IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,394

DISTRICT COURT OF APPEAL
THIRD DISTRICT - NO. 85-2863

FRATERNAL ORDER OF POLICE,
MIAMI LODGE 20,

APPELLANT,

v.

CITY OF MIAMI, FLORIDA

APPELLEE

ANSWER BRIEF

OF

APPELLEE

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June 12, 1991

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STATUTES

MISCELLANEOUS

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STATEMENT OF THE CASE AND OF THE FACTS[1/]

The Statement of the Case and Facts contained in the Initi 1 Brief filed by the Fraternal Order of Police ("FOP") is in need of substantial correction and elaboration. First, in many instances the FOP has failed to comply with Florida Rule of Appellate Procedure 9.210(b)(3), which requires pinpoint references to the appropriate pages of the record or transcript. More importantly, however, the FOP has presented as "facts" statements that are not in the record at all, statements that are contrary to the findings of fact adopted by the Public Employees Relation Commission ("PERC") and statements that are contrary to the testimony.[2/] Pursuant to Florida Rule of Appellate Procedure 9.210(c), the City of Miami ("the City) will specifically address in this section those areas in which there is disagreement.

First, the FOP mischaracterizes the test results from a urinalysis allegedly conducted by officer Beruvides' personal

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1/ References to the record will be indicated by "(R.___);" references to the FOP's initial brief will be indicated by "FOP I.B. p. ___;" references to the en banc court's decision will be cited as "City of Miami, 571 So.2d at ____." A copy of this opinion is included in the Appendix submitted with this brief.

2/ It is important to note that the FOP has not challenged PERC's factual findings in this appeal, but rather, as stated on p. 11 of its Initial Brief, it seeks review of the Third District Court of Appeal's statutory interpretation of the Public Employees Relations Act. Notwithstanding the posture of this case on appeal, however, it is clearly improper to assert statements as "fact" when conflicting evidence exists.

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physician as "negative." FOP I.B. p. 1 Sergeant Reynolds of Internal Security had received a report that an employee at Monty Trainer's, a restaurant and lounge in the Coconut Grove area, had positively identified Beruvides as the man he had seen earlier "snorting" cocaine in the restroom. (R. 139) As a result of this report, Colonel Riggs ordered Beruvides to submit to a urinalysis; however, he declined to do so. (R. 240; 344)

As noted by the en banc court, after being relieved of duty, Officer Beruvides allegedly submitted to a urinalysis test administered by his own physician. City of Miami, 571 So. 2d at 1320 n.3 Although the Hearing Officer found that Officer Beruvides "learned that the test did not reveal the presence of any cocaine in his system," the Commission specified that this finding did not mean that the test results were in fact negative as to the presence of controlled substances. Rather, it stated that this finding merely "concerns Beruvides' belief concerning the test results, not the actual results themselves." (R. 547) Thus, there simply is no support in the record for the FOP's assertion that the test "proved negative."

Next, the FOP claims that the order issued by Colonel Billy R. Riggs ("Riggs") to Officers Ferrer and McKinnon to submit to a urinalysis was precipitated by an anonymous caller who had accused them of buying drugs. FOP I.B. p. 1 In fact, however, as reflected in the findings of fact issued by the

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Hearing Officer and subsequently adopted by the Commission,[3/] these officers were not ordered to submit to a urinalysis until the City obtained evidence corroborating an eyewitness report. According to the eyewitness, a uniformed black male police officer with a curly perm haircut left City police car 188 and approached a black male sitting on a porch. The two men shook hands, and the officer gave money to the other man. In return, the officer received several "nickel bags" -- small envelopes in which marijuana is commonly placed. The officer then returned to his vehicle where his partner, a uniformed white male officer, was waiting. The area of the City in which this incident occurred is known for its heavy drug use. (R. 217-219; 345; 435)

After receiving this information, Sergeant Reynolds of Internal Security called the eyewitness, who had left her name and telephone number, to verify the story. (R. 217-220; 345; 435) Reynolds' Internal Security investigation ascertained that vehicle 188 was being used by Officers Ferrer and McKinnon at the time of the drug buy. These officers regularly patrol the area where the incident occurred and both met the physical description of the officers provided by the eyewitness. (R. 199; 221; 345; 435) Additionally, the officers' worksheets for the day placed them in the area of the drug buy at the appropriate time.

3/ It is also noteworthy that the FOP did not except to any of these findings. (R. 463-464)

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(R. 156; 199; 224; 345) Based on a review of this corroborating evidence, Officers Ferrer and McKinnon were ordered to report to a hospital for urinalyses. (R. 197; 316-319; 345; 436) The FOP then states that, although these officers submitted to the drug tests under protest, the test results proved negative. FOP I.B. p. 1 The City is at a loss to understand the FOP's representation that these tests proved negative -- certainly this information is nowhere to be found in the record.

The FOP's statements concerning the City's position regarding its obligation to bargain rules for drug testing is confusing and internally inconsistent. Although the FOP admits that at no time during discussions between members of the Personnel Practices Committee "did management assert any right not to engage in drug screening," FOP I.B. p. 2, it also states that the City never contended that it did not have the obligation to bargain rules for drug testing. FOP I.B. p. 3 Clearly, if management did not assert the right not to engage in drug testing, then it must have, at least implicitly, maintained the right to do so. This, of course, is entirely consistent with the position that it did not have the obligation to bargain rules for drug testing. Furthermore, the Hearing Officer specifically noted that the Personnel Practice committee was established to deal with "non-negotiable items," (R. 458) and, that the City's willingness to bargain over drug screening did not mean that the City was obligated to do so. (R. 458)

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Finally, the last point upon which the City disagrees concerns the FOP's statement that "[a]rticle 8 of the Collective Bargaining Agreement provides a bargained for procedure far all departmental investigations. The drug testing utilized in the present case constituted an investigation and interrogation under that article." FOP I.B. p. 3 Again, the Hearing Officer specifically rejected this finding of fact and the FOP failed to except to its decision. (R. 441, 459) This statement is based on the testimony of then FOP President Richard Kinne in which he stated his belief that a urinalysis was an interrogation or investigation. (R. 123) In addition, and as the Hearing Officer found, the urinalysis was not done in connection with any investigation or interrogation within the meaning of Article 8 of the collective agreement. (R. 454) Although urinalysis is deemed to constitute a search and seizure for Fourth Amendment purposes, it does not implicate the testimonial or communicative capacities contemplated by Article 8 of the parties' collective agreement. As such, urinalysis does not constitute an investigation or interrogation.

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?

II. SUMMARY

Stripped of its legal idioms, the question before this court is really quite fundamental. Will collective bargaining over drug testing of sworn police officers reasonably suspected of illicit drug use result in decisions which are ultimately better for the community? Crucial to a proper analysis of this question is the recognition that this case is not simply one which involves the average public employee -- but, rather deals with police officers who are entrusted with public safety and empowered with enforcing the law.

The significance of the unique status of police officers is not mere hyperbole, as the FOP insists. It cannot seriously be disputed that police officers are responsible for the lives and safety of the citizenry and as such, occupy a position in which the public has a right to have absolute trust. Thus the City's ability to ferret out criminal misconduct by the imposition of a drug testing policy upon reasonable suspicion is central to the operation of the police force as an enterprise. At the same time, however, it also cannot be disputed that such a drug testing policy impacts upon the terms and conditions of these police officers' employment.

In search of an analytical vehicle to accommodate the interests of both the City and the FOP, the en banc court adopted a balancing test. Notwithstanding the fact that a balancing test, by definition, takes into account the interests of both parties, the FOP urges its rejection. While the FOP argues that

a balancing test conflicts with existing Florida law, there is no support for this position. In reality, the FOP's objection to a balancing test appears to be predicated on a recognition that the interests of the City and the public in ensuring the right to a drug-free police force outweigh the interests of the Union in negotiation, Finding it cannot prevail under this test, the FOP seeks its abandonment. Indeed, the competing interests of management and labor were recognized by this Court in United Teachers of Dade V. Dade City School Bd., 500 So.2d 508 (Fla. 1986). The adoption of a balancing test follows from this decision,

The United Teachers court similarly recognized that the scope of bargaining within the public and private sectors need not be identical. Private sector managerial concepts simply are not analogous to the City's interest in efficient and effective law enforcement. Moreover, unlike private sector employees, public employees have a unique ability to participate politically, as interest groups and voters in determining the scope and end result of mandatory bargaining. Thus, contrary to the FOP's assertions, public employees are not hindered by a lack of economic weapons, but rather have significant and real leverage through the political process. Indeed, public employees have the power to change their employer by simply exercising their voting rights, something private employees are clearly unable to accomplish. As such, a finding that drug testing is a

mandatory subject of bargaining under federal precedent does not mean that it should also be bargainable in the public sector.

In fact, other public sector jurisdictions have also declined to find drug testing a mandatory subject of bargaining where public safety and security is at stake, In all of these cases, the courts' reasoning turned on the peculiar characteristics of maintaining the integrity of government and providing for the safety and security of its citizens.

Finally, the FOP improperly attempts to raise the issue of "effects" bargaining at this late stage of litigation. "Effects" bargaining constitutes a separate and distinct doctrine, which has neither been considered by PERC nor the Third District Court of Appeal. As such, the parties have failed to develop a factual record upon which this Court can properly analyze this issue.

STANDARD OF REVIEW

This Court's review of a decision passing upon a question of great public importance is not restricted to the certified question, but rather encompasses the district court's entire opinion and judgment. Zirin v. Charles Plizer Co., 128 So.2d 86 (Fla. 1961); Confederation of Canada Life Ins. Co, V. Vega Y. Arminan, 144 So.2d 805 (Fla. 1962); Hillsborough Ass'n V. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). In finding that PERC had erroneously interpreted a provision of law, the Third District Court of Appeal en banc properly exercised its jurisdiction to set aside the Commission's action. § 120.68(9),

Fla. Stat. (1989); Pasco County School Bd. of Polk County v. Florida Pub. Employees Relations Comm'n., 353 So.2d 108 (Fla. 1st DCA 1977).

I.

INVOLUNTARY URINALYSIS OF POLICE OFFICERS REASONABLY SUSPECTED OF ILLICIT DRUG USE IS NOT A MANDATORY SUBJECT OF BARGAINING UNDER FLORIDA LAW.

A. The En Banc Court Properly Applied a Balancing Test in Determining that the City has an Unquestionable Right to a Drug Free Police Force

The FOP argues that the Third District Court's en banc decision incorrectly employed a balancing test in determining that the City was not required to enter into collective bargaining prior to engaging in compulsory drug testing of police officers who were reasonably suspected of using illegal drugs. As support for this argument, FOP asserts that 1) Florida courts, and specifically the Supreme Court, have rejected the balancing test, FOP I.B. p. 10, 12, 22-23; and 2) concerns regarding a drug free workplace, even when those concerns relate to sworn police officers, are irrelevant to a rational analysis in the present case. FOP I.B. 19 As demonstrated below, these premises cannot withstand critical analysis and cannot support the FOP's conclusion that the en banc opinion was incorrectly decided and should be reversed.

Although the FOP repeatedly asserts throughout its brief that Florida courts have specifically rejected the balancing test as an effective means for determining whether a

subject is a mandatory subject of bargaining, it fails to direct the Court to any case where such test was in fact "rejected." FOP I.B. p. 10, 12, 22-23. It is readily evident that the FOP's bald assertion of "rejection" simply cannot be supported under Florida law. Moreover, the city submits that the appropriateness of utilizing a balancing test in determining whether a subject must be collectively bargained was foreshadowed by this Court in United Teachers of Dade v. Dade city School Bd., 500 So.2d 508 (Fla. 1986).

The issue before this Court in United Teachers was whether the enactment and implementation of a Master Teacher Program intruded on the right to collective bargaining guaranteed public employees by Article I, Section 6 of the Florida Constitution. Id. at 510. The resolution of this question entailed an analysis of management's right to make policy decisions as well as employees' rights to bargain over wages or terms and conditions of employment. Id. Although it was ultimately determined that this program did not constitute a wage and thus was not an abridgement of Article I, Section 6, Id. at 518, the analysis employed by this Court in reaching its conclusion is instructive in the instant matter.

The United Teachers' court affirmed the trial court's determination that the Master Teacher Program was constitutional, but rejected the court's underlying rationale. Specifically, the trial court's reliance on the legislature's status as a non-employer was disapproved. In so doing, this Court noted that

such an approach "ignores the real impact or practical effect legislation may have on the rights guaranteed by Article I, Section 6." Id. at 510. The court explained that the analysis employed in resolving this issue must be equally applicable to cases arising from disputes between the local school boards (the legally defined employer) and the teacher's bargaining representative, which may produce different factual or procedural scenarios. Significantly, the court then determined that:

> The correct analysis of each of these situations, however, must encompass not only the legislature, the State Board of Education's, or the local school board's constitutional authority to make educational policy decisions, but also must focus on the impact such decisions have on public employees' constitutionally guaranteed collective bargaining rights.

Id. at 511.

This pronouncement clearly recognized the coexistence of the public employer's right to make policy decisions and public employees' rights to collectively bargain. More importantly, and contrary to the FOP's contentions, this Court also acknowledged that the scope of bargaining cannot be determined by neatly distinguishing "policy" from "conditions of employment." Id. at 513, In rejecting the notion that a subject is necessarily a mandatory subject of bargaining once it is found to be a condition of employment, this Court noted with approval the Supreme Court of Connecticut's view that:

> Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true. There

> is no unwavering line separating the two categories.

Id., citing, West Hartford Educ. Ass'n, Inc. v DeCourcy, 295 A.2d 526 (Conn. 1972).

As a result of these overlapping rights, this Court further noted that most courts have determined these "issues on a case-by-case basis, but, as a starting point for their analysis, have tended to view the test of bargainability as the degree of impact on wages, hours or other conditions of employment." Id. (emphasis added) Importantly, this proposition was supported by other public sector decisions which, like the en banc court in the instant matter, have specifically adopted a balancing test. See, e.g., Sutherlin Educ. Ass'n v Sutherlin School Dist., 548 P.2d 204 (Or. App. 1976); Pennsylvania Labor Relations v. State College Area School Dist., 337 A.2d 262 (Pa. 1975). other cases cited by this Court utilized tests such as whether an issue significantly related to terms and conditions of employment, Clark County School Dist. v. Local Government Employee Manasement ions Bd., 530 P.2d 114 (Nev. 1974); whether the subject materially affects the terms and conditions of employment, Aberdeen Educ. Ass'n V. Aberdeen Bd. of Educ., 215 N.W.2d 837 (S.D. 1974); and whether a subject is primarily related to conditions of employment, City of Beloit v. Wisconsin Employment Relations Comm'n, 242 N.W.2d 231 (Wis. 1976).

Thus in view of this Court's reasoning in United Teachers, the FOP's insistence that Florida law has "rejected" a balancing test is simply wrong. It is clear that not only has

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there been no such rejection, but in fact this Court has recognized that overlapping management/employee rights cannot be simply be categorized as "policy" or "conditions of employment," over which, in the latter case, management is automatically required to bargain. It is true that the Master Teacher Program in United Teachers was not found to be a wage,[4/] and as such, overlapping management/employee rights were not implicated. However, it is equally true that in rejecting the trial court's reasoning, this Court anticipated that situations would arise that impacted on both sets of rights. The en banc court's adoption of a balancing test to accommodate these rights was a logical progression from the reasoning employed in United Teachers.

Notwithstanding the rationale of United Teachers, the balancing test adopted by the en banc court does not conflict with existing Florida law, as the FOP would have this Court believe. Specifically, the FOP claims that the en banc ruling directly conflicts with the Fourth District Court of Appeal's decisions in School Bd. of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979) and School Bd. of Indian River County v.

4/ The FOP attempts to distinguish United Teachers on the basis of this Court's finding that the Master Teacher Program did not fall within the definition of "wages, hours and terms and conditions of employment." FOP I.B. 21 However, this Court's careful and thoughtful analysis also provides guidance in those situations where the subject in question is found to constitute conditions of employment. Otherwise, this Court could have summarily concluded that the program did not constitute a wage and much of its opinion would have been unnecessary.

Indian River Education Ass'n, 373 So.2d 412 (Fla. 4th DCA 1979)

FOP I.B. p. 22 The FOP's reasoning is fundamentally flawed in that it fails to distinguish between a decision requiring police officers reasonably suspected of illicit drug use to submit to a urinalysis and decisions adjusting school teachers work schedules. Indeed, as the en banc court correctly stated, but the FOP has chosen to ignore:

> No 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 conditions of employment and also directly relates to the functioning of an enterprise.

City of Miami, 571 at 1323.

Thus, the facts presented in Palowitch and Indian River[4/] simply did not compel those courts to devise an analytical tool to be used in defining the scope of bargaining when a subject relates so directly to employment security and at the same time relates to the very functioning of an enterprise. It does not follow, however, that the adoption of a balancing test is somehow inconsistent with these decisions. Taken to its logical extension, this view would restrict courts from developing and

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4/ Moreover, as explained in some detail by the en banc court, the employer in Indian River conceded that the subject of the new policy was bargainable and thus the court was not faced with the question of whether it was a mandatory subject of bargaining. City of Miami, 571 So.2d at 1323 n.11. The FOP has failed to address this point in its brief.

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refining legal doctrines to accommodate the ever changing needs of litigants before the court and of society as a whole.

The FOP's failure to distinguish between the unique issues relating to drug testing of police officers reasonably suspected of illicit drug use and other subjects of bargaining is not surprising, given its position that such "concerns are irrelevant to a rational analysis in the present case." FOP I.B. p. 19 In fact, the FOP admittedly urges this Court to view drug testing of police officers "no different[ly] than any other issue of mandatory bargaining." FOP I.B. p. 8 In so doing, the FOP submits that "the hysterical self-righteousness which surrounds drug testing of law enforcement officers," FOP I.B. p. 8, and "the passionate [sic] and concerns regarding a drug free work place," FOP I.B. p. 19, (even when those concerns relate to sworn police officers), have apparently been allowed to cloud the real issues in this case. The FOP's reasoning fails, however, for the simple reason that the public's interest in drug-free, law abiding police officers, or as stated by the Fifth Circuit Court of Appeal in City of Palm Bay v. Bauman, 475 So.2d 1322, 1326 (Fla. 5th DCA 1985), the public's "right to insist that its law enforcers not be law breakers," is the real issue in this case.

Indeed, the appropriateness of utilizing a balancing test in the instant case is precisely because it allows the court to consider such overriding public interest in maintaining a drug-free, law-abiding police force. As the en banc court emphasized:

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> This case is not simply one which involves 'the average public employee,' [but] [r]ather, we are dealing with a specific category of public employee -- that of police officer -- which is entrusted with the public safety and empowered with enforcing the law. Because police officers are responsible for the lives and safety of the citizenry, they occupy a position in which the public has a right to have absolute trust. The credibility of police officers is thus central to the operation of the police force as an enterprise.

City Of Miami, 571 So.2d at 1324-25.

As a result, the FOP's contention that it does not matter whether bargaining over drug testing of police officers reasonably suspected of illicit drug use is a "good idea" or "bad idea" simply misses the point. FOP I.B. p. 21 The 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." First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573 (1981). Where bargaining over a subject is a "bad idea," neither management, labor or society is benefitted. Nevertheless, the FOP urges this Court to reject the en banc court's adoption of a balancing test -- a test uniquely suited to accommodate each of these interests.

The FOP maintains instead that the proper construct is one that -- for better or for worse -- mandates bargaining over any management decision that affects terms and conditions of employment. FOP I.B. 21 This precise reasoning, however, has been rejected by the Supreme Court of the United States in favor of a balancing test. First Nat'l Maintenance Corp., 452 U.S. at

679, 101 S. Ct. at 2581 (1981). In holding that a balancing test was the proper analytical device to be utilized in determining whether there was a duty to bargain over matters, such as a partial plant closing, which affects the terms and conditions of employment, the Court stated:

> In view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor management relations and the collective bargaining process, outweighs the burden placed on the conduct of business.

Id.

The balance in this case overwhelmingly favors the need for drug screening of police officers, unimpeded by collective bargaining. As stated throughout this brief, the City and the public have a paramount interest in maintaining the integrity of the police department as well as the public's perception that its police officers are absolutely free of corruption and impairment caused by drug use. Requiring police officers reasonably suspected of illicit drug use to submit to a urinalysis is an effective and reasonable investigative tool to ferret out and prevent criminal misconduct by its officers.

On the other hand, the union's interest in representing those reasonably suspect officers is to condition, limit, alter, and/or otherwise impede such drug screening. Indeed, the union's actions in this case concerning officers Ferrer and McKinnon are representative of standard Union efforts concerning

representation of its members. The officers were instructed to protest the urinalysis and to state that they were doing it only to avoid losing their jobs. Institutionally, the union cannot cooperate with the City in internal security matters for the union exists, in part, for the exact opposite purpose - to protect its members from such efforts. As such, in balancing the parties' respective interets, the en banc court correctly determined that "submitting the subject of drug testing to the mandatory bargaining process [will not] 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." City of Miami, 571 So.2d at 1324.

B. Article I, Section 6 of the State Constitution Does not Require Drug Testing of Police Officers to be a Mandatory Subject of Bargaining

The FOP contends that the en banc court misapplied and misconstrued this Court's decision in City of Tallahassee v. Public Employees Relation Comm'n, 410 So.2d 487 (Fla. 1981). FOP I.B. p. 19 According to the FOP, this decision dictates that while courts may regulate the procedure or process of collective bargaining, they may not prohibit bargaining over a subject of bargaining without violating Article I, Section 6, of the state constitution.[5/] FOP I. B. p. 14, 15, 19 The FOP asserts that

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5/ This provision provides:

> The right of employees, by and through a labor organization, to bargain collectively

(continued..)

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the court below erred in failing to make this distinction.[6/]

FOP I.B. p. 19

The en banc court explained that although this Court has consistently held that, 'with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees, -- it has not held that this must be accomplished by providing that the scope of bargaining issues within each sector be identical. City of Miami, 571 So.2d at 1327. This conclusion necessarily follows from this Court's discussion of the issue in City of Tallahassee, 410 So.2d at 489. In that case, this Court objected to the legislature's attempt to remove retirement matters from the collective bargaining process. The objection was based on a determination that the statutory sections in question, "affected much more than the scope of collective bargaining by public employees." Id. Indeed, this Court concluded that the statute eliminated a significant facet of the collective bargaining process and thus

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5/(...continued)
should not be denied or abridged.

Fla. Const. Art. I, § 6.

6/ At the outset it should be noted that one need look no further than an ordinary dictionary to question the FOP's assumption that the "process" of collective bargaining is distinguishable from the "subjects" of bargaining. Process is defined as "a series of actions or operations conducing to an end" and the whole course of the proceedings in a legal action." Webster's New Collegiate Dictionary. G & C Merriam Co., Springfield Ma. 1981. The process of collective bargaining, then must necessarily include the subjects that are bargained over.

could not be considered a reasonable regulation of the scope of bargaining. Id.

Implicit in this reasoning is the recognition that the scope of bargaining in the public sector may be regulated, provided that such regulation does not unreasonably exclude bargaining on a broader basis than necessary under the circumstances. The problem in the City of Tallahassee case was that the legislative enactment essentially prohibited bargaining on all retirement matters, rather than, for example, being restricted to a specific subpart within that category. In contrast, drug testing of police officers reasonably suspected of illicit drug use is not a subject governing an entire aspect or facet of an employment agreement; rather, it is but one of numerous investigative tools utilized by the City's Internal Security Department to determine whether its police officers have engaged in criminal misconduct. (R. 231) See Hillsborough County School Bd., 8 F.P.E.R. 13074 (1989) (holding that the specific proposals in question were simply not comparable to the legislative exclusion of the entire topic of pensions from collective bargaining).

In this regard, the FOP has insisted on characterizing the drug testing policy in this case as merely another matter relating to discipline and discharge. FOP I.B. p. 13-14, 19, 26 Although the City disputes this characterization, under this view drug testing would be a subset of the subject of discipline and discharge. Thus, a determination that drug testing of police

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officers based on reasonable suspicion is a non-mandatory subject of bargaining, even under the FOP's interpretation, is simply not comparable to the situation in City of Tallahassee where bargaining was eliminated on all retirement matters. This would only be the case if the entire subject of discipline and discharge were eliminated.

The fact that this Court never intended to accomplish the task of achieving equal bargaining rights in the public and private sectors by equating the scope of bargaining within each sector is further evidenced by this Court's subsequent decision in United Teachers, 500 So.2d at 508. In acknowledging the fact that public employees have the same rights of collective bargaining as are granted private employees, this Court quoted from its decision in City of Tallahassee where it held that "[i]t would be impractical to require that collective bargaining procedures . . . be identical in the public and private sectors." United Teachers, 500 So.2d at 512. The FOP would have this Court believe that the Tallahassee court's reference to "procedure" was limited to such distinctions in the public and private sector as a statutory impasse resolution procedure and the prohibition against striking. However, this Court's further explanation belies this contention. This Court stated:

> Myriad distinctions, not just those of procedure exist between public and private collective bargaining, and have been noted by the highest courts of several sister states.

Id.

In support of this proposition, the United Teachers court cited several cases finding that the subjects which must be bargained in the private sector are different than those in the public sector. Id., citing, West Hartford Educ. Ass'n v. DeCourcy, 295 A.2d 526 (Conn. 1972); Spokane Educ. Ass'n v. Barnes, 517 P.2d 1362 (Wash. 1974); Pennsylvania Labor Relations Bd. v. State Colleae Area School Dist., 337 A.2d 262 (Pa. 1975) Thus, the above analysis makes clear that the scope of bargaining in the public and private sectors need not be identical since, as the en banc court properly concluded, "[e]qual rights do not necessarily mean identical rights." City of Miami, 571 So.2d at 1327. The FOP's suggestion to the contrary should be rejected.

Finally, the FOP's attempt to distinguish United Teachers on the ground that the Master Teacher Program did not violate Article I, Section 6 of the state constitution because it presented a situation unique to the public sector is unavailing. Surely no situation is more unique to the public sector than the problems and dangers created by police officers who are under the influence or corruption of illicit drugs. As the en banc court correctly observed, "police officers are empowered to make arrests and, under appropriate circumstances, use deadly force." City of Miami, 571 So.2d at 1325. The uniqueness of this situation to the public sector was explained in San Jose Peace Officer's Ass'n v. City of San Jose, 78 Cal. App. 3d 935, 144 Cal. Rptr. 635 (1978). In that case, the court upheld the police department's adoption of a regulation, which governed the

circumstances under which a police officer would be permitted to discharge a firearm. In upholding the City's action, the appellate court reasoned:

> [T]he use of force policy is so closely akin to a managerial decision as any decision can be in running a police department, surpassed only by the decision as to whether force will be used at all. While private managerial concepts do not translate easily to the public sector, we can imagine few decisions more managerial in nature than the one which involves the conditions under which an entity of the state will permit a human life to be taken.

San Jose, 78 Cal. App. 3d at 947, Cal. Rptr. at 645. Similarly, by ensuring that its police officers are not acting under impaired judgment or corrupting influences induced by illegal drug usage, the City seeks to control the conditions under which it will permit force to be used which could result in the taking of a human life. The fact that these circumstances, like those in San Jose present a situation uniquely public in nature cannot be seriously questioned. Thus, contrary to the FOP's assertion, this Court's decision in United Teachers provides a well reasoned platform from which to analyze the issues in this case.

C. The En Banc Court Correctly Declined to Apply Private Sector precedent

In its brief, the FOP urges this Court to follow the National Labor Relation Board's decision holding that drug testing is a mandatory subject of bargaining under the National Labor Relations Act 29 U.S.C. § 151 et seq. (NLRA). Johnson-

Bateman Co., 295 NLRB No. 26 (1989).[7] Interestingly, however, in doing so the FOP fails to address the en banc court's reasons for finding thase cases inapplicable to this matter. For example, as the City argued below and the en banc court agreed, federal precedent should not be followed in instances where PERA and the NLRA follow divergent courses. Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior Collese, 425 So. 2d 133, 138 (Fla. 1st DCA 1983), approved in relevant Part, 475 So.2d 1222 (Fla. 1985). Numerous cases noting the limited application of private sector precedent in the context of mandatory subjects of bargaining have been cited throughout these proceedings. In addition, this Court specifically declined to look to private sector decisions for guidance in defining wages or terms and conditions of employment. United Teachers, 500 So.2d at 512. In reaching this conclusion, this Court found persuasive the reasoning of the Supreme Court of Pennsylvania:

> [W]e are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experience gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Pennsylvania Labor Relations Bd., 337 A.2d at 264-65 (Pa. 1975).

7/ Significantly, in American Fed'n of State. County and Municipal Employees. (AFSCME) AFL-CIO, v. The Illinois State Labor Relations Bd., 546 N.E.2d 687, 692 (Ill. App. 1st Dist. 1989) the First District Court of Appeal noted that, although the NLRB found drug testing to be a subject of mandatory bargaining in Johnson-Bateman, the drug testing policy in that case was instituted only to reduce insurance rates as opposed to curbing criminal conduct.

Not only has the FOP failed to suggest why these Florida cases should not be followed by this Court, but perhaps of even greater significance, it did not -- or could not -- respond to the en banc court's recognition of the public employee's unique ability to participate, as a voter, in determining the scope and end result of mandatory bargaining through the political process. City of Miami, 571 So.2d at 1328-29. These considerations provide yet another reason why across-the-board application of federal precedent is inappropriate in this case. Such distinctions involve the very core of public sector employment -- namely, the accountability of the public employer, acting through its duly authorized officials, to the voters, who are the true employers. See Patterson Police PBA Local No. 1 v. City of Patterson, 432 A.2d 847, 853-54 (N.J. 1981); Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156 (1969). When viewed from this perspective, as correctly noted by the en banc court, "public employer decision making is influenced primarily by political forces as opposed to private employment which is essentially shaped by the market." City of Miami, 571 So.2d at 1328, citing, Summers, Public Employee Bargaining: A Political Perspective, 85 Yale L.J. 1156 (1969); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 227-28, 97 S.Ct. 1782, 1795-96 (1977). As such, unlike private employees, public employees enter the collective bargaining process with the ability to negotiate at the "table," as well as the ability to exert leverage through political

forces. And, also unlike the private sector, public employee unions have the unique ability, regularly exercised, to change the persons of the employer.

Recognition of this leverage not only demonstrates the inappropriateness of applying private sector precedent in this case, but in addition, also demonstrates that a perceived imbalance of bargaining power in favor of the public employer, based upon the absence of the right to strike and the City's ultimate right to act unilaterally through its legislative body, is clearly misplaced. The fact that public employee unions in Florida and elsewhere have greatly increased their compensation and benefits through collective bargaining without the right to strike illustrates this point. The very reason for such accomplishments is that the public employees' supposed lack of economic weapons[8/] is more than replaced by political weapons.

Indeed, the force of the latter is nowhere more evident than the language negotiated over the subject of drug testing in

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8/ In distinguishing between the public and private sector, the FOP repeatedly relies on the impact of strike prohibition and impasse resolution in claiming a lack of economic weapons to counterbalance the City's bargaining power. However, the FOP fails to point out other pertinent distinctions and tradeoffs between public and private employments, such as the use of the lockout, the temporary layoff of employees, the transfer of work, and the liquidation of the business to counter the strike threat and resolve the impasse; as well as the various constitutional, statutory, and civil service rights enjoyed by public but not private employees. See American Ship Bldg. Co v. NLRB, 380 U.S. 300, 85 S.Ct. 955, (1965); NLRB v. Brown, 380 U.S. 278, 85 S.Ct. 980, (1965); and The Florida Bar, Collective Bargaining for Public Employees in Florida - In Need of a Popular Vote? October. 1982.

the collective bargaining agreement between the City and the FOP. In this agreement the Union succeed in achieving significant provisions designed to hinder the testing process. For example, an employee has his choice of having urine or blood tested. See Memorandum of Understanding Re: Article 36, Substance/Alcohol-Personnel Screening (March 25, 1986) at ¶ 3. Depending on the drug used and other circumstances, however, drug use may be detectable in urine but not blood. Then, if the first test is confirmed positive after an initial positive screen, a second specimen may be supplied, again with the employee choosing the fluid. At this point, particularly if the employee insists on a blood test, evidence of drug use may be long gone.

In view of these concessions, the FOP's insistence that public employers in Florida ultimately "have the absolute right to have a drug testing program based upon guidelines which they themselves determine," FOP I.B. p. 8, simply mischaracterizes the significance of their political powers. In reality, the City's ability to "impose its will" on the union is first filtered through the political process and only then may it take action through its legislative body -- which, as in the instant case, may be no action at all. The FOP's failure to address these issues speak for itself.

D. The En Banc Court's Analysis is Consistent With That Used in Other Public Sector Jurisdictions

Where a public employer's responsibility for ensuring public safety and security is at stake, the employer's unilateral implementation of a drug testing policy is not a mandatory subject of bargaining. In Amalgamated Transit Union Div. 1279 V. Cambria County Transit Auth., Case No. PERA-C-88-133W, 19 P.P.E.R. 19213; 21 P.P.E.R. 21001 (PLRB Pa. 1989), the Pennsylvania Labor Relations Board approved the Hearing Examiner's use of a balancing test to reconcile the competing interests of management and labor. In that case, the union filed an unfair labor practice charge after the public transit authority unilaterally implemented a drug and alcohol policy covering its bus drivers and maintenance employees represented by the union.

Although the Hearing Examiner recognized that the impact of drug testing on the employees' interest in job security was great, the subject was determined to be non-mandatory because of the "paramount interest of the public in ensuring safe mass transportation." 19 P.P.E.R. at 534 As the Authority pointed out and the Hearing Examiner agreed, the drug testing policy impacted heavily on its interest in protecting the safety of the traveling public in that the policy was designed to ensure that the employees who drive and maintain its buses will do so free from the deleterious effects of drugs and alcohol. Id. Thus, critical to the Hearing Examiner's decision in this case was

"[t]he peculiar characteristics of the public service at issue -- mass transit." Id.

Indeed, in affirming the Hearing Examiner's order, the Board emphasized the significance of the factual setting in analyzing the negotiability of a particular subject. In doing so, it compared two Commonwealth court decisions reaching opposite conclusions in addressing the negotiability of employer policies concerning employee smoking. The Board noted that the crucial distinction between these two cases was the fact that in one case the policy impacted an the very mission of the employer, whereas, in the other case it did not.9/

Similarly, in American Fed'n of State. county & Mun. Employees, (AFSCME) AFL-CIO, v. Illinois State Labor Relations Bd., 190 Ill. App. 3d. 259, 546 N.E. 2d 687 (Ill. App. 1st Dist. 1989) the employers duty in protecting the life and property of prisoners and employees supported the court's conclusion that the implementation of a drug testing policy was not a mandatory subject of bargaining. Again, the court's decision was based on balancing management's statutory right to implement policy

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9/ It is also noteworthy that in finding federal authority decided under the NLRA distinguishable, the Board stated:

> Public employment and the discharge of public services in many ways differs from private employment. Contrary to the private sector, this Board and the appellate courts of the Commonwealth have determined that reasonable steps unilaterally taken by the employer to insure public confidence and the efficient discharge of public services may indeed lie at the core of entrepreneurial control of a public employer.

against the statutory duty to bargain over matters affecting terms and conditions of employment. Although the court determined that the drug policy did, indeed, impact on terms and conditions of employment, it concluded that such impact did not outweigh management's right to curb criminal conduct which affects the job.

In both Cambria County and AFSCME, the critical factor weighing in favor of management's right to implement a drug testing policy was the public employer's overriding interest in safety and security matters. Clearly if safety issues relating to mass transportation and prison security are deemed paramount to employees' bargaining interests, then surely the same result is even more compelling in the case of police officers who are entrusted with the public safety and empowered with enforcing the law.

Several cases addressing the scope of bargaining in the context of sworn police officers, although not dealing with drug testing, support this conclusion. In San Jose Peace Officer's Ass'n, 78 Cal. App. 3d 935, 144 Cal. Rpt. 638 (1978) the court held that a police department's new use of force policy was not a mandatory subject of bargaining, despite the obvious impact of the policy on the police officers' terms and conditions of employment, The central theme of the court's reasoning was that the use of force policy was primarily a matter of public safety. In reaching its decision, the court distinguished Fire Fighters Union v. City of Valleio, 116 Cal. Rptr. 507, (Cal. 1974), a case

relied upon by the FOP. The court noted that in City of Vallejo, the California Supreme Court indicated that if the constant manning procedure under review primarily involved employee workload and safety, then it would relate to a condition of employment, but not if it primarily involved the City's fire protection policy. The San Jose court explained that employers can eliminate safety problems affecting firefighters merely by purchasing better equipment or by increasing the work force; thus implying that these issues are amenable to the bargaining process. San Jose Peace Officers Ass'n, 144 Cal. Rptr. at 645. On the other hand, the court found that safety issues relating to police officers are uniquely public in nature and, thus not amenable to the bargaining process. In this regard, the court stated:

> It is, unfortunately true that the job of a police officer is a dangerous one. The danger, however, is inherent in the calling; a police officer's situation is unique, and in today's world, often times unenviable. Unlike the normal job in the private sector, or indeed, the job of a fire fighter, police work presents danger from third parties, rather than from dangerous working conditions.

Id.

The court went on to observe that the danger "obviously extends equally as much to the public at large as it does to the individual police officer." Id. at 645-46. As such, the court found the policy in question was primarily a matter of public safety and therefore not subject to bargaining.

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Similarly, in Berkeley Ass'n v. City of Berkeley, 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1977), the California First District Court of Appeal held that the establishment of new policies for investigating citizen complaints against police officers did not constitute a condition of employment. As acknowledged in the en banc decision, the court in that case determined that the policies, which concerned a matter of police-community relations, clearly constitute management level decisions which are not properly within the scope of union representation and collective bargaining. City of Miami. 571 So.2d 1326 n.14. According to the Berkeley court, to find otherwise would place "an intolerable burden upon fair and efficient administration of state and local government." Berkeley, 76 Cal. App. 3d at 937, 143 Cal. Rptr. at 260.[10/]

And, in Township of Bridgewater V. P.B.A. Local 174, 19C N.J. Super. 258, 482 A.2d 183 (App. Div. 1984) the court

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10/ The FOP's contention that the en banc decision relied in part on California law, yet incorrectly interpreted that public bargaining act is without merit. FOP I.B. 33, 34. The FOP maintains that by observing the Berkeley court's analysis of the unique nature of issues relating to police officers in the context of mandatory subjects of bargaining, the en banc court was somehow also obligated to follow NLRB precedent. The FOP reaches this non-sequitur by noting the City of Vallejo court's reference to federal precedent in defining the scope of bargaining for firefighers. Clearly, the en banc court may adopt any part of a nonbinding decision it finds persuasive without being required to "follow" holdings it does not find persuasive. Notwithstanding this fact, City of Vallejo is distinguishable, inasmuch as the issues there related to firefighters. In contrast, when considering matters relating to police officers, the court stated that "private management concepts do not translate easily to the public sector." San Jose Peace Officer Assn., 78 Cal. Rptr. at 946.

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upheld the New Jersey PERC's determination that the content of a physical fitness and agility test for police officers was not a mandatory subject of bargaining. The court found that such a policy directly related to the employer's "right to establish and require that its police officers will be physically fit to perform their expected assignments" Id. at 185-86. In balancing the interests against bargaining, the New Jersey PERC concluded that, "the predominant interest in this case is the employer's right to determine the qualifications necessary to do police work and to determine whether its police officers meet those qualifications." Id. at 186.

In contrast to these cases, the FOP relies, in part, on Senior Accountants, Analysts & Appraisers, Ass'n v. Citv of Detroit, 459 N.W. 2d 15 (Mich. App. 1990). The issue before the court in that case was whether persons rehired into the City's summer job training program were public employees and thus entitled to bargaining rights under that state's public relations act. Accordingly, the court's reasoning focused exclusively on the status of the parties' employment relationship. Thus whether the subject of drug testing was a mandatory subject of bargaining was never properly before the court and, as such, was never addressed.

Notwithstanding this fact, it is important to note that the drug testing policy in City of Detroit related to drug screening of job development and training specialists returning to active service. These employees were not engaged in matters

relating to public safety or security, nor does it appear that the employer's interest in maintaining a drug-free work force was of paramount concern. As a result, the drug testing policy was not designed to ferret out illicit drug users based on reasonable suspicion, but rather was merely a pre-rehire requirement. Thus even if, under those facts, it were considered a mandatory subject of bargaining, it is not relevant to whether drug testing of sworn police officers reasonably suspected of illicit drug use must be bargained. The critical distinction is the public employer's duty under our system of democracy to control the basic policy and direction of the public entity and fulfill its mission of providing effective and efficient service to the public.

Although the FOP also cited City of New Haven, Case No. MPT-10, 432 (Conn. 1987), which held that the impact of drug testing on individual police officers outweighed the City's need for unilateral action, the en banc court strongly disagreed with that court's reasoning. City of Miami, 571 So.2d at 1326 n.15. Moreover, the FOP points out that the New Haven court adopted the holding of City of Buffalo, Case No. U-8922 (N.Y. 1987), which held that a compelled urinalysis testing for drugs was a mandatory subject of bargaining. However, the FOP has misconstrued the applicability of that case to the facts in the instant matter.

In City of Buffalo, the drug testing policy in question was not based on reasonable suspicion of illicit drug use, but

rather constituted a random test. The significance of this distinction is that, unlike random testing, where the purpose of drug screening is to affect terms of employment, the purpose of a drug testing policy based upon reasonable suspicion is to curb criminal conduct which affects the job. See AFSCME. AFL-C10 v. State Labor Relations Bd., 546 N.E. 2d 687 (Ill. 1st Dist. 1989). An employer instituting a random drug testing policy is simply not faced with a situation, as the City was here, where citizens have reported witnessing a police officer "snort" cocaine or buy marijuana. Such circumstances impact heavily on the public's perception of the integrity of public officials and the public's respect for the dignity of government. Indeed, based on these very concerns, the Commonwealth Court of Pennsylvania upheld a Board decision that Pennsylvania did not commit a unfair labor practice by unilaterally enacting a code of conduct for state employees. Council 13, AFSCME, AFL-C10 v. Pennsylvania, 479 A.2d 683 (Pa. Commer. Ct. 1984). The court in that case stated that in balancing the impact the Code had on the integrity and efficiency of government against the impact on the conditions of employment, the Board properly concluded that:

> Though some provisions of the Order [code] do have impact on employee wages, hours, terms and conditions of employment, that impact is clearly outweighed by the great impact such a policy has on the ability of the government to preserve integrity among public employees and to provide a mechanism for enforcing a policy dedicated to the improvement of public services. The respect of the public for the dignity of government will be thereby enhanced and the public interest will be thereby served.

Id. at 687; See also Cambria County, 21 P.P.E.R. at 24-25 (noting that even off duty incidents involving public employees may negatively impact the public perception of government services).[11/]

Finally, although the FOP acknowledges that the implementation of a drug testing policy in Cambria County and AFSCME, supra, was found to be a non-mandatory subject of bargaining, it attempts to distinguish these cases by arguing that the "effects" of implementing such a policy were, nevertheless, found to be bargainable. FOP I.B. p. 31, 34-35 The City submits that the FOP has never raised the issue of "effects" bargaining as a separate and distinct concept. Its attempt to do so now in a final appeal to the Florida Supreme Court is improper and cannot be reviewed by this Court.

1. This Court Lacks a Sufficient Factual Record Upon Which to Review the Issue of "Effects" Bargaining

The FOP's attempt to raise the issue of "effects" bargaining after six years of litigation appears to be a desperate maneuver. Although the FOP will undoubtedly argue that the "impact" of implementing a drug testing policy has been at issue in this case from the start, the City does not contend

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11/ Moreover, the FOP's reliance on City of Oak, Case No. C87D-107 at 605 (Mich. PERC 1987) is similarly misplaced. In that case, the City ordered one of its police officers to submit to a breathalizer test after alcohol was detected on his breath. Thus, this case did not involve and consequently the Board did not consider the impact of illicit drug use and corruption by sworn police officers.

otherwise. It is certainly true that, in weighing management's right to make policy against the union's right to bargain over terms and conditions of employment, it is the "impact" of such policy that constitutes the "conditions" of employment. However, this analysis never encompassed nor, for that matter, did it contemplate the distinct doctrines applicable to a proper evaluation of "effects" or "impact" bargaining. As a result, the parties have never developed a proper factual record upon which to evaluate this issue. It is elementary that an appellate court reviews decisions of lower tribunals based upon the record as established in that court. Altchiler v. State, Dep't of Professional Regulation 442 So.2d 349, 350 (Fla. 1st DCA 1983); Florida Livestock Bd v. Hygrade Food Prod. Corp., 141 So.2d 6 (Fla. 1st DCA 1962) (finding it improper for counsel on appeal to insert in their brief matters and things which were not a part of trial record and which have not been brought to attention of trial court for his consideration).

A review of the legal and factual issues relevant to an analysis of "effects" or "impact" bargaining illustrates that the record has not been sufficiently developed to allow a proper analysis of these issues. First, in deciding whether an employer has committed an unfair labor practice for failing to engage in "effects" bargaining, it must be determined whether the union was afforded notice and an opportunity to bargain. City of Cassleberry, 10 F.P.E.R. 15204 (1984). Whether an employer has provided the union with sufficient "notice," depends on the

factual circumstances surrounding the decision. For example, in Hillsborough Community College, 15 F.P.E.R. 20160 (1989), PERC determined that the union had received actual notice of the college's decision to alter the length and number of its summer school terms, even though it may not have constituted "formal notice" of such change. Id. at 344. Specifically, the Hearing Officer determined that actual notice was received by the union as a result of certain discussions that took place at a math and science meeting. Id. at 341.

Similarly, prior to issuing the drug testing orders in this case, the FOP and the City had engaged in several discussions and meetings in which the union could have received notice. For example, in its brief the FOP admits that "[a]s early as 1980 . . . the FOP and the city had discussed concern over the potential of drug and alcohol abuse in the Police Department" and that during these discussions the City did not "assert any right not to engage in drug screening." FOP I.B. p. 2 The FOP also notes that these discussions took place at meetings of the Personnel Practices Committee. FOP I.B. p. 2 The obvious question that follows from this statement, is whether the City did assert the right to engage in drug testing and whether such assertion constituted notice. This is particularly true in view of the Hearing Officer's finding that the Personnel Practices Committee was established to deal with "non-negotiable" items. (R. 459)

Additionally, the FOP acknowledges that between January and May, 1985, then FOP President Kinne and then City Labor Relations Director Dean Mielke discussed the issue of a drug testing policy and that it was an item the City intended to raise as a subject of bargaining. FOP I.B. p. 3 Indeed, the FOP states that drug screening was mentioned as a "hot item." FOP I.B. p. 3 Again, whether any of the statements made during these discussions constituted notice is a question that must be resolved by a factfinder. As determined in Hillsborouah Community College, 15 F.P.E.R. 20160 (1989), notice need not be formal and may even be given during the course of a wholly unrelated meeting.

Next, assuming that the employer has provided the union with notice of a managerial decision, it must then be determined whether the union requested negotiations over the "effects" or "impact" of such decision. Hillsborough Community College, 15 F.P.E.R. 20160 (1989). If it is determined that a proper bargaining request has not been made, the union will be deemed to have waived its right to negotiate the "effects" of the employer's managerial decision. City of Cassleberry, 10 F.P.E.R. 15204 (1984). In City of Cassleberry, PERC explained that all of the facts and circumstances must be considered before waiver can be established. Id. at 403. In that case, PERC concluded that the union waived its right to engage in "effects" bargaining since, although it objected to the implementation of the City's

decision, a proper request to engage in "effects" bargaining was never made. Id.

Whether the FOP made a proper request for "effects" bargaining or merely objected to the implementation cannot be determined without additional facts. However, the evidence that does exist in the record indicates that, from the outset, the focus of the FOP's objection was not related to "effects" bargaining. FOP President Richard Kinne's testimony, which the FOP quotes on page 2 of its brief before the panel of the Third District Court of Appeal, is instructive in this regard. It stated:

> When asked then why the FOP sought to bargain the issue, Kenne replied:
>
> > To establish guidelines and establish probable cause so that it [testing] was not indiscriminately done against an employee for whatever reason the supervisor might have so that they could do it, establish a reason that both management and labor could live with and make it orderly.

This statement indicates that the FOP sought to bargain over when and if drug testing could be conducted, -- in other words, it sought to bargain over the decision itself, rather than the "effects" of such decision.

Yet another issue relevant to a consideration of "effects" bargaining is whether the parties have engaged in sufficient bargaining. In Palm Beach Junior Colleae, 7 F.P.E.R. 12300 (1981), PERC indicated that when negotiating solely over the "effects" of a management decision, resort to the impasse resolution procedure may not be necessary. Thus an analysis of

this issue would again turn on the specific facts and circumstances surrounding the parties bargaining status. In the instant case, the FOP repeatedly states that "the parties were already bargaining at the time the drug tests were ordered." FOP I.B. p. 3, 9. Thus whether sufficient "effects" bargaining had taken place is a question of fact that was never determined.

2. To the Extent "Effects" Bargaining is Considered by This Court, the Charge is Factually Deficient and That Issue Must be Dismissed.

The contents of the charge are a matter of record, (R. 1-3), and thus properly reviewable by this Court. PERC has stated that in order to determine whether an employer has committed an unfair labor practice for failing to engage in "effects" bargaining, the charge must contain specific information relating to each of the above requirements. See City of Orlando. 13 F.P.E.R. 18114 (1987). Specifically, the charge must allege and provide prima facie proof of negotiable "effects," Id. at 274, as well as identify the specific "effects" over which negotiations were requested. City of Monticello, 15 F.P.E.R. 20090 (1989). A charge which does not contain this information will be considered factually deficient and summarily dismissed. Id. at 211.

Here the FOP does not allege in the charge that it sought to bargain the "effects" or "impact" of the City's decision to implement a drug testing program; nor does the FOP allege which "effects" it sought to bargain -- indeed, the FOP does not even allege that the City refused to bargain "effects."

Thus to the extent that the FOP now raises the issue of "effects" bargaining, the charge is factually deficient under the standards announced in City of Orlando and City of Monticello, and that issue must be dismissed.

3. Decision v. "Effects" Bargaining Analysis is Inapplicable to This Issue

If the Court reaches the question of "effects" bargaining on the merits, it should not be beguiled by the Union's arguments that it does not wish to trample on management's right to decide to test - that it only seeks to negotiate the effects of that decision. If the City could not test for drugs until it negotiated the effects of the testing, whether it had the right to unilaterally decide to test would be meaningless. What is at issue is whether management may take a unilateral action - not whether it can make a unilateral decision. If this case were simply about making a decision standing alone, it would not be before the Court. It is the implementation of the decision to test which brings us here and it is that implementation which is or is not a statutory management right in Florida.

This illusory quality of the Union's argument on the decision/effects dichotomy is apparent from its brief on page 29 wherein it states that it "is of little consequence" whether the Court requires bargaining over the decision or the effects of the decision. The Union argues further that the procedures must be scientifically sound, respect privacy, not carry unreasonable presumptions, or not violate due process applicable to

dismissals. Each of those Union fears, however, if identified as "effects" over which the City must bargain, are already subsumed in the labor agreements' "just cause" standard for discipline or discharge. Arbitrators regularly consider those issues when deciding whether management's action was reasonable or not. Indeed, the protection afforded the Union through the collective agreements "just cause" provisions is exemplified by the arbitration decision to which the FOP refers in its brief. FOP I.B. p. 27, citing, Matter of Arbitration Between FOP 20 and the City of Miami, Gr: Fortune Bell confirmed Fraternal Order of Police. Miami Lodge 20 v. City of Miami, No. 88-09953(12) (Fla. 11 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) (per curiam). In that case, the union successfully argued that the positive confirmed test should be ignored because the cutoff levels had not been negotiated; the laboratory procedures were not satisfactory; the employee had not been given his choice of fluids in the second testing; and that only a small amount of cocaine was detected.

The Bell decision is a demonstration of successful union advocacy on behalf of its member whose two urine specimens tested positive for cocaine use at two different laboratories. Thus the FOP's assertion that, "[h]ad it not, however, been for the requirements of the collective bargaining agreement, Officer Bell's life and career would have been destroyed without an opportunity to challenge that result in the arbitral forum", is

completely wrong. To the contrary, Officer Bell was protected by the arbitral proceeding, regardless of the collective bargaining agreement.

CONCLUSION

The facts of this case illustrate that in the difficult task of attempting to deter and ferret out illegal drug use among its police officers, the City was put in the unusual position of having to test its officers for their compliance with the law. As the City has previously argued, collective bargaining and its purposes are fundamentally incompatible with the testing of police officers for illegal drug use. The Union's purpose of bargaining over drug testing can only be to limit it or otherwise condition it. Its actions in this case and those which it advert to in its initial brief to this Court demonstrate that its motive is to impede drug testing in any case.

It is the City's position, conversely, that keeping drug users and drug dealing organizations from infiltrating the police department and preventing police officers from using or dealing in illegal drugs, should not be negotiable because t is not a "garden variety" workplace issue upon which the give and take of negotiations may be effective. Thus, whatever the effect of drug use in other work forces and in other workplaces, it is of paramount concern that the City of Miami's law enforcers should be kept free of lawbreakers.

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Based on the foregoing argument and authority and the argument and authority that has previously been submitted, appellee city of Miami respectfully requests that this Court affirm the decision of the Third District Court of Appeal en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 12th day of June, 1991 to the following:

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