047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,394

THIRD DCA CASE NO. 85-2863

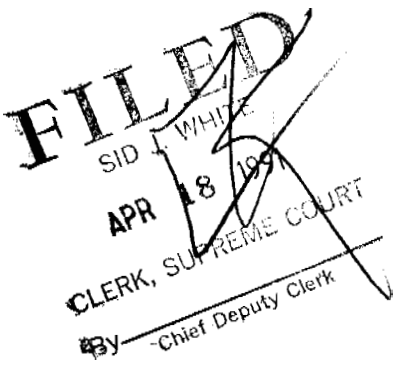
FRATERNAL ORDER OF POLICE,
MIAMI LODGE **20,**

Petitioner,

vs.

CITY OF MIAMI,

Respondent.
_____/



INITIAL BRIEF OF PETITIONER
FRATERNAL ORDER OF POLICE, MIAMI LODGE 20

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STATEMENT OF THE CASE AND FACTS[1]

In June, 1985, two separate incidents occurred involving City of Miami Police Officers which resulted in their being required, as a condition of continued employment, to submit to mandatory chemical testing to determine the presence of drugs in their system. The first incident arose as a result of an order given to an off-duty police officer to submit to chemical testing after it was alleged that he had been observed using cocaine in the rest room of a restaurant. The second incident occurred when two officers who had made a number of arrests in a high drug area of the City had been accused by virtue of an anonymous phone call of purchasing drugs at a location where they had recently made an arrest.

The first officer declined to take the drug test and was terminated from his employment for refusal to obey a direct order. That officer submitted to a test from his personal physician which proved negative. The test was rejected by the City (R-150). The other two officers, upon advice of the union, submitted to the drug tests under protest. The tests proved negative and the officers suffered no disciplinary action.

At the time these officers were ordered to submit to chemical tests, the City of Miami ("City") and Fraternal Order of Police, Miami Lodge 20 ("FOP") were parties to a collective bargaining agreement covering the City's police officers with civil service

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[1] Except where otherwise noted, the facts are drawn from the opinions of the Third District Court of Appeal, City of Miami v. Fraternal Order of Police, Miami Lodge 20, 571 So.2d 1309 (Fla. 3d DCA 1989).

status (police officer, sergeant, lieutenant and captain) effective October 1, **1983** through September **30**, 1985. The subject of involuntary drug testing was not expressly mentioned in the agreement. In addition, prior to the drug tests described above, no City of Miami police officer had ever been required to involuntarily submit to urinalysis testing (R-199). There was not at that time nor had there ever been at any time prior thereto any written City or departmental rule, regulation or policy specifically addressing the subject of involuntary drug screening of the City's police officers (R-187).

In February, 1985, the command staff of the police department had its first discussions concerning creation of a rule regarding chemical testing (R-193). By July, **1985,** no regulation had yet been promulgated. In fact, the procedures were still in a draft form being prepared by a staff officer (R-245).

As early as 1980, however, the FOP and the City had discussed concern over the potential of drug and alcohol abuse in the Police Department and the need for a rehabilitation program (R-96-97). At no time during those discussions, which took place at meetings of the Personnel Practices Committee (a creation of the collective bargaining agreement), did management assert any right not to engage in drug screening (R-102). In addition to the absence of any departmental rule or regulation, the civil service rules of the city did not require drug screening as a condition of employment (R-98).

Between January and May, 1985, then FOP President Richard Kinne visited the office of Labor Relations at the Miami City Hall. During one of those visits, there were discussions between Kinne and the City's Labor Relations Director as to what issues would be placed on the table for collective bargaining for a successor agreement to the contract which would expire on September 30, 1985. Among the items specifically mentioned as "hot items" was drug screening (R-99-102).

In his conversations with FOP President Kinne, then City Labor Relations Director Dean Mielke indicated that he was aware of the problem and that it was an item that the City intended to raise as a subject of bargaining. At no time, did the City contend that it did not have the obligation to bargain rules for drug testing. Article 8 of the Collective Bargaining Agreement provides a bargained for procedure for all departmental investigations. The drug testing utilized in the present case constituted an investigation and interrogation under that article (R-99-102).

The parties bargained over the issue of chemical testing and exchanged written proposals concerning their respective positions on this issue. The parties ultimately concluded a collective bargaining agreement to cover the period of October 1, 1985 through September 30, 1987. That agreement was adopted by the Miami City Commission as Resolution No. 86-230. The collective bargaining agreement included within it Article 36 which sets forth a specific procedure for chemical screening for drug and alcohol abuse.

Three days after the second set of drug tests ordered in this case, FOP President Kinne, in accordance with the wishes of the membership, met with the City's police chief to discuss the incidents. Kinne told the chief that the members were "highly incensed because of chemical testing." The chief responded by stating that he had ordered "a full fledged investigation into the incidents" to discover "why the officers were ordered to get chemical testing."

When the matter was not resolved to the satisfaction of the FOP, an unfair labor practice charge was filed against the City of Miami based upon the City's failure to bargain in good faith pursuant to Fla. Stat. § 447.501(1)(c) and the fact that the City had interfered with the rights of public employees in violation of Fla. Stat. § 447.501(1)(a).

The City responded to the unfair labor practice charges by claiming that drug testing was not a mandatory subject of collective bargaining and alternatively, even if drug testing was a mandatory subject of bargaining, that the language of the current (1983-1985) collective bargaining agreement between the FOP and the City waived any rights that the FOP might have regarding bargaining over drug testing for the term of that agreement.

The Public Employees Relations Commission (PERC) found the charges to be sufficient and conducted evidentiary proceedings. In December, 1985, the Commission issued a final order finding that drug testing was a mandatory subject of bargaining and that the FOP did not clearly and unmistakably waive the right to bargain over

drug testing. At no time in the course of the proceedings did the City claim that its actions were justified by the existence of any exigent circumstance which would have permitted the City to administer the drug test immediately and bargain thereafter. In fact, the City specifically discounted the fact that exigent circumstances were an issue.

An appeal was timely taken by the City to the Third District Court of Appeal. A three-judge panel of the Court on January 31, 1989 unanimously upheld the decision of PERC and found that drug testing was a mandatory subject of bargaining and further found that there was no waiver on the part of the FOP. Again, throughout the appellate proceedings, the City vigorously contended that exigent circumstances were not an issue.

A motion for rehearing and rehearing en banc was filed. On April 13, 1989 an order setting the cause for a rehearing en banc was issued. On April 17, 1989, the Court directed the parties to address the issue as to whether the City's actions were justified by the existence of exigent circumstances. Supplemental briefs were filed in accordance with that direction. Again the City stated no exigent circumstances existed.

On April 17, 1990 a divided court issued an opinion on rehearing en banc reversing the three-judge panel and finding that drug testing was not a mandatory subject of bargaining.

A motion for rehearing and to certify the issue of drug testing as a mandatory subject of bargaining was filed by the FOP on May 2, 1990. On January 22, 1991 the FOP's motion for rehearing

of the en banc decision was denied. The FOP's motion to certify as a question of great public importance the issue of whether drug testing was a mandatory subject of collective bargaining was granted. On January 31, 1991, a notice to invoke the discretionary jurisdiction of this Court was filed. This brief follows.

SUMMARY OF ARGUMENT

Since the infancy of public employee collective bargaining in the State of Florida, the Supreme Court and the various District Courts of Appeal have stated without equivocation that public employees shall have all of the rights of collective bargaining enjoyed by their private sector counterparts except for the constitutionally prohibited right to strike. The courts and the Public Employees Relations Commission have carefully noted that public employees lack any statutory procedure to bring pressure upon an employer to make concessions in collective bargaining. Public employees in the State of Florida do not have the right to strike nor do they have the right of binding interest arbitration for the formation of the collective bargaining agreement. As a result, the courts of this state and PERC have painted with a "broad brush" the spectrum of subjects over which an employer is required to bargain as being the only effective counter balance to the power of the public employer.

Ironically, by designating a subject of bargaining to be "mandatory" a public employer is ultimately permitted to impose its will upon its employees if it is unable to reach an agreement over that particular subject. The statutory impasse resolution process set forth in Fla. Stat. § 447.403 permits an employer after a reasonable period of negotiations to declare an impasse and cease further negotiations. A special master will be appointed to hear the contentions of both sides and render an advisory opinion which may be summarily rejected by either the union or the City.

Thereafter, the City through its legislative body, is permitted to take such action "as it deems to be in the public interest" and to impose its will on that particular subject.

If, for example, the FOP and the City were unable to reach agreement over terms for a drug testing program, the City, through its City Commission could simply decide in a public hearing what that program shall be and the union and its members are obliged to follow it. What the en banc decision did, however, was eliminate the opportunity for employee input into a decision which can strip from them their livelihood and falsely brand them as a drug abuser in a society which is increasingly intolerant of that behavior.

The foregoing analysis is significant in that public employers in Florida have the absolute right to have a drug testing program based upon guidelines which they themselves determine. By requiring bargaining, however, the City will have the opportunity to receive the input of the employee organization and to foster the harmony and stable labor relations which is the stated legislative intent in Florida's Public Employees Relations Act.

When the present case is stripped of the hysterical self-righteousness which surrounds drug testing of law enforcement officers, the issue is no different than any other issue of mandatory bargaining. If Article I, Section 6 of the State Constitution and the provisions of the Public Employees Relations Act are to retain any significance, then the en banc decision must be overturned and the panel decision reinstated.

The FOP and the City have been able to successfully complete a series of collective bargaining agreements over the subject of drug testing without the destruction of the police department or the City. All the claims that had been raised that management's prerogatives are somehow reduced if it is required to bargain have been rendered moot by the success of the parties at the bargaining table.

It is significant in the present case that the City of Miami could have easily have administered the drug tests to the three officers in question without having first being required to bargain. PERC has a longstanding doctrine involving **"exigent circumstances."** This permits an employer in a time of emergency to implement a managerial decision and then, at the earliest reasonable opportunity, bargain with the union.

In the present case, the City could have avoided all unfair labor practice liability by administering the drug tests as it did and then simply sitting it down with the FOP and bargaining over the subject. Perhaps the greatest irony is that the parties were already bargaining at the time the drug test was ordered. After the drug tests were ordered, the parties were able to complete a collective bargaining agreement with a fair and comprehensive procedure for future drug tests.

The City has repeatedly disclaimed that its actions were based on any exigent circumstances. It simply has decided that it does not have to bargain over a procedure which can literally brand a police officer as a criminal. The panel decision correctly

recognized the importance of the union's input in the process. The en banc decision, however, simply disregards the rights of public employees by employing a "balancing test" which has been specifically rejected by the Supreme Court.

This Court has since the adoption of the 1968 Constitution which created the right of public employee bargaining been the steadfast guardian of the right of the public employee to have his or her say in the conditions which govern their employment. For this Court to sustain the en banc decision would require a direct retreat from 23 years of well reasoned, compassionate jurisprudence and doom Florida's employees to a veritable dark ages. Each issue of controversy will be unilaterally determined by management to be a subject over which it need not bargain unless ordered. The result will be a flood of litigation which will clearly disserve the public interest.

This Court correctly recognized and should continue to recognize that any subject which bears upon wages, hours and terms and conditions of employment is a mandatory subject of bargaining. The legislature has seen fit to prevent public employers from being forced to accept policies which they do not find consistent with the efficient operation in government. The scales are already tipped in management's favor. If this Court upholds the en banc decision, those scales will tip further against the constitutional rights of public employees.

ARGUMENT

I.

COMPULSORY DRUG TESTING OF POLICE OFFICERS IS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

A. THE STANDARD OF REVIEW.

The standard to be applied on review of statutory construction by an agency charged with the enforcement of that statute is to accord substantial deference to the agency's interpretation. This Supreme Court has agreed that a reviewing court must defer to an agency's interpretation of an operable statute as long the interpretation is consistent with legislative intent and is supported by substantial, competent evidence. Public Employees Relation Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985).

With specific regard to decisions of the Florida Public Employees Relation Commission in resolving unfair labor practices it has been held:

> An expert tribunal such as PERC, is entitled to substantial deference in recognition of its special competence in dealing with labor problems. It is not our province to displace its choice between two conflicting views simply because we would have been justified in deciding the issue differently were it before us in the first instance.

Lewis v. City of Clearwater, 404 So.2d 1156 (Fla. 1st DCA 1980).

As the First District stated in Pasco County School Board v. Florida Public Employees Relation Commission, 353 So.2d 108 (Fla. 1st DCA 1978):

> Expert tribunals are entitled to the greatest deference in recognition of their special competence in dealing with labor problems. In many areas their evaluation of the competing interest of employer/employee should unquestionably be given conclusive effect in determining the application of the pertinent sections of the act. **Id.** at p.116.

See also, City of Miami v. FOP, Miami Lodse 20, 511 So.2d 549 (Fla. 1987).

B. FLORIDA LAW IS UNEQUIVOCAL IN MANDATING BARGAINING OVER COMPULSORY DRUG TESTING.

The present case involves a determination of whether or not compulsory drug testing as a condition of continued employment by a police officer is a subject over which a public employer is required to bargain with the public employer organization. It is no different than any other mandatory bargaining case presented before the various courts of this State. The en banc holding of the Third District Court of Appeal creating a "balancing test" is in direct and express conflict with 23 years of precedence in this Supreme Court.

In 1968, the people of Florida amended the State Constitution to grant to hundreds of thousands of public employees the right to bargain collectively. In so doing, the people of Florida proscribed only a single activity; that is, the right to strike. Article I, Section 6, Constitution of Florida (1968).

Within months after the adoption of that Constitutional provision, this Court was called upon to define the scope of rights created for public employees. In Dade County Classroom

Teachers Association v. Ryan, 225 So.2d 903 (Fla. 1969), a unanimous Supreme Court expressly stated:

> We hold that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6.

Despite that unequivocal holding, it took the direct threat of judicial intervention to force the Florida Legislature to enact legislation to implement that Constitutional provision. See, Dade County Classroom Teachers Association, Inc. v. State Legislature, 269 So.2d 684 (Fla. 1972). As a consequence, the State Legislature ultimately implemented Article I, Section 6, through the passage of Fla. Stat. Chapter 447, Part II (1974).

Since the creation of the Public Employees Relation Commission (PERC), the Commission and the courts of this State have adopted as a policy broad interpretation of the scope of bargaining. See, Central Florida Professional Firefighters v. Board of County Commissioners, 9 FPER 14372, aff'd, 467 So.2d 1023 (Fla. 5th DCA 1985). Early in its history, PERC determined that the scope of bargaining, as defined by Fla. Stat. § 447.309(1), is "statutorily broad." School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979).

There is no question that the drug testing in the present case was sought for the sole purpose of determining whether three City of Miami police officers maintained a required level of fitness for employment and whether they should be subject to disciplinary action, up to and including dismissal. It has long since been

determined that matters pertaining to discharge and other forms of discipline are "an aspect of the employee/employer relationship" and, therefore, are mandatory subjects of collective bargaining under PERA. See, Orange County PBA v. City of Casselberry, 457 So.2d 1125 (Fla. 1st DCA 1984), aff'd, 482 So.2d 336 (Fla. 1986); PERC v. District School Board of DeSoto County, 374 So.2d 1005 (Fla. 2d DCA 1979); Bradford County School Board, 6 FPER 11228 (1980). To adopt the en banc decision's analysis in the present case would eviscerate the obligation to bargain. Any time that an employer would "wrap itself in the flag" of management rights, the union would find itself with no meaningful opportunity to bargain. As both the panel opinion and the dissenting opinion of Judge Jorgenson on the en banc decision directly note, drug tests are notorious for producing false test results. 571 So.2d at 1331. The result of the false positive test is to brand an innocent law officer a drug abuser in a society which correctly has little or no tolerance of such conduct by its law enforcement officials. Even with a 99 percent degree of accuracy, in a police department such as Miami's which has over 1,000 officers, nearly a dozen persons would find their lives destroyed when they were in fact blameless. It is precisely for this reason that PERC correctly determined the duty to bargain must be broadly interpreted.

Against this background an analysis of this Court's seminal decision on the right to bargain is instructive. In City Of Tallahassee v. PERC, 393 So.2d 1147 (Fla. 1st DCA 1987), aff'd, 410 So.2d 487 (Fla. 1981), the District Court of Appeal and this Court

were confronted with the issue of the obligation to bargain over pension and retirement. The Legislature had provided in §§ 447.301(2) and 447.309(5), that the scope of bargaining over wages, hours and terms and conditions of employment was restricted with respect to issues concerning pension and retirement. Both the District Court and this Court held that since private employees have the right to bargain collectively on the issue of retirement benefits, "public employees must **also."**

The City of Tallahassee case is significant in that the employer complained, as the City of Miami does here, that a broad interpretation of the duty to bargain would lead to the result that no limitation whatsoever could be placed on the bargaining obligation. This Court rejected the argument by noting that while the Legislature was free to regulate collective bargaining by providing for an orderly procedure, it could not prohibit bargaining over a subject without abridging the constitutional provisions establishing the rights of collective bargaining for public employees. Id. at 490. The result was that public employers and employee organizations then proceeded to bargain the issue of pension. The City of Miami and the FOP are among them and it successfully resulted in manageable agreements and the promotion of harmonious labor relations as required in the Legislature's statement of intent in Fla. Stat. § 447.201. The predictable consequence of a failure to include such subjects in a mutually accepted collective bargaining agreement would be to encourage litigation each time the union disagreed with a managerial

decision. The same result will abide if drug testing is not found to be a mandatory subject of bargaining.

The en banc opinion states that if a police officer becomes the subject of a disciplinary proceeding as a result of a positive drug test, the employee will have the benefit of all "due process protections" afforded such persons by statutory and decisional law. This means that each time a police officer was found to have a positive drug test, he or she would be able to litigate from beginning to end the appropriateness of the city's drug testing procedure. The resources which would have to be focused on such litigation would far outweigh the time spent in bargaining a mutually agreed upon procedure for the implementation of a chemical testing program. By confining the question of drug testing to a provision of the collective bargaining agreement, the parties can limit the forum for review of those decisions to the statutorily mandated arbitration procedure in § 447.401. As this Court held in its 1987 decision in City of Miami v. FOP Miami Lodge 20, 511 So.2d 549 (Fla. 1987), there is a fundamental policy of allowing and encouraging parties to provide their own solution to disputes through the interpretation and application of the collective bargaining agreement. Id. at 552. By removing this subject from the bargaining process, it only encourages employees to bring their disputes to the courthouse, thereby further clogging an already overburdened judicial system with matters that clearly belong in the forum of labor arbitration.

In Palm Beach Junior Collese Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (Fla. 1st DCA 1982), aff'd in relevant part, 475 So.2d 1221 (Fla. 1985), the courts were again confronted with the interplay between statutory management rights and the statutory rights of collective bargaining enjoyed by employees. Specifically, the issue in Palm Beach Junior College involved the ability of an employer to insist to the point of impasse and to thereafter impose upon its union a waiver of "impact" bargaining (bargaining the effects of a managerial decision on wages, hour and terms and conditions of employment).

The Supreme Court specifically noted that in attempting to so expand the management's rights clause (as the en banc decision does in the present case) the employer sought not a recognition of management rights, but a waiver of the right to collectively bargain reserved to employees by statute and Constitution. Id. at 1225. This Court held, in the absence of a clear and unmistakable waiver on the part of the employee organization, such an attempted expansion of management rights "most certainly is bad faith bargaining." Id. at 1227.

The First District Court of Appeal in Palm Beach Junior College recognized a major disadvantage under which public employee unions in Florida operate, and for the need to expansively review the limited rights which those unions do possess:

> Perhaps the major distinction between public sector law and that in the private sector is that in the latter, the employee has the option to strike--a right specifically denied the public employee in Florida by Article I, Section 6, of the Florida Constitution. This

distinction was alluded to in First National Maintenance Corp.:

> 'Both employer and union may bargain to impasse over those matters [in matters of required bargaining] and use their economic weapons at their disposal to attempt to secure their respective aims.' 425 U.S. at 675.

The courts of Florida in numerous instances have noted that Section 447.309 (1), Florida Statutes, requires a relatively broad scope of negotiations to help counter balance the absence of the right to strike by public employees. For example, in School Board of Escambia County v. Public Employees Relation Commission, 350 So.2d 819, 821 (Fla. 1st DCA 1977), we observed that:

> 'The constitutional and legislative prohibitions against strikes by public employees were never intended to give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not circumvent the rights of public employees to do meaningful collective bargaining with their employer.'

Later, in School Board of Oranse County v. Palowitch, 367 So.2d 730, 731 (Fla. 4th DCA 1975), the Fourth District Court of Appeal held:

> 'We do not agree with the petitioner's position that the right of ultimate decision making instills the right of unilateral action without bargaining because to hold that would effectively gut the life of the statute providing for bargaining by public employees. There are certain trade offs in the statutory scheme, not the least of which is the lack of right to strike.'

Therefore, the panel decision and PERC properly exercised their discretion in requiring this new disciplinary requirement of drug testing to be bargained for the same as any other. The passionate and concerns regarding a drug free work place are irrelevant to a rational analysis in the present case.

The en banc decision misapprehends the language of this Court in the City of Tallahassee, supra, which distinguishes between the collective bargaining "process" and "subjects" of collective bargaining. See, 571 So.2d at 1327, relying on City of Tallahassee, 410 So.2d at 491.

The Florida Legislature has already distinguished the public and private sector collective bargaining process by providing for a statutory impasse resolution procedure which ultimately permits the public employer to impose its will on public employees on any mandatory subject of bargaining. There is no such process in the private sector. Under the terms of the National Labor Relations Act, 29 U.S.C. § 151, et seq., impasses in bargaining are resolved either through mutually agreed upon binding interest arbitration (arbitration for the formation of the contract) or through strikes. There is no provision in Florida law for binding interest arbitration and strikes are constitutionally prohibited under Article I, Section 6, of the Constitution.

The process is therefore clearly different. In the private sector if the parties cannot agree to engage in interest arbitration, then they return to their "neutral corners" and engage in an economic strike. Whichever party can last the

longest ultimately wins the dispute. Public employees have no economic weapons. Under the impasse resolution procedures in Fla. Stat. § 447.403, the public employer is given the irrefutable authority to decide what the contract shall be on any mandatory subject of bargaining. What takes place prior to that, however, is an opportunity for employees make their beliefs heard at the bargaining table in the hopes of better educating management about their needs. The hoped for result under § 447.201 is that labor and management will voluntarily settle their problems at the bargaining table rather than resorting to the courtroom. The en banc decision in the present case discards the former and guarantees the latter. By removing the entire subject of drug testing from the list of mandatory subjects of bargaining clearly is an "abridgement" of the right of collective bargaining.

In Schermerhorn v. Local 1625, 141 So.2d 269 (Fla. 1962), this Court held that with regard to the question of union rights under Article I, Section 6, of the State Constitution, the term "abridgement" meant:

> Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use or enjoyment of that right. As defined in Webster's New International Dictionary, to abridge is 'to deprive; to cut off; to diminish, curtail.' Id. at 276.

The en banc decision acknowledges that drug testing is clearly a condition of employment, yet removes it from the bargaining table for the simple reason that it is believed to be "a bad idea" to bargain over the subject. This is simply an incorrect legal

result. whether bargaining over drug testing is a good idea or a bad idea is not the issue. If it is a term and condition of employment, the Constitution mandates bargaining.

The en banc decision also misapprehends and misapplies the decision of this Court in United Teachers of Dade v. Dade County School Board, 500 So.2d 508 (Fla. 1986). In that decision, this Court held that the master teacher program did not fall within the definition of "wages, hours and terms and conditions of employment." Specifically, the Court found that the program was not a "wage" and therefore not subject to bargaining. The en banc opinion in the present case, however, clearly and unmistakably finds that drug testing is a condition of employment. Having made such a determination, the employer and the union are obligated to bargain. Were it not a condition of employment, then how could three officers be subjected to termination for their failure to abide by the order?

The en banc opinion also misapplies the United Teachers of Dade decision in that it ignores its holding that the master teacher program did not violate Article I, Section 6 of the State Constitution on the ground that it was a situation unique to the public sector and would not arise in the private sector. 500 So.2d at 512. Drug testing of security personnel arises in both public and private employment. It must be negotiated in the private sector. Article I, Section 6 compels that it be negotiated in the public sector.

In summary, what is wrong with the en banc opinion is that it has determined that the right to bargain now extends only to **"significant"** conditions of employment and not to all conditions. Such a holding directly conflicts with the decision of the Fourth District Court of Appeal in School Board of Oranse County V. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979) which held that the obligation to bargain extends to all terms and conditions of employment. The obligation to bargain extends whenever there is an impact, no matter how slight. School Board of Indian River County v. Indian River Education Association, 373 So.2d 412 (Fla. 4th DCA 1979). The Court in School Board of Indian River County heldthat permitting employers to take unilateral action can weaken the confidence of public employees in the fairness of the bargaining process and may lead to more disruptive tactics, such as strikes, which would upset the labor harmony required by the legislature in Section 447.201, Florida Statutes.

The en banc decision is largely founded on the premise that the **"realities"** of a drug free work place override the right to bargain. As this Court noted in **City of Tallahassee**, supra, the unconstitutionality of a statute restricting bargaining may not be overlooked or excused for "reasons of **convenience."** While courts should not resolve disputes in a vacuum, the **"realities"** of the situation cannot justify acceptance of that which is clearly unconstitutional. 410 So.2d at **490**.

The en banc decision also incorrectly attempts to excuse its refusal to obey the clear dictates of this Court in **City of**

Tallahassee and Ryan by creating for the first time a "balancing test" as to whether a subject should be included as bargaining. Florida has **rejected** such a balancing test. As the Fourth District Court of Appeal held in School Board of Indian River County v. Indian River County Education Association, supra:

> "The point seems to be that Section 447.309(1), Florida Statutes (1977), requires that the [employer] to bargain in good faith with respect 'wages, hours and terms and conditions of employment.' This change falls within the purview of that provision even though it may not be a change of great moment."

373 So.2d at 414.

The only balancing test ever approved with regard to labor relations is the one established by this Court in Rvan and readopted in City of Tallahassee which balanced the need for a broad definition of bargaining to insure labor harmony and prevent public employee strikes:

> **"In** the sensitive area of labor relations between public employees and public employers it is requisite that the legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6. **A** delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process.

410 So.2d at 491.

This Court went on to hold that it is its obligation to insure that the constitutional right of all employees to bargain collectively "is not abridged." An action which removes the subject from the scope of bargaining is not "reasonable regulation of the scope of collective bargaining." Id. at 491.

The right which the FOP seeks to vindicate in this case has nothing to do with drugs. Rather, it has to do with the right of public employees to meaningfully exercise the rights given them by the people of Florida. The only way that right can be lawfully restricted is if the people choose to do so through an amendment of their Constitution. It is not for the Third District Court of Appeal to rewrite the Constitution for them. Accordingly, the en banc decision should be reversed and the panel decision reinstated.

C. CASES INTERPRETING THE NATIONAL LABOR RELATIONS ACT SUPPORT THE POSITION OF THE FOP THAT DRUG TESTING IS A MANDATORY SUBJECT OF BARGAINING

In School Board of Polk County v. Florida Public Employees Relations Commission, 399 So.2d 520 (Fla. 2d DCA 1981) the Court held that decisions of the National Labor Relations Board are pertinent and instructive in cases before the Public Employees Relations Commission. The Court correctly noted that relevant provisions of Florida's Public Employees Relations Act are similar to those of the National Labor Relations Act and therefore decisions of the National Labor Relations Board are particularly useful in cases of first impression. Id. at 522. See also, Pasco County School Board v. Public Employees Relations Commission, 353

So.2d 108 (Fla. 1st DCA 1987); City of Miami v. FOP Miami Lodse 20, 511 So.2d at 552. In Johnson-Bateman Company, 295 NLRB No. 26 (1989) the National Labor Relations Board unequivocally found that unilateral implementation of a mandatory drug and alcohol testing program by an employer is an unfair labor practice. The Board found that such a policy illegally changes a mandatory subject of bargaining since it alters terms and conditions of employment.

In reaching that conclusion, the National Labor Relations Board relied in large part on the decision of the United States Supreme Court in Ford Motor Comsanv v. NLRB 441 U.S. 488 (1979) which described mandatory subjects of bargaining as such matters that are "plainly germane to the working environment" and "not among those managerial decisions" which lie at the core of entrepreneurial control.

As to the first factor, germane to the working environment, drug/alcohol testing is analogized by the NLRB to physical examinations and polygraph testing. Both of those have been found to be mandatory subjects of bargaining. Lockheed Ship Building Company, 273 NLRB 171 (1984); LeRoy Machine Company, 147 NLRB 1431 (1964); Austin-Berryhill, Inc., 246 NLRB 1139 (1979) and Medi-Center. Mid-South Hospital, 221 NLRB 670 (1975).

The Johnson-Bateman Company decided to implement drug testing as a means of enforcing its anti-drug policies. This is precisely the reason why the City of Miami implemented it. In both Johnson-Bateman and the City of Miami, violation of the drug rule

is punishable by discipline including discharge. Therefore the record firmly establishes that drug/alcohol testing is a condition of employment because it has the potential to affect the continued employment of employees who become subject to it. As is seen in the present case, the officer who refused to submit to the City's drug testing case was fired. The other two officers submitted to the drug testing under protest in order to avoid that disciplinary action for disobedience of a direct order. It was for this same reason that the NLRB in Medi-Center found required polygraph testing to be a mandatory subject of bargaining.

The second criterion which led the Board to establish drug testing as a mandatory subject of bargaining is that the subject in question was not among those "managerial decisions" that were at the core of entrepreneurial control. Such decisions are those which concern the commitment of investment capital and the basic scope of the enterprise. See, Fiberboard Corp. v. NLRB, **379 U.S. 203, 222-223 (1964).**

Drug testing has nothing to do with the fact that the City of Miami will have a police department or how it will distribute its economic resources in the management of that police department. Moreover, it is not in the words of Ford Motor Company, "only indirectly" infringing upon employment security. The manner in which the test is conducted and the result of that test will determine without question whether a police officer remains in the employ of the City. The purpose of including it in the bargaining

process insures that the interests of the employee are adequately represented.

The fact that both the FOP and the City concur that a drug free work place is essential in no way relieves the obligation to bargain. The fact that management and labor share the same goal does not mean that they agree on the means by which one should achieve it. In fact, the city's failure to abide by the contactual provisions led to the discharge of an employee based on a faulty test result. Police Officer Fortune Bell was wrongly accused of having a false/positive drug test. When the City was called to account at an arbitration for its alleged violation of the scientific collection procedures required in the collective bargaining agreement, it was revealed that the city's testing "expert" had deviated substantially from accepted scientific procedure by using his own urine as a "blank" to test his machine. All expert witnesses who testified were to say the least horrified at that practice. Had 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. See, Matter of Arbitration between FOP 20 and the City of Miami, Gr: Fortune Bell, confirmed, Fraternal Order of Police, Miami Lodse 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 Lodse 20, No. 88-1564 (Fla. 3d DCA, April 25, 1989) (per curiam).

Even assuming for the purposes of argument that the decision to have drug testing is an exclusive managerial prerogative, this does not relieve management of the obligation to bargain the **"impact"** that this managerial decision may have on wages, hours and terms and conditions of employment. It is this failure to understand "impact bargaining" that also led the en banc panel to an incorrect interpretation of the law.

The en banc panel relied on the decision of the United States Supreme Court in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) in support of its argument that a "balancing test" is appropriate for determining whether drug testing is a mandatory subject of bargaining. What the en banc panel misapprehended, however, is that even if the decision to employ drug testing is deemed managerial, it does not relieve management of the obligation to bargain the **"impact"** that the decision has on wages, hours and terms and conditions of employment.

In First National Maintenance, the issue is whether an employer had a right to effectively terminate a portion of its business without the consent of the union. The Supreme Court held that this solely economic decision was a core entrepreneurial judgment which it was exclusively management's to make. In making that decision, however, management created an **"effect"** through layoffs, reassignments, etc. on members of the bargaining unit. The U.S. Supreme Court held that these effects relate to wages, hours and terms and conditions of employment and **required** mandatory bargaining.

In the present case, whether the court finds the decision or the effects of that decision to be the point at which bargaining begins is of little consequence. The FOP is concerned that management would have a free hand to implement procedures for drug testing which are not scientifically sound; which would not respect the privacy of the individual; which might carry unreasonable presumptions of correctness; or any of a variety of other difficulties which could lead an employee to dismissal regardless of the due process implications. That is, the FOP is interested in being involved in the process by which the decision to have a drug free work place is implemented. Therefore, even if this is called bargaining over the effects, the obligation to bargain remains. Under the law as set forth in First National Maintenance Corp., the City of Miami would still have committed an unfair labor practice because of its refusal to bargain the effect that its decision to implement drug testing had on the three affected officers and all others who followed.

The balancing test which is spoken of in First National Maintenance is not as to whether a subject should be bargained, the balancing test was whether bargaining **should** take place over the decision itself or the effects of the decision. This Court may fairly resolve the case either way and still protect the rights of public employees. Drug testing **is not** a core entrepreneurial decision and is a mandatory subject of bargaining. Even if this Court holds that drug testing is such a decision, the effects of that decision must be bargainable. The en banc

decision's first application of First National Maintenance wrongly eliminates effects bargaining as well as decision bargaining.

29 U.S.C. §§ 158(a)(5) and (d) require an employer to bargain in good faith with respect to wages, hours and other terms and conditions of employment. Section 447.309(1) requires a public employer to bargain collectively in the determination of "wages, hours and terms and conditions of employment of the public employees within the bargaining unit." The language of the statutes is the same. Under any reasonable application of federal case law to the present situation, bargaining is required over the implementation of mandatory drug testing, whether it be over the decision or the effects of the decision.

The en banc decision therefore should be reversed and the panel decision reinstated.

D. DECISIONAL LAW IN THE SISTER STATES SUPPORTS A FINDING THAT DRUG TESTING IS A MANDATORY SUBJECT OF BARGAINING

The en banc panel made reference to a number of decisions from other states for the proposition that those decisions supported a finding that drug testing is not a mandatory subject of bargaining. Florida's right of collective bargaining for public employees is not a creature of statute. Rather, it is founded on a provision of the State Constitution adopted by the people and made fundamental. Attempts by the legislature to alter those fundamental rights consistently have been struck down by this Court.

In City of New Haven, Case No. MPT-10,432 (CT 1987) the Connecticut State Labor Relations Board found the City of New Haven guilty of unfair labor practices for unilaterally implementing a mandatory drug testing program for police officers. In reaching that conclusion, the Connecticut Labor Relations Board adopted the holdings of Florida's Public Employees Relations Commission in this case as well as a decision of the New York Public Employees Labor Relations Board in City of Buffalo, Case No. U-8922 **(1987)** in which it was held a compelled urinalysis testing for drugs was a mandatory subject of collective bargaining.

In City of Royal Oak, Case No. **C87 D-107** (Mich. PERC **71388)** the Michigan Public Employees Relations Commission held that an employer's adoption of a mandatory substance abuse testing policy without prior bargaining is an unlawful alteration of existing terms and conditions of employment. The Michigan Court of Appeals reached the same conclusion in Senior Accountants, Analysts and Appraisers Association v. City of Detroit, **459** N.W.2d. 15 (Mich.App. 1990). The court found that Michigan's Public Employee Bargaining Law created a duty on the part of the City to bargain drug testing of all employees, including persons seeking rehire. The only exception was the drug testing of applicants who had never been employees. The reason that applicants were excluded is that they were not "employees'' as defined by Michigan's Public Employees Relations Act.

In Amalsamated Transit Union Division 1279 v. Cambria County Transit Authority, Case No. PERA-C-88-133-W (PLRB 1989) the Pennsylvania Labor Relations Board found that while the policy decision of whether or not to have a drug free work place was a management prerogative, that management prerogative ceased when speaking about the manner in which drug testing would be implemented. Specifically, the Labor Relations Board held:

> "Although the Board finds the fundamental decision to test employees under appropriate circumstances may be a managerial prerogative, it does not follow that a subsequently promulgated comprehensive policy encompassing a testing process as well as disciplinary consequence of positive testing also has a greater impact on managerial policy rather than employee working conditions. As broader matters of managerial prerogative filter down from decision making involving the management and operation of the enterprise to matters involving the day-to-day rules of the shop for rank and file employees, the statutory bargaining obligation arises."
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> We thus fund that a public employer may under limited circumstances unilaterally decide that employees may be randomly tested for drug or alcohol abuse which impairs public services. However, prior to the promulgation of any drug or alcohol testing program, the public employer must negotiate with the exclusive representative of its employees regarding consequential matters which more directly affect employee working conditions than matters of managerial prerogative. Included among those matters are the nature, integrity and reliability of the testing process as well as matters of employee discipline which follow a positive test result.

It is significant that the foregoing decision arises under Pennsylvania's Bargaining Law for Civilian Employees, 43 P.S.

§ 1101.101 et seq. Under Pennsylvania's Civilian Bargaining Law a statutorily enacted balancingtest is employed to determine which subjects are bargainable and which are not, 43 P.S. 1101.701-702. In the case of police and fire employees, however, no such bargaining test is employed. Under Pennsylvania's Police and Fire Bargaining Law 43 P.S. §§ 217.1-217.10, a topic of management action is deemed bargainable where it "bears a rational relationship to employee duties." Clairton v. Labor Relations Board, 528 A.2d 1048 (Pa.Cmwlth. 1987). This decision is significant in that in the absence of the specific statutory determination that a balancing test was to be used, Pennsylvania's court could not create one. Florida courts also have specifically rejected a balancing test, yet the Third District Court of Appeal in the en banc decision seeks to legislate one.

The en banc decision relied in part on California law, yet has incorrectly interpreted that public bargaining act. In Firefighters Union Local 1186 v. City of Vallejo, 116 Cal.Rptr. 507, 526 P.2d 971 (Cal. 1974) the Supreme Court of California held that the bargaining requirements of the National Labor Relations Act and cases interpreting them were properly referred to in interpreting the scope of bargaining under Vallejo's city charter provision for firefighter bargaining. The court took special care to note that the right to bargain cannot be diluted by an overbroad determination of management rights. If the en banc panel had indeed followed California law, it would have followed its reliance

on NLRB precedent and applied Johnson-Bateman thereby finding drug testing a mandatory subject of bargaining.

More recently, in San Mateo City School District V. PERB, 663 P.2d 523 (Cal. 1983) the Supreme Court noted that the determination of what is a mandatory subject of bargaining and what is not was best left to the expertise of the Public Employment Relations Board. Had the legislature wished to enact a specific list of those matters which could come to the bargaining table the legislature would have done so as it did in Wisconsin and Nevada. 663 P.2d at 528. The court further noted that the fact that a subject of bargaining touched upon a matter of management policy in no way diminished the broad scope to be accorded to subjects of bargaining. This is particularly so in light of the fact that teachers in California had no right to engage in true collective bargaining and no right to strike thereby requiring a broad definition of matters subject to the meeting confer requirement to offset that uneven power in management. Id. at 530.

The District Court of Appeal, First District of Illinois did find that the decision to employ compulsory drug testing was not a mandatory subject of bargaining under a balancing test under that state's labor relations law. AFSCME v. State Labor Relations Board, 546 N.E.2d 687 (Ill.App. 1st Dist. 1989).

Even though the decision to bargain over drug testing was not mandatory, bargaining over the effect that the decision had on policy matters is a mandatory subject of bargaining. Id. at 693. Specifically, the court held:

> "Regardless of whether [the employer] must bargain a topic of introducing a drug policy, however, it must still negotiate 'with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon.' (Ill.Rev.Stat.1987, Ch. 48, Par. 1604). If the new policy includes disciplinary sanctions, these sanctions are mandatory subjects of bargaining.

Id. at 693.

Therefore, even those tribunals which found decision on the subject which finds the decision to implement drug testing as non-mandatory, bargaining was still required over the effect that decision had. Therefore, if the Illinois decision were applied to the Florida case, Miami would still have committed an unfair labor practice. Not only did Miami refuse to bargain its decision, it refused to bargain the effects. Significantly, the Illinois court deferred to its Public Employee Relations Board in this question of expertise. Id. at 690.

Therefore, the en banc panel is out of line even with the most conservative view expressed by an appellate court in the United States on the subject of compulsory drug testing. More importantly, it remains out of line with the clear holding of this Court in City of Tallahassee and Ryan.

II.

THE CITY OF MIAMI EXPRESSLY DISCLAIMED THE EXISTENCE OF EXIGENT CIRCUMSTANCES WHICH COULD HAVE PERMITTED THE IMPOSITION OF A DRUG TEST PRIOR TO BARGAINING

The Public Employees Relations Commission and the courts of this State have long recognized exigent circumstances as an exception to the requirement to collectively bargain prior to altering terms and conditions of employment. Exigent circumstances exist where there is a showing by the employer of no viable alternative to taking immediate action. Florida School for the Deaf and Blind, 11 FPER 16080. In Pasco County School Board V. Florida Public Employees Relations Commission, 353 So.2d 108 (Fla. 1st DCA 1977) the court recognized the existence of exigent circumstances as an affirmative defense to an unfair labor practice, but found it to be particularly limited. In that case, the court rejected the claim of exigent circumstances from a public employer claiming it was faced with *a* fiscal emergency and found the employer obligated to engage in negotiations with the union prior to taking unilateral action. Id. at 125-126.

The private sector standard for exigent circumstances was established in the Circuit Court of Appeal opinion NLRB V. Hondo Drilling Company, 525 F.2d 864 (5th Cir. 1976). In Hondo Drilling, the NLRB and the court rejected an employer's unilateral grant of a pay benefit on the asserted ground that the danger involved in the drilling operation required the attraction of sufficient numbers of workers.

Therefore, if a public employer were to argue that the short span of time which the presence of drugs in the human body remain prevent it from adequately detecting the presence of those drugs if it were first required to bargain, a reasonable case would be made out for exigent circumstances. What is significant in the present case, is that the City of Miami expressly discounted the existence of exigent circumstances. That is, it simply stated that given the factual situations that it was facing, no great emergency existed to justify unilateral action before bargaining.

Exigent circumstances are an affirmative defense which must be plead and proven. Section 38D-21.005(3) F.A.C. expressly provides that failure to plead an affirmative defense shall constitute a waiver of that defense. The City did not raise exigent circumstances in its answer nor did it attempt to prove exigent circumstances during the evidentiary hearing before the Commission. In fact, the evidence before the hearing officer revealed that the City had already begun bargaining with the union over drug testing at the time the June incidents arose. Moreover, the police department had been in the process of drafting a rule concerning drug testing for several months and it had not gotten around to finishing it.

At pages 1 and 2 of its supplemental brief to the Third District Court of Appeal filed on May 15, 1989, the City stated that it neither raised nor proved a defense based on exigent circumstances because it said that they did not exist. The City admitted it could have taken urine samples from the affected

officers and then frozen them for later testing thereby offering sufficient opportunityto bargain. The City chose instead to argue that drug testing and collective bargaining are fundamentally incompatible.

Therefore, to avoid an unfair labor practice, a public employer could demand, prior to bargaining, that employees submit to the collection of bodily fluids which could be frozen and tested at a later time. Immediately after that collection, the exigency is removed and the employer may fairly have an opportunity to bargain with its union. Had such a procedure been followed in the present case, no unfair labor practice would have arisen and six years of litigation would not have ensued. If anything, the greatest irony is that, once the parties committed themselves to the bargaining process, they were able to create and enforce a mutually satisfactory comprehensive drug testing policy. That is precisely what Ch. 447 was intended to do and what the people envisioned when they granted collective bargaining rights to their public employees.

CONCLUSION

The right of Florida public employees to bargain collectively is a fundamental grant from the people preserved in Article I, Section 6 of the State Constitution. The people have seen fit to recognize that police officers, like any other employees, are not relegated to a watered-down version of the Constitution. Nothing in Article I, Section 6 permits the abridgement of that right of bargaining by the executive, legislative or judicial branches of government.

The panel decision in this case correctly recognized that right and preserved it. The District Court of Appeal sitting en banc has decided to substitute its wisdom for that of the people and effectively rewrite the Constitution as it relates not only to police officers but all public employees. If this Supreme Court's words for the last 23 years in preservation of those rights of public employees are to have continued meaning, the en banc decision must be reversed and the panel decision reinstated.

WHEREFORE, for the foregoing grounds and reasons, Petitioner respectfully prays this Court to answer the certified question in the affirmative and find that a public employer must bargain the decision to implement compulsory chemical testing of its employees. At the very least, this Court should find that the effects of such a decision including the implementation of a drug testing program and consequences for a positive test be bargained prior to their implementation. In this fashion, the delicate balance considered

by the people when they granted public employees the right to bargain but withheld the right to strike will be preserved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Peter J. Hurtgen, Esq., Morgan, Lewis & Bockius, 5300 Southeast Financial Center, 200 South Biscayne Blvd., 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; Attorney for 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; Lorene C. Powell, 118 North Monroe Street, Tallahassee, Florida 32399-1700 and Terence G. Connor, Esq., Attorney for Florida Public Employer Labor Relations Association, Inc., 5300 Southeast Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2339, this 17 day of April, 1991.

Robert D. Klausner

LLP/19023690