IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SARASOTA CLASSIFIED/TEACHERS ASSOCIATION AND PUBLIC EMPLOYEES RELATIONS COMMISSION,

Petitioners,

v.

SARASOTA COUNTY SCHOOL DISTRICT,

Respondent.

#81423

Case No. 92-001101
L.T. Case No. CA-91-057

REPLY BRIEF OF PETITIONER PUBLIC EMPLOYEES RELATIONS COMMISSION

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PRELIMINARY STATEMENT

The abbreviations and designations used in SC/TA's Brief on the Merits are used in the Commission's reply brief. The SC/TA's Brief on the Merits is referred to as "In. Br. _____." The School Board's answer brief is referred to as "An. Br. _____."

All cases cited herein that are not published in the Southern Reporter, Second Series, have been provided for the Court's convenience in the attached appendix.

STATEMENT OF CASE AND FACTS

The Commission hereby adopts the SC/TA's Statement of Case and Facts set forth in its reply brief at page iv.

SUMMARY OF ARGUMENT

The School Board seeks to make an issue in this appeal of the Commission's interpretation of Section 447.309(2), Florida Statutes. The Commission's construction of the statute it is charged to administer is entitled to great deference, and should not be overturned by a reviewing court unless the construction is clearly erroneous.[1] § 120.68(8), Fla. Stat. (1991); Palm Beach Junior College v. United Faculty of Palm Beach Junior College, 425 So.2d 133, 136 (Fla. 1st DCA 1982), aff'd, 475 So.2d 1221 (Fla. 1985).

In its reply brief, the School Board argues, among other things, that the Commission's interpretation of Section 447.309(2), Florida Statutes, has the anomalous result of affording employees more rights upon expiration of a collective bargaining agreement than during the term of the agreement. (An. Br. at 11 and 12) This purportedly restricts the public employer from making changes in wages during the hiatus between contracts which it could unilaterally impose during the contract period pursuant to Section 447.309(2). This argument is illusory.

The Commission's interpretation does not vitiate the School Board's ability to make necessary changes during the hiatus

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[1]While the Commission endeavors to interpret Chapter 447, Part II, in a fashion which considers constitutional ramifications, we recognize that we are precluded from ruling upon the constitutionality of the statute. See Hotel, Motel, Restaurant Employees and Bartenders Union v. Escambia County School Board, 426 So.2d 1017 (Fla. 1st DCA 1983), aff'g 7 FPER ¶ 12395 at 870 (1981). Thus, the Commission will not address the constitutional arguments advanced by the parties in this case.

period. The School Board may make essential changes in the status quo by giving the union notice and an opportunity to bargain, or if required by exigent circumstances, by simply making the change.[2] When bargaining is in process, the School Board can maintain any legitimate position it desires on negotiable issues, including wages. It is statutorily authorized to maintain a legitimate proposal without making a concession. § 447.203(14), Fla. Stat. The School Board could have declared an impasse at any time "after a reasonable period of negotiation" and, after presentation of evidence and argument to a special master, legislatively imposed a change pursuant to Section 447.403(4). § 447.403(1), Fla. Stat.

Thus, there is no merit to the School Board's contention that the Commission's interpretation of Section 447.309(2) impermissibly impairs the School Board's authority to take necessary actions. It is evident, therefore, that the public employer has the ultimate power to make changes during the hiatus between agreements as well as during the term of the collective bargaining agreement. In view of this power, the School Board's complaint that policy considerations require the availability of the absolute right to underfund at all times, lest it be unduly restricted in its ability to make necessary changes, is without merit. Accordingly, the Commission's construction of Section 447.309(2) has not been shown to be "clearly erroneous."

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[2]The School Board unsuccessfully asserted the defense of exigent circumstances and waiver before the Commission. The Commission's determination that these defenses were not proven has not been challenged in this appeal.

ARGUMENT I

THE COMMISSION'S DETERMINATION THAT SECTION 447.309(2) IS INAPPLICABLE DURING THE HIATUS PERIOD BETWEEN THE EXPIRATION OF ONE CONTRACT AND RATIFICATION OF A SUBSEQUENT CONTRACT IS A REASONABLE CONSTRUCTION OF THE STATUTE AND NOT CLEARLY ERRONEOUS.

It is evident that this case may be resolved on a constitutional issue presented in the Second District Court of Appeal's opinion. Nevertheless, the Commission is compelled to address the argument advanced by the School Board at pages 11 and 12 of its brief. The School Board argues in support of the Second District Court of Appeal's expansive interpretation of Section 447.309(2), Florida Statutes, to allow a public employer which also acts as a legislative body to employ this statute to underfund or unfund any obligation which arises pursuant to collective bargaining.

Prior to addressing that issue, it is necessary to reiterate the standard of review that must be used by an appellate court. The primary issue advanced to the District Court of Appeal was the Commission's interpretation of law and formulation of policy within its delegated discretion. § 120.68(7), (9), and (12), Fla. Stat. (1991). It is axiomatic that the interpretation of a statute by an agency "charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous ...." State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla. 1973); Daniel v. Florida State Turnpike Authority, 213 So.2d 585, 587 (Fla. 1968); § 120.68(3), Fla. Stat. (1991). This standard has been

consistently applied by Florida appellate courts in reviewing the Commission's construction of Chapter 447, Part II. E.g., Palm Beach County Firefighters, Local 2928 v. City of Palm Beach Gardens, 590 So.2d 50 (Fla. 4th DCA 1991); City of Clearwater v. Lewis, 404 So.2d 1156 (Fla. 2nd DCA 1981); City of Ocala v. Marion County PBA, 392 So.2d 26, 32 (Fla. 1st DCA 1980). The First District Court of Appeal cogently articulated the standard of review in Palm Beach Junior College v. The United Faculty of Palm Beach Junior College, 425 So.2d 133, 136 (Fla. 1st DCA 1982), aff'd, 475 So.2d 1221 (Fla. 1985):

> Essentially, we are asked in this appeal whether PERC's interpretation of the Public Employees Relations Act (PERA) was in error. The standard to be applied on review of the construction of a statute that an agency is charged to enforce is ordinarily to accord substantial deference to it and decline to overturn it, except for the most cogent reasons, or unless clearly erroneous, unreasonable, or in conflict with some provision of the state's constitution or the plain intent of the statute. (citation omitted) As we observed in Framat Realty, Inc., 407 So.2d at 242: "[T]he judiciary must not, and we shall not, overly restrict the range of an agency's interpretive powers. Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and they may even seem preferable according to some views."

The School Board argues that the Second District Court of Appeal's construction of Section 447.309(2), rather than the Commission's interpretation, is correct. As is evident from the case law cited above, the fact that the Second District Court of Appeal's interpretation may seem preferable according to the views of the School Board is not a legally sufficient basis to

reject the Commission's interpretation. Rather, the Commission's construction must be shown to be clearly erroneous, and there has been no such showing in this case.

The School Board's primary argument is that it would be unfair to public employers if public employees are able to reap all the benefits of a collective bargaining agreement during the hiatus period, while public employers are denied the right to fully exercise control over their funds during the same period.[3] This argument lacks merit because, as demonstrated below, the public employer has the final and absolute ability to effectuate necessary budgetary changes.

The Commission's rationale for this conclusion was fully explained in the first of three cases in which the Commission was required to interpret Section 447.309(2), styled Martin County Education Association v. The School Board of Martin County, 18 FPER ¶ 23061 (1992), recon. den'd, 18 FPER ¶ 23108 (1992), rev'd, 613 So.2d 521 (Fla. 4th DCA 1993), appeal filed No. 92-0702 (Fla. April 1, 1993). After recognizing that the construction of Section 447.309(2) implicates public employees' constitutional right to collectively bargain, the Commission concluded that this statute must be narrowly construed to only allow underfunding during the term of a bargaining agreement. Id at 100. The

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[3]The Commission denies the implication made by the School Board throughout its brief that the status quo doctrine has been applied unevenly. Indeed, the Commission has also allowed an employer to implement drug testing authorized by an expired contract because it was part of the status quo expected by employees. IAFF, Local 226 v. City of St. Petersburg Beach, 13 FPER ¶ 18116 at 277 (1987).

during the term of a bargaining agreement. Id at 100. The Commission's rationale was explained as follows:

> Section 447.309(2) only allows the legislative body to underfund effective provisions of the collective bargaining agreement. The introductory language of this provision states that it becomes applicable "upon execution of the collective bargaining agreement." We construe this and three more references to "the collective bargaining agreement" to establish that the statute is plainly limited to applicable provisions of a collective bargaining agreement.
>
> This construction is also supported by related statutory provisions which describe the parties' obligations during negotiations and when an impasse has been reached. §§ 447.309(1) and (4); and .403(1), (2), (3), and (4). They provide the statutorily mandated procedure for negotiating bargainable issues and resolving apparently unreconcilable positions. This is true whether the issues are the subject of comprehensive negotiations or limited to reopener provisions. For example, under § 447.309(1), during ongoing negotiations the School Board's negotiator is required to consult with and attempt to present the views of the legislative body. Thus, when negotiations are transpiring the position of the legislative body is to be addressed at the bargaining table. When an impasse is declared, pursuant to § 447.403(4)(d), the legislative body may impose whatever it deems to be in the public interest, so long as it follows the statutorily prescribed procedures. These are the statutorily mandated approaches for addressing a shortfall in funding during negotiations. To conclude that § 447.309(2) could be applied during the course of these complex and delicate procedures would serve to frustrate that process.
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> Therefore, given constitutional implications which require a strict construction, the plain meaning of § 447.309(2), and a reading of § 447.309(2) in pari materia with the other applicable provisions of § 447.309 and .403, we conclude that § 447.309(2) does not allow a legislative failure to fund wages when that

issue is undergoing authorized reopener negotiations.

We are urged by the School Board to construe § 447.309(2) broadly to allow the Legislature to invoke the "failure to fund" proviso upon wages even when they are subject to reopener negotiations.... it suggests that the provision should be liberally construed because a narrow construction would encourage unions to negotiate short term contracts or reopen negotiations on wages without appropriate justification simply to avoid legislative non-funding under § 447.309(2).

While we are cognizant of these concerns, the Commission is compelled to reject the School Board's position for the following reasons: As previously discussed, there are statutorily authorized means of recourse for the School Board's anticipated problems. During negotiations it may propose a longer term contract without reopener provisions. See § 447.309(5). Further, the School Board may take any legitimate position it desires on negotiable issues including wages. It is statutorily allowed to maintain a legitimate proposal without making any concessions, and should an impasse be reached, it has the authority to legislatively impose that position pursuant to § 447.403. See §§ 447.203(14), .309, and .403(4)(d). Also, as fully discussed by the hearing officer, prior to reaching an agreement or during a hiatus between agreements, the School Board can make essential changes in the status quo by giving the union notice and an opportunity to bargain, or by making the change when required by exigent circumstances. See School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979), aff'g 3 FPER ¶ 280 (1977).

In either case the School Board can take the action it desires; however, it may do so only after following the negotiation process outlined in the Public Employees Relations Act, which disfavors unilateral action except in unusual circumstances. This includes, in the case of impasse, the presentation of evidence and argument to a special master, the master's recommendation to the School Board, and an opportunity for both parties to accept the recommendations or make a direct presentation to the School Board acting as a

> legislative body. See § 447.403(4). Section 447.309(2) is not a shield for a legislative body's unilateral alteration of the status quo without bargaining. The School Board of Orange County v. Palowitch, id.

Thus, the Commission's decision will not unfairly bind the School Board during the status quo period after expiration of a contract, because the School Board may effectuate desired changed through negotiations or, if unsuccessful, through the statutory impasse resolution procedure contained in Section 447.403. Additionally, the Commission has long held that if a public employer is actually faced with exigent circumstances requiring immediate action, it may take immediate unilateral action to alleviate the exigency. Florida School for the Deaf and The Blind Teachers United v. Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985), aff'd, 483 So.2d 58 (Fla. 1st DCA 1986). Given these alternatives, the Commission's construction of Section 447.309(2), Florida Statutes, is a reasonable accommodation of competing interests and is not clearly erroneous.

The Commission's construction of Section 447.309(2) is consistent with the plain meaning of the statute and the policy of the entire Act, which is to encourage changes in wages, hours, and terms and conditions of employment through negotiations and not, as the School Board suggests, through unilateral action taken without notice to the employees' representative. § 447.309(1), Fla. Stat. (1981); Palowitch v. Orange County School Board, 3 FPER 280 (1977), aff'd, 367 So.2d 730 (Fla. 4th DCA 1979). The opinion of the Second District below is

inconsistent with the legislative purpose of Chapter 447, Part II, which is to provide a process wherein employees' terms and conditions of employment may be negotiated with their employer. The illegitimacy of this contention is starkly illustrated in that it renders superfluous the legislative impasse resolution procedure provided in Section 447.403(4), in that it allows a public employer to unilaterally impose budgetary issues without addressing these matters through negotiations and, if necessary, the statutorily mandated impasse resolution procedure. It also defies over fifteen years of established jurisprudence holding that public employers are prohibited from making unilateral changes on negotiable subjects. See Palowitch, id.

Under this Court's recent decisions in State v. Florida PBA, Inc., 613 So.2d 415 (Fla. 1992), and Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), a contract entered into by the executive branch at the state level is legally enforceable once funded by the legislature. As specifically recognized in the United Faculty case, the legislature has only one opportunity per year to make this funding decision. United Faculty, id at 673. The decision of the Second District in this case would elevate the power of local public employers over those of the state by allowing local public employers to make constant unilateral changes to the status quo during a hiatus period after expiration of a contract, so long as they are done in the guise of a legislative body resolution. Thus, it is most perplexing that the practical effect of the Second District's decision is a disincentive to reaching a bargaining agreement. This is not

only an illogical extension of the plain meaning of Section 447.309(2), but also presents grave implications to the right to collectively bargain pursuant to Article I, Section 6 of the Florida Constitution. See Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So.2d 358, 363 (Fla. 1988) (constitutional right of public employees to collectively bargain requires that they enjoy "effective" bargaining).

The amicus curiae brief filed on behalf of the Florida Association of District School Superintendents, Inc. (FADSS), contends that the obligation to maintain the status quo is "effectively a de jure collective bargaining agreement" which exists during the hiatus between agreements. FADSS cites the Commission's decision in Hendry County Education Association v. School Board of Hendry County, 9 FPER ¶ 14059 (1982), in support of this contention. (Brief of FADSS at 8.)

The Hendry County decision, and the cases cited therein, do not support this proposition. Rather, since 1977 the Commission has applied the status quo doctrine, which was adopted from Federal Courts, the National Labor Relations Board, and other state boards acting under provisions similar to Section 447.501(1)(c). Section 447.501(1)(c) precludes unilateral action taken by an employer in regard to wages, hours, or terms and conditions of employment during the pendency of negotiations. See Pinellas County PBA v. City of St. Petersburg, 3 FPER 205 at 208 (1977). Section 447.501(1)(c) makes such unilateral action a per se unfair labor practice, but it does not create a legal

fiction that the parties are acting under a "de jure" contract which is, presumably, enforceable by suit for a breach of contract. Thus, the Commission's construction of Section 447.309(2) in this case is fully consistent with this Court's decisions in FPBA and United Faculty, i.e., once a contract is funded by the legislative body, it is enforceable through an action for a breach of contract. During the hiatus period between contracts, the public employer is precluded from making unilateral alterations to the status quo by Section 447.501(1)(c), unless the Union has manifested a waiver, exigent circumstances arise which require immediate action, or an impasse in negotiations is resolved through the procedures set forth in Section 447.403(4)(d). E.g., Florida School for The Deaf and The Blind v. Florida School for The Deaf and The Blind, Teachers United, 483 So.2d 58, 59-60 (Fla. 1st DCA 1986).

ARGUMENT II

THE SCHOOL BOARD'S ARGUMENT ON THE PROPRIETY OF AN AWARD OF INTEREST HAS NOT BEEN PRESERVED AS AN ISSUE IN THIS APPEAL AND IS WITHOUT MERIT.

In its answer brief, the School Board for the first time seeks to take issue with the Commission's authority to impose interest on unpaid wages. The Commission submits that this issue has been waived by the School Board's failure to raise the matter below. While it is unnecessary to reach, in an abundance of caution the Commission will additionally respond that the Commission's authority for this remedy is contained in Section 447.503(6)(a), which provides broad remedial powers. In unilateral change cases, this provision has been consistently

applied by the Commission to mean that the aggrieved employees must be restored to the status quo ante, including payment of the deprived salary increases with interest. E.g., Marion County PBA v. City of Ocala, 5 FPER ¶ 10088 (1979), aff'd, 392 So.2d 26 (Fla. 1st DCA 1980). Since 1981, the Commission has employed the statutory rate of interest set forth in Section 55.036, Florida Statutes, which is currently twelve percent. E.g., Fusaro v. Hialeah Housing Authority, 7 FPER ¶ 12471 (1981); Florida Lodge, FOP v. Town Of Pembroke Park, 10 FPER ¶ 15001 (1983). The School Board has provided no cogent reason for this Court to override this policy.

CONCLUSION

The Commission's construction of Section 447.309(2) that it is only applicable during the term of a collective bargaining agreement is supported by the plain meaning of the statute, related provisions of Chapter 447, Part II, and the policy of fostering changes in wages, hours, and terms and conditions of employment through the negotiation process, and not by unilateral action. This interpretation is within the range of the Commission's delegated authority, and is not "clearly erroneous."

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CERTIFICATE OF SERVICE

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