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FILED
SID J. WHITE
AUG 8 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 77,394
DCA CASE NO. 85-2863

FRATERNAL ORDER OF POLICE
MIAMI LODGE 20,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

REPLY BRIEF OF PETITIONER
FRATERNAL ORDER OF POLICE
MIAMI LODGE 20

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I.

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

11. The City's Statement of the Facts is Itself a Mischaracterization.

In its Answer Brief, the City has alleged that there are certain mischaracterizations of the facts in the FOP's Initial Brief. A review of the transcript and the record in this cause show that is not the case.

The City alleges that there is no support in the record that the urinalysis tests that the three officers in question were required to take upon suspicion of drug use proved negative. In the testimony of Fel x Beruvides at page 63 of the transcript (R-143), Beruvides was asked if he submitted to a drug screen. He answered in the affirmative. When asked the results of the screen Beruvides replied that the screen came back negative except for the presence of nicotine. With regard to Officers McKinnon and Ferrer, it is clear from the facts as set forth in the en banc opinion that no disciplinary action was taken against the officers following the conduct of the drug test. Given the state of the record that the City of Miami has a policy of mandatorily terminating employees found guilty of illegal drug use, the results of the drug tests for McKinnon and Ferrer are obvious.

With regard to the anonymity of the complaint against McKinnon and Ferrer, the record is also equally clear that they were never

advised as to the identity of the complainant against them. (R-171).

Lastly, the City claimed that the hearing officer rejected the factual statement that Article VIII of the Collective Bargaining Agreement between the FOP and the City provided a bargained for procedure for all departmental investigations, The hearing officer rejected this statement as a finding of fact stating it was "more in the nature of a legal conclusion." (PERC Hearing Officer's Recommended Order at page 11) (R-441). Accordingly, no factual exception needed to have been filed.

III. To Deny Police Officers the Right to Bargain on the Subject of Drug Testing Deprives Them of Fundamental Constitutional Riahts.

Article I, Section 6, of the Florida Constitution specifically grants public employees the right to collectively bargain. By including that right in the Constitution the people have recognized that right as a fundamental one. See Article I, §§ 1 and 2, Constitution of Florida.

The essence of the City's argument regarding collective bargaining is that police officers are somehow different than other human beings and therefore are entitled to less protection under the Constitution than other citizens. Such "us versus them" thinking has been the favorite excuse throughout history for the wholesale deprivation of the rights, lives and property of millions of human beings.

The public relies on its police force to enforce the law. Similarly, it also relies on the judiciary and attorneys to do the same. Society relies on doctors and nurses to keep citizens

healthy and entrusts teachers with the education of its children. All of these are sensitive positions in our society and the public correctly has little or no tolerance for drug abuse by a person who occupies those positions or any position in this society. The Fraternal Order of Police has stated throughout these proceedings that it has a commitment to a drug-free work place. It has also stated, however, that it should not and will not surrender the constitutional rights of its members to bargain because of unproven and speculative perceptions on the part of management.

No society can run roughshod upon the rights of its citizens, regardless of their profession. In Garrity v. State of New Jersey, 385 U.S. 493 (1967), the United States Supreme Court considered the question of whether police officers can be required to account for their actions in the course and scope of their duties. The answer to that question clearly was yes. In making that accounting, however, the Supreme Court also held that police officers cannot be deprived of fundamental constitutional rights, including the right to remain silent. To deprive police officers of the constitutional rights enjoyed by others, regardless of their responsible position in society, would relegate those officers "to a watered down version of constitutional rights." Id. at 499.

Notwithstanding this unequivocal holding of the United States Supreme Court, the City (and the various amicus curiae) implore this Court to uphold a judicially created balancing test in the name of "overriding public interest."

In reaching its conclusions, the City has still failed to deal with this Court's ruling in Dade County Classroom Teachers

Association v. Ryan, 225 So.2d 903 (Fla. 1969), in which this Court unanimously 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."

The City argues in its Answer Brief that this Court somehow departed from that standard United Teachers of Dade vs. Dade County School Board, 500 So.2d 508 (Fla. 1986). In Dade, however, this Court simply decided that the Master Teacher Program was not "a term and condition of employment." Accordingly, it reasonably followed that the Program was not a mandatory subject of bargaining under Fla. Stat. § 447.309.

The City grudgingly admits at page 10 of its Brief that this was the Court's rationale for reaching its decision. The City attempts to extend the United Teachers of Dade case, however, by arguing that the adoption of a balancing test by the en banc court in this case "was a logical progression." (City's Brief at p. 13). What the City fails to acknowledge is that the enbanc court in this case clearly and unequivocally determined that drug testing is a term and condition of employment. It simply decided, for constitutionally impermissible reasons, that police officers would not be permitted to enjoy bargaining over that term and condition of employment.

To adopt the City's rationale and to permit the enbanc decision to stand, this Court would be allowing the judiciary to violate the Constitution in the exact manner which it prohibited the legislature from doing in City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487 (Fla. 1981).

When City of Tallahassee was decided ten years ago, public employees had been forbidden by the legislature to bargain over issues concerning pension and retirement. At that time, the Department of Administration, Division of Retirement, filed an amicus brief on behalf of the City of Tallahassee. In its brief, the Department stated that "it was necessary to eliminate retirement from collective bargaining in order to protect the actuarial soundness of pension funds." City of Tallahassee v. Public Employees Relations Commission, 393 So.2d 1147 (Fla. 1st DCA 1981) at p. 1151. Despite the dire predictions of financial crisis for the state, pensions became a mandatory subject of bargaining. This Court held that if private sector employees may bargain collectively on the issue of retirement benefits, then "so too may public employees." 410 So.2d at 490.

It is significant in the ten years that have passed since the City of Tallahassee decision, public employers have not collapsed under the predicted financial disaster. Similarly, since PERC's decision in the present case, the FOP and the City of Miami have successfully bargained a number of contracts, which included a drug testing provision. That drug testing provision provides not only for testing upon reasonable suspicion, but allows the City a form of random drug testing through its annual physical. Thus, the Union has demonstrated its good faith by granting a broader range of drug testing than might be constitutional for the City to unilaterally impose.

It has now become routine for Florida's public employers and bargaining representatives to negotiate compulsory drug testing

provisions in their collective bargaining agreements. The Florida Police Benevolent Association (hereinafter "PBA") stated in its amicus brief that 71 of the 127 bargaining units represented by the Florida PBA have collective bargaining agreements which contain specific drug testing provisions. This further demonstrates that organized police labor and public employers have utilized the bargaining process to protect not only the interest of the citizens of Florida in a drug-free work force, but the interest of police officers in a drug testing program which is constitutional and accurate.

In its Answer Brief, the City attempted to deal with the holding of this Court that "bargaining procedures" may differ lawfully from those in the private sector, but not the scope of the bargaining. The City's attempt has been unsuccessful.

As noted in the FOP's Initial Brief (pp.17-20), the procedure by which public employees and public employers reach an agreement is substantially different than in the private sector. Florida's public employees do not have the right to withhold their labor should a dispute arise, nor do they have a statutory procedure for binding interest arbitration for the formation of their contracts. At all times the public employer retains the ultimate power to determine what the terms and conditions of employment shall be. §447.403, Fla. Stat. What mandatory bargaining over the subject of drug testing will do, however, is ensure that the right of employees to bargain as guaranteed by the Constitution is not denied or abridged. By requiring labor and management to talk, confidence in labor and employment relations is enhanced and the

labor harmony required by § 447.201, Fla. Stat. is assured. School Board of Indian River County v. Indian River Education Association, 373 So.2d 412 (Fla. 4th DCA 1979).

A. Reliance Upon Private Sector Standards is Appropriate.

In its Answer Brief, the City argues that private sector standards which now require bargaining over drug testing should be rejected. The City's argument here fails for noticeable lack of consistency.

The last time the City and the FOP brought an issue to this Court it concerned the question of whether the Public Employees' Relations Commission could defer unfair labor practices to an arbitrator consistent with the policy established by the National Labor Relations Board in Collyer Insulated Wire, 192 NLRB 837 (1971), and Spielberg Manufacturing Company, 112 NLRB 1080 (1955). City of Miami v. FOP 20, 511 So.2d 549 (Fla. 1987). The FOP argued that differences between the National Labor Relations Act and the Public Employees Relations Act mandated a finding that PERC could not defer. This Court rejected that argument and adopted the NLRB's deferral policy as being consistent with this Court's view of Chapter 447, Part 11. Id. at 552, n.5.

The FOP brings to this Court the issue of mandatory bargaining over drug testing. The National Labor Relations Board has stated unequivocally in Johnson-Bateman Company, 295 NLRB 26 (1989), that the unilateral implementation of a mandatory drug and alcohol testing program by an employer is an unfair labor practice. It is an unfair labor practice because it alters terms and conditions of

employment over a mandatory subject of collective bargaining. Yet the City argues in this case (presumably because it is the Respondent) that the private sector standard which in the last case was so compelling is now inapplicable.

The rejection of the private sector standard in this case appears to be based on the belief that police officers are "somehow different" from other professions. The National Labor Relations Board standard requires mandatory drug testing for people who work in nuclear power plants, who assemble nuclear weapons, who transport hazardous materials, who are responsible for medical care and a myriad of other vital occupations and professions. Those occupations, however, were never the issue. The issue was whether or not the subject of drug testing was "plainly germane to the working environment" and "not among those managerial decisions" which lie at the core of entrepreneurial control." Ford Motor Company V. NLRB, 441 U.S. 488 (1979). As the panel opinion in this case correctly noted, bargaining over drug testing is no different than bargaining over any other term and condition of employment and all the protestations and social arguments to the contrary cannot change that fact. The people of Florida decided what the bargaining test would be when they wrote their Constitution. If the principle that all political power resides in the people is to have continued meaning, then the rationale by which this Court struck down legislative incursion into the rights created by Article I, Section 6 in City of Tallahassee, must also apply to judicial incursion.

The City's reliance on the United States Supreme Court decision in First National Maintenance Corporation v. NLRB, 452 U.S. 666, 101 S.Ct. 2573 (1981), supports the position of the FOP. In First National Maintenance, the Supreme Court decided that the decision to open or close a business is a core managerial decision and not a wage, hour, or term and condition of employment. This is completely consistent with this Court's rationale in United Teachers of Dade. First National Maintenance states, however, that if the decision of management impacts on wages, hours and terms and conditions of employment, an obligation exists on the part of management to bargain that impact.

As a practical matter, whether there shall be drug testing for police officers in the City of Miami is already a moot point. Labor and management settled that problem at the bargaining table six years ago. The process by which that bargaining is instituted and the controls which will exist for the benefit of both employees and the employer is what the parties have and must continue to be permitted to bargain over.

IV. Case Law in Other States Supports a Finding that Drug Testing is a Mandatory Subject of Bargaining.

The City attempted to suggest that the greater weight of jurisprudence in this country supports the City's position that drug testing is not a mandatory subject of bargaining. That is simply untrue.

The City relies on San Jose Peace Officers Association v. City of San Jose, 144 Cal. Rptr. 638 (Cal. App. 1978), to support its argument that concern for public safety should outweigh the duty

to bargain over the issue of drug testing. In San Jose, the court found that a policy involving use of deadly force was not a wage, hour or a condition of employment. Id. at 946.

What the City neglected to point out to this Court is that California has dealt with the issue of compulsory drug testing for public safety employees and determined that it is a mandatory subject of collective bargaining. In Holliday v. City of Modesto, 280 Cal. Rptr. 206 (Cal. App. 1991), the court found that compulsory drug testing constituted a condition of employment. In reaching that decision, the court adopted the conclusion of the National Labor Relations Board in Johnson-Bateman. In particular, the court took notice that an employee's job security will depend upon the mode of drug testing technology implemented and the character of proof which it produces. Id. at 211.

In West St. Paul v. Law Enforcement Labor Services, Inc., 466 N.W.2d 27 (Minn. App. 1991), the Minnesota Court of Appeals recognized that the purpose of the statewide public bargaining law is to promote resolution of labor disputes through negotiation. Id. at 29. This is consistent with the statement of purpose contained in Fla. Stat. § 447.201. As a result, Minnesota has adopted a standard that areas of mandatory bargaining are to be "broadly construed." As a result, a policy concerning a requirement that civilians be permitted to ride along with officers in patrol cars was found to be a mandatory subject of bargaining. Of particular importance is the fact that the court focused on the effect that implementation of such policies have on officers' safety. Id. at 30.

The City has placed considerable stock in the decision of the Pennsylvania Labor Relations Board in Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, 19 PPER 19213; 21 PPER 22001 (PLRB Pa. 1989). Cambria County and the cases which follow it actually support the position of the FOP. Under the rationale in C the decision to have drug testing was determined to be managerial, but the failure to bargain with the union over the procedures by which drug testing will be implemented was determined to be an unfair labor practice.

In the present case, the FOP has already told the City that drug testing is acceptable. What the parties have bargained over is the manner in which that policy will be implemented.

In City of Pittsburgh, 22 PPER 22080 (PLRB Pa. 1991), the Pennsylvania Labor Relations Board heldthat the City of Pittsburgh violated its bargaining obligation by unilaterally implementing a drug testing program for that city's police department. The PLRB noted that under Pennsylvania law a topic of management is deemed bargainable where it bears a rationale relationship to employees' duties. Id. at 180. When that is the case, the "balancing test" upon which the City of Miami so heavily relies is not applicable. Id. at 180.

The PLRB went on to note that the city's implementation of a drug testing policy was an undeniable change in working conditions. Id. at 180.

The overwhelming body of case law in this country supports drug testing as bargainable. The inclusion of the right to bargain in the State Constitution, makes it a fundamental right. The cases

relied upon by the City involving other states occurred in jurisdictions where the right to bargain is determined by the legislature and does not involve fundamental constitutional rights.

Florida's voters have determined in their Constitution that public employees shall have all the rights of private sector employees and have therefore set the balance that they believe is appropriate. It is not the place of the legislature, the City of Miami or a court to displace that decision made by the people.

A. The Issue of Effects Bargaining is Properly Before the Court.

The City urges this Court to ignore the issue of effects bargaining, claiming it somehow is not properly an issue. Even a cursory review of the record reveals that effects/impact bargaining has always been an issue. In the City's Initial Brief to the Third District Court of Appeal, the City argues the necessity of deciding the issue of drug testing by using the "balancing test" set forth by the United States Supreme Court in First National Maintenance Corporation. First National Maintenance is a case about bargaining "decisions" versus the "effects" of those decisions. Even earlier in this cause, the Hearing Officer's Recommended Order at p.20 (R-450) speaks of the concept of the effects of managerial decision making.

More importantly, it was the judges of the Third District Court of Appeal who squarely addressed the issue in their varying opinions which formed the en banc decision. Judge Jorgenson concurred in the opinion of the majority that the decision to implement drug testing is a mandatory subject of bargaining. He

dissented, however, on the issue of how mandatory drug testing should be implemented. Noting that drug tests are notorious for producing false positive results with "insidious and unfair impact" upon employees, the effects of the decision clearly cannot be ignored. 571 So.2d at 1331. How drug testing can impact on the lives of police officers has been an issue in this case from the first day. The City attempts to again avoid the arguments which it does not find favorable by making the blanket statement that it is not included in the record. To suggest that one cannot address in this Court the opinions of the various judges of the Third District Court of Appeal should be indicative of the reason why the employees want to bargain. The employer emphasizes that which it finds favorable and simply chooses to ignore that which it does not. The loser in that equation will be the police officer whose life and career is destroyed by a false positive drug test resulting from the City's selection of a drug testing provider whose only virtue is the fact that he may have been "the low bidder."

The issue of effects bargaining has also been raised by the City in its reliance upon decisions from other jurisdictions, The decision of the Pennsylvania Labor Relations Commission in ~~Cambria~~ County is all about the distinction between decisions and effects bargaining. It is the City which has claimed this case is all about where to draw the line on bargaining. Whether to draw that line on bargaining the effects as opposed to the decision is a part of the process. Having raised the issue, the City cannot now avoid overwhelming legal precedent which fails to support its position

by asking this Court to close its eyes to those parts of the record which the City finds unpleasant.

CONCLUSION

Bargaining over drug testing in the 1990's has been wrapped in all of the arguments that surrounded bargaining over pensions in the 1980's. The fundamental issue, however, is no different.

The people of Florida have decided in their Constitution that public employees shall have all the rights of bargaining of private sector employees, except the right to strike. Having set that standard, it is not for the legislature, local government or the judiciary to ignore that mandate. If the scope of public employee bargaining in Florida is to be limited, then it is the people who must limit it.

Drug testing has been acknowledged by every tribunal and court which has considered it as a term and condition of employment. As such, it is a mandatory subject of bargaining and the en banc decision incorrectly ignores that fact.

This Court should continue the long line of precedent established in 1968, preserving and protecting the constitutional rights of public employees. By reinstating the panel decision and the decision of the Public Employees' Relations Commission in this case that duty will be fulfilled.

WHEREFORE, Petitioner respectfully prays this Court to answer the certified question in the affirmative and to find that a public employer must bargain drug testing with its employees.

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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 7th day of August, 1991.

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