over drug testing is the type of programs that will emerge from such negotiations. Despite modest union assertions to the contrary, public employees wield effective negotiating power at the bargaining table. This is evidenced by the substantial increase in compensation and benefits achieved over the years by public employee unions in Florida and elsewhere. See C. Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156 (1974). Accordingly, the influence that such unions will have on the eventual wording of the testing programs cannot be underestimated.

It is doubtful that such influence from public employee organizations will serve the public interest in this context. For while it might be hoped that these organizations would share the public's goal of implementing drug-free police departments, this cannot be left to the whim of every local union leadership which may have other bargaining objectives in mind. The record here shows that the FOP was successful in negotiating substantial restrictions on the City's ability to conduct meaningful drug testing.[3/] Moreover, the record also shows a willingness on the

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3/ These restrictions include allowing an officer suspected of drug use to choose whether to give a blood or urine sample, (continued...)

part of the FOP to litigate the ambiguities of the resulting contract to protect its members from adverse management actions, even if it means protecting a police officer who is a drug user. City of Miami v. FOP (Fortune Bell), supra (union successfully argued that positive, confirmed tests should be ignored because the cutoff levels had not been negotiated).

Given this history, it seems clear that any benefit accruing to public employees on account of bargaining over drug testing will be substantially outweighed by the harm that requiring such negotiations will cause Florida's municipalities as they strive to provide drug-free police services to their citizens. As Fla. Stat § 447.209 clearly provides a mechanism whereby municipalities are lawfully entitled to protect essential public functions from the vagaries of collective bargaining, such protection should be **afforded** the public in this case.

3/(...continued)
and even allows the officer the right to give another sample, again of his choosing. At the time of the second test, evidence of drug use may be long gone. See City of Miami v. Fraternal Order of Police (Fortune Bell), (unpublished) (January 29, 1988) (Bairstow, Arb.), confirmed, Fraternal Order of Police, Miami Lodge 20 v. City of Miami, No. *88-09953* (12) (Fla. 11th Cir. Ct., May 26, 1988), affirmed sub nom., City of Miami v. Fraternal Order of Police, Miami Lodge 20, No. **88-1564** (fla. 3d DCA, April 25, 1989) (all opinions and awards included in Appellant's Supplemental **Brief** to Third District Court of Appeal, May 15, 1989).

CONCLUSION

Based upon the cases, authorities and principles cited above, the Florida Public Employer Labor Relations Association respectfully requests this Honorable Court to affirm the decision of the Third District Court of Appeal, en banc.

Respectfully submitted,

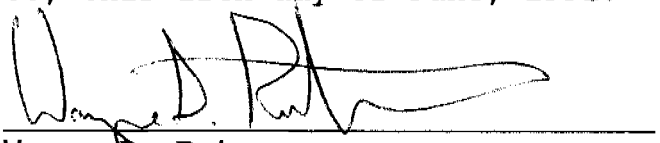
MORGAN, LEWIS & BOCKIUS
Attorneys for Amicus Curiae
The Florida Public Employer Labor Relations Association

Terence G. Connor
Florida Bar No. 291153
Wayne D. Rutman
Florida Bar. No. 782424

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true a copy of the foregoing was mailed to Robert D. Klausner, Esq., Atkinson, Jenne, Diner, Stone, Cohen & Klausner, P.A., 1946 Tyler Street, Post Office Drawer 2088, Hollywood, Florida 33022-2088; Peter J. Hurtgen, Esq., Morgan, Lewis & Bockius, 5300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Lee Cohee, Esq., General Counsel, Florida Public Employees Relations Commission, 2586 Seagate Drive, Suite 100, Tallahassee, Florida 32301; George N. Ayelsworth, Esq., and Thomas Guilfoyle, Esq., Attorneys for Florida Sheriff's Association, Florida Police Chief's Association, Dade County Association of Chiefs of Police, and Florida Association of Police Attorneys, 1320 N.W. 14th

Street, Room 318, Miami, Florida 33125; Jane Hayman, Deputy General Counsel for the Florida League of Cities, Inc., P.O. Box 1757, Tallahassee, Florida 32302; Gene "Hal" Johnson, Florida Police Benevolent Association, Inc., P.O. Box 11239, Tallahassee, Florida 32302; and Lorene C. Powell, 118 North Monroe Street, Tallahassee, Florida 32399-1700, this 12th day of June, 1991.



Wayne D. Rutman