PERC NEWS

Florida Public Employees Relations Commission

April 1—June 30, 2007

Fiscal Problems and Unilateral Changes

By Jack E. Ruby, Hearing Officer.

In the past twelve years there have been significant decisions by the Public Employees Relations Commission, the Florida district courts of appeal, and the Florida Supreme Court, as well as legislation as a result of those decisions, regarding fiscal problems and the duty of public employers to collectively bargain. Recently, there have been three Florida circuit court lawsuits involving recent legislation addressing the duty to bargain changes caused by fiscal problems. One of the circuit court lawsuits has resulted in a decision, discussed below. A preliminary discussion of the background of the recent legislation is necessary to determine the importance of the recent circuit court decision.

Background Prior to 1991, Without Consideration of "Underfunding"

Article I, Section 6, of the Florida Constitution is both simple and succinct:

> The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.

The Florida Supreme Court has held that public employees have the right to "effective collective bargaining." *Hillsborough County GEA v. Hillsborough County Aviation Authority*, 522 So. 2d 358, 363 (Fla. 1988). As an integral part of the constitutional right, a public employer must maintain the established status quo during the collective bargaining process. *School Board of Orange County v. Palowitch*, 367 So. 2d 730, 731 (Fla. 4th DCA 1979). A unilateral change in terms and conditions of employment during the status quo period may be a violation of the statutory duty to negotiate in good faith. § 447.501(1)(a) and (c), Fla. Stat. (2006).

By statute, the subjects of wages and other economic terms and conditions of employment are mandatory subjects of negotiations. § 447.309 (1), Fla. Stat. (2006). *Nassau Teachers Association, FTP-NEA v. School Board of Nassau County*, 8 FPER ¶ 13206 (1982). A public employer may take unilateral action to change these and other mandatory subjects of negotiations pursuant to the impasse resolution mechanism of Section 447.403, Florida Statutes, to change terms and conditions of employment, but only after (1) completion of negotiations which fail to end in an agreement and (2) exhaustion of the statutory impasse procedures. This provision only applies after the completion of the impasse process, and it does not authorize unilateral action during pending negotiations. *Palowitch v. Orange County School Board*, 3 FPER 280 (1977), *aff'd*, 367 So. 2d 730 (Fla. 4th DCA 1979) (holding that the bargaining table is the legislatively mandated forum to determine wages, hours, and terms and conditions of employment). In addition to legislative body action, a public employer may lawfully take unilateral action where there has been a waiver by the employee organization or where there are exigent circumstances. *Florida School for the Deaf and Blind v. Florida School for the Deaf and Blind Teachers United*, 483 So. 2d 58 (Fla. 1st DCA 1986). Absent such defenses, a public employer's unilateral change is a per se unfair labor practice violating the duty to bargain in good faith. *Pasco County School Board v. Pasco County CTA*, 3 FPER 9, 13 (1976), 353 So. 2d 108 (Fla. 1st DCA 1977).

In this Issue:

General Counsel Steve Meck Is Elected Chair of Labor & Employment Law Section

Steve Meck, the Commission's General Counsel, has been elected Chair of the Florida Bar's Labor and Employment Law Section. The purposes of the Section are to: work in cooperation with the Board of Governors, and under its supervision work towards accomplishing the aims and purposes of The Florida Bar within the field of labor law; actively sponsor the continuing education of the members of The Florida Bar in the field of labor law; study and report on proposed legislation or administrative policy for the improvement of the law and practice in this field and to make appropriate recommendations thereon to The Florida Bar; and encourage members of the Section interested in the problems of management and labor throughout the state to meet and confer, through this section, upon their various problems and, through such cooperation, to promote justice.

Steve has been an active supporter of the Section, and the principles for which it stands, for decades. The Section was organized in 1981-82, and Steve was a founding member. Over the years, Steve has written numerous articles for *The Check-Off*, the Section's newsletter. Since 1994, Steve has been a member of the Section's executive council, its governing body. He has been the legal education chair as well as the continuing legal education chair. He has co-chaired numerous Public Employees Labor Relations conferences as well as other conferences, and last year he was selected as the Section's chair-elect.

Steve is humbled by his election to chair. As chair, his goals are to reach out to fellow attorneys and encourage their participation in the Section. He states, "I am particularly pleased in attaining this position because it symbolizes PERC's significance in the establishment of the Labor and Employment Law Section, which now boasts more than 2,200 members. PERC first sponsored the Public Employees Labor Relations Forum nearly 33 years ago which, to my knowledge, was the first conference of its kind. This is seven years before the Labor and Employment Law Section was established."

Reaction among the Commission's staff to Steve's election has been enthusiastic. Of the many positive comments, Commission Chair Donna Maggert Poole summed the staff's feelings up best: PERC, and the entire labor bar, is honored to have Steve's phenomenal expertise to lead us through the next year as Chair of the Labor and Employment Law Section. Steve brings with him a vast knowledge of labor law and the legal process - a knowledge surpassed by few I know. Congratulations to Steve, but more so to the wise members who were instrumental in selecting him as chair - you will not be disappointed." From the entire PERC staff: Congratulations, Steve.

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Career Service Cases

***Monroe v. Department of Corrections*, 22 FCSR 72 (2007).**

Demotion of a correctional officer captain to a correctional officer for failing to carry required items on her person and for failing to complete incident reports was affirmed. Mitigation was not warranted where the seriousness of the conduct and disciplinary record outweighed disparate treatment.

***Arthur v. Department of Corrections*, 22 FCSR 76 (2007).**

Dismissal of a correctional probation senior officer for unbecoming conduct for using her position to attempt to influence a judge and for using agency material or equipment for personal use was mitigated to a sixty-day suspension. Disparate treatment and a superior ten-year work record outweighed the seriousness of the conduct. Commissioner Kossuth dissented.

***Covington v. Department of Corrections*, 22 FCSR 81 (2007).**

Dismissal of a correctional officer sergeant for willful violation of rules prohibiting inmate abuse for slapping an inmate and for conduct unbecoming a public employee for discouraging a subordinate from reporting the incident was affirmed. Mitigation was not warranted due to the seriousness of the conduct and the employee's recent reassignment due to criticism concerning an excessive number of use-of-force incidents.

***Harvey v. Department of Corrections*, 22 FCSR 85 (2007).**

Five-day suspension of a correctional officer sergeant for excessive unscheduled absenteeism and tardiness was affirmed. Mitigation was not warranted due to the seriousness of the conduct and prior reprimands for excessive absenteeism.

***Warren v. Department of Business and Professional Regulation*, 22 FCSR 89 (2007).**

Dismissal of a regulatory specialist under the extraordinary dismissal procedure for violation of rules regarding prohibited uses of electronic mail and workplace violence for harassing a co-worker was affirmed.

***Harper v. Department of Corrections*, 22 FCSR 92 (2007).**

Dismissal of a correctional officer sergeant for conduct which violates a state statute, rule, directive , or policy statement, failure to comply with rules and regulations, and failure to follow oral or written instructions for allowing a known drug user to live in his residence on prison grounds was affirmed. Mitigation was not warranted where the seriousness of the conduct outweighed a fifteen-year spotless employment record. Commissioner Kossuth dissented, agreeing with the hearing officer that the dismissal should be mitigated to a thirty-day suspension.

***Burgess v. Department of Health*, 22 FCSR 96 (2007).**

Appeal was dismissed as a career service appeal; employee's appeal will continue as a Drug-Free Workplace Act appeal.

***Dixon v. Department of Corrections*, 22 FCSR 97a (2007).**

Appeal of a ten-day suspension was dismissed for lack of jurisdiction where the agency reduced the discipline to a written reprimand.

***Sami v. Department of Juvenile Justice*, 22 FCSR 98 (2007).**

Appeal of a dismissal of a selected exempt service employee was dismissed for lack of jurisdiction.

***Colonel v. Department of Children and Families*, 22 FCSR 99 (2007).**

Dismissal of an economic self-sufficiency specialist for violation of agency rules and conduct unbecoming a public employee was affirmed where the employee used the agency's computer system to access the Department of Revenue's (DOR's) computer system and, in turn, accessed his personal child support case, complained to DOR regarding the handling of his case, and printed out restricted information.

***Thomas v. Department of Corrections*, 22 FCSR 100 (2007).**

Dismissal of a correctional officer for conduct unbecoming a public employee for refusing to obey a police officer's order during an altercation with a passenger in his car, refusing to cooperate in his arrest, and attempting to run away during the arrest was affirmed. Mitigation was not warranted where a three-year employment record with prior written reprimand was outweighed by the seriousness of the conduct.

***Conry v. Department of Legal Affairs*, Case No. CS-2007-066 (May 1, 2007).**

Appeal of a proposed demotion was dismissed as premature where the agency had not taken final action.

***Mamoran v. Department of Corrections*, Case No. CS-2007-032 (May 2, 2007).**

Dismissal of a correctional officer sergeant for conduct unbecoming a public employee and violation of a state statute by engaging in felony child abuse was affirmed. Mitigation was not warranted due to the seriousness of the conduct.

***Mobley v. Department of Agriculture and Consumer Services*, Case No. CS-2007-059 (May 7, 2007).**

Appeal was dismissed where the employee failed to appear at hearing.

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***Cone v. Department of Business and Professional Regulation*, Case No. CS-2003-245 (May 15, 2007).**

Appeal was dismissed as abandoned where the employee failed to file a status report regarding the petition challenging her reclassification before the Division of Administrative Hearings.

***Foster v. Department of Corrections*, Case No. CS-2007-040 (May 15, 2007).**

Ten-day suspension of a correctional officer for unbecoming conduct for escalating an already volatile situation by stepping toward a supervisor, pointing his finger at her, and using vulgar language was mitigated to a one-day suspension where the employee's reaction was due to the supervisor's abhorrent and reprehensible method of counseling a subordinate.

***Henry v. Agency for Persons with Disabilities*, Case No. CS-2007-056 (May 15, 2007).**

Appeal of a probationary employee was dismissed for lack of jurisdiction.

***Casey v. Department of Health*, Case No. CS-2007-045 (May 18, 2007).**

Appeal of a reassignment, that was not demotion as alleged, was dismissed for lack of jurisdiction.

***O'Brien v. Department of Children and Families*, Case No. CS-2007-036 (May 21, 2007).**

Extraordinary dismissal of a human service worker for unbecoming conduct for making inappropriate comments about a mentally ill patient was affirmed.

***Reeder v. Department of Corrections*, Case No. CS-2007-050 (May 21, 2007).**

Dismissal of a correctional officer for failing to maintain a professional relationship with an inmate and his girlfriend, conduct inconsistent with the maintenance of proper security, and giving false testimony was affirmed. Mitigation was not warranted where the seriousness of the conduct outweighed an excellent fourteen-year employment record.

***Courington v. Department of Juvenile Justice,* Case No. CS-2007-060 (June 6, 2007).**

Dismissal of a juvenile probation officer for conduct unbecoming a public employee, poor performance, violation of Agency policy, and insubordination for unauthorized use of overtime, failure to timely submit reports or appear in court, and failure to follow reasonable orders of her supervisor was affirmed.

***Lemus v. Department of Corrections,* Case No. CS-2007-098 (June 6, 2007).**

Appeal of a five-day suspension was dismissed for lack of jurisdiction where the suspension letter was issued in error and was rescinded.

***Jones v. Department of Corrections,* Case Nos. CS-2007-026 and DF-2007-001 (June 13, 2007).**

Dismissal of a correctional officer sergeant for failing to comply with an Employee Assistance Program drug treatment plan was mitigated to a thirty-day suspension due to the counseling clinic's partial responsibility for the employee's missed counseling sessions, employee's eleven-year unblemished employment record, and the employee's commitment to treatment. Back pay awarded.

***King v. Agency for Persons with Disabilities,* Case No. CS-2007-073 (June 21, 2007).**

Dismissal of a human services worker for poor performance for inappropriate conduct toward a co-worker in front of residents was affirmed.

***Milliner v. Department of Juvenile Justice,* Case No. CS-2007-091 (June 21, 2007).**

Dismissal of a juvenile probation officer for poor performance and negligence for deficiencies in managing his caseload was affirmed.

***Jones v. Department of Corrections,* Case No. CS-2007-043 (June 25, 2007).**

Extraordinary dismissal of a correctional officer for violating agency rules, providing false testimony, and conduct unbecoming a public employee for asking an inmate to give false testimony in exchange for marijuana and lying during a sworn interview was affirmed. Mitigation was not warranted where the seriousness of the conduct outweighed a short employment history with a prior suspension.

***Glading v. Department of Corrections,* Case No. CS-2007-063 (June 25, 2007).**

Dismissal of a correctional officer for conduct inconsistent with proper security and failure to follow instructions for improperly opening a cell door, and for conduct unbecoming a public employee for using profane language to give directions to an inmate was affirmed. Mitigation was not warranted where the seriousness of the conduct outweighed a neutral employment history and the employee did not provide medical documentation regarding an alleged post-traumatic stress disorder.

***Carter v. Department of Corrections,* Case No. CS-2007-009 (June 27, 2007).**

Twenty-day suspension of a correctional officer for excessive absenteeism was affirmed. Mitigation was not warranted where prior discipline for excessive absenteeism and the seriousness of excessive absenteeism outweighed the fact that absences were legitimate.

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***Cooper v. Department of Juvenile Justice,* Case No. CS-2007-082 June 27, 2007).**

Appeal of a dismissal filed more than fourteen days after receipt of the final action letter was dismissed as untimely.

***Baxley v. Department of Corrections,* Case No. CS-2007-041 (June 28, 2007).**

Dismissal of a correctional officer for knowingly submitting inaccurate or untruthful information on training records and failing to report that training records were being prepared contrary to rule was affirmed. The Commission majority found that mitigation, which was recommended by the hearing officer, was not warranted where the seriousness of the conduct outweighed employment history. Commissioner Kossuth dissented.

Unfair Labor Practice Cases

***Pursley v. School District of Lake County, Florida,* Case No. CA-2007-012, and *Pursley v. SEIU Local 8,* 33 FPER ¶ 64 (2007).**

Commission affirmed the General Counsel's summary dismissal where the charges failed to establish that the school district prevented an employee from utilizing the contractual grievance procedure or that the union breached its duty of fair representation.

***Martone v. Professional Fire Fighters & Paramedics of Martin County, Local 2959, International Association of Fire Fighters,* 33 FPER ¶ 73 (2007).**

The charging party alleged that the union committed an unfair labor practice by failing or refusing to file a grievance on his behalf, failing to conduct an investigation to determine the merit of his grievance, and by providing information to his employer which was used to dismiss him. The Commission determined that no unfair labor practice occurred because the employee had resigned from employment and, absent discipline, no grievance could be filed pursuant to the contract. Further, the union did not promote the employer's actions against the employee.

***Sheriff of Broward County v. Jean-Baptiste,* 33 FPER ¶ 81 (2007).**

The Commission affirmed the General Counsel's summary dismissal of an unfair labor practice charge and denial of a miscellaneous petition in which the sheriff alleged that an employee instigated a strike. Although the sheriff correctly asserted that the general four-year statute of limitations applied to actions filed pursuant to Section 447.505, Florida Statutes, which prohibits public employees from instigating strikes, there was no remedy available to the sheriff since the employee at issue had already been dismissed from employment.

***Florida Regional Council of Industrial and Public Employees, Local Union 2081, United Brotherhood of Carpenters and Joiners of America,* 33 FPER ¶ 89 (2007).**

The Commission affirmed the General Counsel's summary dismissal of an unfair labor practice charge where the filed PERC Form 15 and affidavit were photocopies. The Commission requires that the originals of all documents containing notarized seals be filed.

***JAX Airport Lodge 85 of the Fraternal Order of Police v. Jacksonville Aviation Authority,* 33 FPER ¶ 90 (2007).**

The Commission affirmed the General Counsel's summary dismissal of an amended unfair labor practice charge where the union filed a photocopy instead of an original of the charge. The Commission rejected the union's assertion that the pertinent statute, Section 447.503, Florida Statutes, was no longer in effect. The case was docketed as a new charge.

***Coastal Florida Police Benevolent Association, Inc v. City of Cocoa,* 33 FPER ¶ 95 (2007).**

The Commission affirmed the General Counsel's summary dismissal of an unfair labor practice charge alleging that the city failed to bargain in good faith over the issue of retroactive pay. The Commission agreed with the General Counsel that the charge was untimely because it was filed more than six months after the union knew or should have known of the city's refusal to bargain over retroactive pay. Further, the number of bargaining sessions and the duration of the bargaining process between the union and city established that a reasonable period of negotiations had transpired.

***Manatee Education Association, FEA, AFT, Local 3821, AFL-CIO v. School Board of Manatee County,* 33 FPER ¶ 96 (2007).**

The Commission denied the school board's motion requesting that the hearing officer consider its post-hearing documents that were not filed until after the hearing officer issued his recommended order. The Commission found that, as a result of the school board's negligence, its post-hearing documents were mistakenly faxed to the opposing party instead of the Commission.

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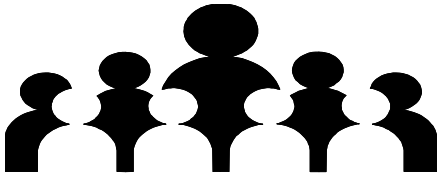
***Lewandowski v. School District of Charlotte County,* 33 FPER ¶ 104 (2007).**

The Commission affirmed the General Counsel's summary dismissal of an unfair labor practice charge where it lacked jurisdiction over the employee's claims of "seniority, age and race discrimination."

***Owen v. School District of Pinellas County,* Case No. CA-2007-025 (June 28, 2007).**

The Commission affirmed the General Counsel's summary dismissal of an unfair labor practice charge where there was no evidence that the school board prevented an employee from advancing her grievance to higher steps in the process or took any improper action against her because of protected concerted activities.

Representation Cases



***Napier v. Florida Police Benevolent Association, Inc. v. City of Niceville,* 33 FPER ¶ 62 (2007).**

Petition to revoke certification was dismissed where the petition contained deficiencies that were not timely corrected.

***Wheeler v. Coastal Florida Police Benevolent Association, Inc. v. Sheriff of St. Lucie County,* 33 FPER ¶ 63 (2007).**

Petition to revoke incumbent union's certification was granted.

***Professional Fire Fighters of Monroe County, IAFF, Local 3909 v. Monroe County Board of County Commissioners,* 33 FPER ¶ 65 (2007).**

Unit clarification petition seeking to include the newly created classification of fire rescue lieutenant in a bargaining unit of fire suppression personnel was granted.

***In Re Petition of Collier County School Board,* Case No. AF-2006-007 and *In Re Petition of Collier Support Professionals Association to Amend Certification No. 745,* 33 FPER ¶ 66 (2007).**

The Commission awarded the NEA/FEA and school board attorney's fees and costs in an amendment to certification case where the Collier Support Personnel Association had submitted a false pleading stating that all employees in the bargaining unit had been given an opportunity to vote on the change in bargaining agents.

***Local 3158, Destin Professional Firefighters v. Destin Fire Control District,* 33 FPER ¶ 68 (2007).**

Unit clarification petition seeking to include the classification of part-time inspector into a rank-and-file bargaining unit of fire suppression personnel was granted.

***Professional Firefighters/ Paramedics of Palm Beach County, Local 2928 v. Village of Tequesta,* 33 FPER ¶ 72 (Apr. 7, 2007).**

Representation-certification petition seeking to represent a bargaining unit of firefighters and lieutenants was approved. The Commission noted that the position of interim firefighter was similar to the trainee classification previously excluded from the unit.

***International Union of Painters and Allied Trades, AFL-CIO, Local Union 2301 v. City of Cape Coral,* Case No. UC-2007-004 (Apr. 23, 2007).**

Unit clarification petition seeking to include the substantially changed classification of harbormaster and the newly created classification of fleet/warehouse administrative support supervisor was granted.

***Tribble v. Hillsborough County Police Benevolent Association, Inc. D/B/A West Florida Police Benevolent Association v. City of Auburndale,* 33 FPER ¶ 80 (2007).**

Petition to revoke an incumbent union's certification was dismissed as untimely where it was filed outside the statutory window period prescribed in Sections 447.307(3)(d) and 447.308(1), Florida Statutes.

***St. Lucie County Classroom Teachers' Association and Classified Unit v. St. Lucie County School Board,* 33 FPER ¶ 82 (2007).**

Unit clarification petition seeking to add numerous classifications to a bargaining unit of nonprofessional, non-instructional employees was granted.

***United Food and Commercial Workers Union, Local 1625, Chartered by the United Food and Commercial Workers International Union v. City of Keystone Heights,* 33 FPER ¶ 84 (2007).**

The Commission dismissed a representation-certification petition seeking to represent a unit of administrative and maintenance employees because it could not determine the type of unit sought and whether the unit was fragmented.

***Professional Firefighters of Citrus County, Local 4562 V. Citrus County Board of County Commissioners,* 33 FPER ¶ 85 (2007).**

Recognition-acknowledgment petition seeking to represent a rank-and-file bargaining unit of fire suppression personnel was granted.

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Clermont Professional Fire Fighters, Local 4350, IAFF v. City of Clermont, **Case No. UC-2007-009 (May 1, 2007).**

Unit clarification petition was dismissed where the union was not registered at the time the petition was filed and failed to re-register within a reasonable time thereafter.

Napier v. Florida Police Benevolent Association, Inc. v. City of Niceville, **33 FPER ¶ 86 (2007).**

Petition seeking to revoke the certification of an incumbent union was granted.

Transport Workers Union of America, Local 291, AFL-CIO v. Metropolitan Dade County, **33 FPER ¶ 88 (2007).**

Unit clarification petition seeking to include the classifications of transit services specialist and transit facilities repairer in a bargaining unit of rank-and-file transit operating employees was granted.

Orlando Professional Fire Fighters, Local 1365, Inc., of the International Association of Fire Fighters v. City of Orlando, **33 FPER ¶ 93 (2007).**

Unit clarification petition seeking to add the newly-created classifications of district chief-training and district chief-special operations to a supervisory bargaining unit of certified fire suppression and medical rescue personnel was granted.

Castner v. City of Longwood v. Local 3163, Longwood Professional Fire Fighters Association, International Association of Fire Fighters, **33 FPER ¶ 94 (2007).**

Unit clarification petition filed by an individual employee was dismissed because UC petitions can only be filed by the certified employee organization or the public employer.

Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Santa Rosa County v. Florida Police Benevolent Association, Inc., **33 FPER ¶ 97 (Apr. 23, 2007).**

Representation-certification petition seeking to represent a unit of supervisory correctional employees was granted.

Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Santa Rosa County v. Florida Police Benevolent Association, Inc., **Case No. RC-2007-007 (May 16, 2007).**

Representation-certification petition seeking to represent a unit of supervisory correctional employees in the classifications of sergeant and lieutenant was granted.

International Union of Painters and Allied Trades, AFL-CIO, Local Union 2301 v. City of Cape Coral, **Case No. UC-2007-014 (May 30, 2007).**

Unit clarification petition seeking to add the newly-created classification of fuel management system technician to an operational services bargaining unit was granted.

University of Florida Board of Trustees v. United Faculty of Florida, **Case No. UC-2007-018 (May 31, 2007).**

The Commission remanded a case to the hearing officer to consider the rarely used third standard in unit clarification cases: whether significant changes in controlling statutory or case law occurred since the unit was originally defined.

International Union of Police Associations, AFL-CIO v. Village of Key Biscayne, **Case No. RC-2007-009 (May 31, 2007).**

Representation-certification petition seeking to represent a unit of supervisory sworn law enforcement officers in the classification of lieutenant was granted.

Teamsters Local Union 385 v. City of Edgewater v. Florida State Lodge, Fraternal Order of Police, Inc., **Case No. RC-07-026 (June 4, 2007).**

Representation-certification petition was dismissed as deficient where the proposed unit included classifications that were not included in the previously certified unit, and numerous classifications were omitted that had been included in the certified unit.

Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Nassau County v. Coastal Florida Police Benevolent Association, Inc., **Case No. RC-2007-012 (June 6, 2007).**

Consent election agreement seeking to represent a unit of deputy sheriffs was approved.

Local 3158, Destin Professional Firefighters v. Destin Fire Control District, **Case No. RC-2006-052 (June 14, 2007).**

Representation-certification petition was filed seeking to represent a supervisory unit of fire suppression captains. The hearing officer determined that the captains were more appropriately included in the rank-and-file bargaining unit, and defined a supervisory unit composed of employees in the classifications of division chief and battalion chief. The Commission rejected the employer's argument in its exceptions that the hearing officer was required to verify the showing of interest cards after he reconfigured the bargaining unit. The procedure for challenging the showing of interest does not provide for a sufficiency review after the hearing officer has defined a unit and issued his recommended order. The "proposed" unit, whose showing of interest may be challenged, is that submitted to the hearing officer by the petitioner, not the unit as defined by the hearing officer and recommended to the Commission.

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***Local 2601, Fort Walton Beach Fire Fighters Association, International Association of Fire Fighters v. City of Fort Walton Beach,* Case No. RA-2007-005 (June 20, 2007).**

Recognition-acknowledgment petition seeking to represent a supervisory bargaining unit of battalion chiefs was granted.

***SEIU Local 8 v. Orange County Board of County Commissioners,* Case No. RA-2007-003 (June 21, 2007).**

Recognition-acknowledgment petition was dismissed where a unit composed of administrative/secretarial employees within the county's corrections department constituted overfragmentation, and there was no basis for excluding probationary and part-time employees.

***Florida State Lodge, Fraternal Order of Police v. University of North Florida v. Truck Drivers, Warehousemen and Helpers, Local Union 512,* Case No. RC-2007-013 (June 27, 2007).**

Representation-certification petition seeking to represent a previously defined rank-and-file unit of certified law enforcement officers was granted. Local Union 512's motion to disclaim interest was granted prospective to the expiration date of the collective bargaining agreement.

***Tribble v. Hillsborough County Police Benevolent Association, Inc., d/b/a West Central Florida Police Benevolent Association v. City of Auburndale,* Case No. RD-2007-006 (June 28, 2007).**

Petition to revoke the certification of an incumbent union was granted.

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The "Underfunding" Cases of 1991

Section 447.309(2), Florida Statutes (1991), stated:

> Upon execution of the collective bargaining agreement, the chief executive officer shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

In 1991, two school districts were the subject of unfair labor practice charges filed by employee organizations for unilateral acts allegedly taken pursuant to the underfunding provision of Section 447.309(2), because of admittedly significant revenue shortfalls during the recession that year. In both cases, the Commission held that the underfunding provision did not apply and that exigent financial circumstances were not alleged or shown. In both cases, the Commission was reversed and the courts of appeal held that the underfunding statute did apply. *Sarasota Classified Teachers Association v. Sarasota County School District*, 18 FPER ¶ 23069 (1992), *reversed*, 614 So. 2d 1143 (Fla. 2d DCA 1993), *review dismissed*, 630 So. 2d 1095 (Fla. 1994); *Martin County Teachers Association v. School Board of Martin County*, 18 FPER ¶ 23061 (1992), *reversed*, 613 So. 2d 521 (Fla. 4th DCA 1993).

1992-1993 Florida Supreme Court Decisions on Collective Bargaining

In 1992, the Florida Supreme Court decided a case arising from the Florida Legislature's decision in the general appropriations act to alter certain state employee leave benefits during the middle of the term of a collective bargaining agreement. *State of Florida v. Florida PBA*, 613 So. 2d 415 (Fla. 1992). A divided court reversed lower holdings that the changes were unlawful and held that, unlike a private employer, a public employer's signature of the executive cannot bind the appropriation of funds by the legislature. 613 So. 2d at 418-19.

In addition to concluding that Section 447.309(2) allowed underfunding, the second district court of appeal reversed the Commission, citing to the *Florida PBA* Supreme Court decision which also reversed the Commission:

> Under the separation of powers doctrine, the right to bargain must be considered along with Article VII, Section 1(c) of the Florida Constitution, which provides that "no money shall be drawn from the treasury except in pursuance of appropriation made by law." Accordingly, even though school board employees have the right to bargain with their employer, the school board in its capacity as the legislative body has the absolute

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> right and obligation under the Constitution to fund or not fund any agreement entered into between the employees and the school board as employer. The Legislature clearly reserved this right when it enacted Section 447.309(2) and made it clear that underfunding an agreement was not an unfair labor practice. Any other rule would permit the executive branch of government, by entering into collective bargaining agreements calling for additional appropriations, to invade the legislative branch's exclusive right to appropriate funds.

Sarasota County School District, 614 So. 2d at 1148.

Subsequent to this opinion, however, the Florida Supreme Court issued an opinion that called this reasoning into question, *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). In that case, the state legislature refused to fund pay increases under a collective bargaining agreement because of a shortfall in funds. The court held that to be unlawful, distinguishing its prior opinion:

> We begin by noting that the present case is factually quite different from our recent opinion in *State v. Florida Police Benevolent Association*, 613 So. 2d 415 (Fla. 1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the Legislature, and finally unilaterally abrogated by the Legislature. Accordingly, we do not believe that the result in *Police Benevolent Association* dictates the result here.
>
> The state now argues that whatever agreement was reached between it and the unions somehow failed to reach the level of a fully enforceable contract. Indeed, the logical conclusion of the state's position is that public-employee bargaining agreements cannot ever constitute fully binding contracts, even after they are accepted and funded. We cannot accept this position.

615 So. 2d at 672.

The court then stated ground rules for the abrogation of an agreement where there are revenue shortfalls:

> We recognize that in the sensitive area of a continuing appropriation obligation for salaries, and perhaps in other contexts as well, the Legislature must be given leeway to deal with bona fide emergencies. Accordingly, we agree with the trial court that the Legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. Art. I, §§ 6, 10, Fla. Const.; *Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority*, 522 So .2d 358 (Fla. 1988).
>
> Before that authority can be exercised, however, the Legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the Legislature must demonstrate that the funds are available from no other possible source. *Accord United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed 2d 92 (1977); *Association of Surrogates and Supreme Court Reporters v. New York*, 940 F. 2d 766 (2d Cir. 1991); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P. 2d 1 (1979). That has not happened here.

615 So. 2d at 673.

Statutory Amendment of the Underfunding Statute

In 1995, Section 447.309(2)(b) was amended to state:

> If the state is a party to a collective bargaining agreement in which less than the requested amount is appropriated by the Legislature, the collective bargaining agreement will be administered on the basis of the amounts appropriated by the Legislature. The failure of the Legislature to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice. All collective bargaining agreements entered into by the state are subject to the appropriations power of the Legislature and the provisions of this section shall not conflict with the exclusive authority of the Legislature to appropriate funds.

Ch. 95-218, § 1 at 1943, Laws of Florida. The effect of this amendment was to limit the applicability of the underfunding statute to the State of Florida.

Creation of New Statute on "Financial Urgency"

As a part of the statutory amendment to Section 447.309(2)(b), the legislature created a new statute, Section 447.4095, which provides:

(Continued on page 10)

(Continued from page 9)

> Financial Urgency. In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his representative and the bargaining agent or his representative shall meet as soon as possible to negotiate the impact of a financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred and one of the parties shall so declare in writing to the other party and to the [Public Employees Relations] Commission. The parties shall then proceed pursuant to the provisions of Section 447.403 [to resolve the impasse]. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

Ch. 95-218, § 2 at 1944, Laws of Florida.

Subsequent Case Law on Section 447.4095

In February 2002, the Commission received a request from the School Board of Miami-Dade County for the appointment of a special master to resolve impasses with employee organizations involving the application of Section 447.4095, Florida Statutes. Thereafter, two circuit court lawsuits and two unfair labor practice charges were filed concerning the application of the statute. The lawsuits and unfair labor practice charges involved the School Board of Miami-Dade County and the School Board of Madison County. Each case involved the alleged abrogation of existing collective bargaining agreement economic provisions because of significant shortfalls in revenues. The lawsuits filed by the various employee organizations alleged the facial unconstitutionality of Section 447.4095, using the supreme court's standard that the defendant school districts were allegedly unable to show that the "funds [to pay contractual benefits] are available from no other possible reasonable source." The parties resolved the lawsuits and unfair labor practice charges without any statutory interpretation in mid-2002. Therefore, neither the Commission nor the Florida courts have had an opportunity to interpret Section 447.4095 and the circumstances in which it may be applied until a recent decision from the Florida circuit court for the nineteenth circuit.

The circuit court action was predicated upon a motion by the Indian River County School Board (School Board) to vacate an arbitrator's award in favor of the Communications Workers of America (CWA) relating to changes to benefit levels and employee contributions to the School Board's health insurance plan without negotiations. The School Board defended its changes by arguing that they were made pursuant to Section 447.4095. The circuit court held that the arbitrator incorrectly held that the remedy of arbitration was available and that the arbitrator could interpret the School Board's actions under Section 447.4095. The circuit court held that the unfair labor practice provisions of Sections 447.501 and 447.503 preempted the arbitrator's consideration of the issue of whether the School Board violated the provisions of Section 447.4095. The court held that, if injunctive relief was necessary to prevent a change in the status quo, the injunction provisions of Section 447.503 (3) were available.

In addition, the circuit court held that:

> Just as the activities at issue here were matters for PERC, that interpretation is also a matter clearly within the jurisdiction of PERC. For this same reason and because the Court must avoid reaching constitutional issues where it can resolve matters on other grounds such as the preemptive jurisdiction of PERC, the Court will not reach the CWA's claim that Section 447.4095, Florida Statutes, is unconstitutional.

Accordingly, the circuit court set aside the arbitrator's decision pursuant to Section 682.13(1)(c), Florida Statutes (2003), for exceeding the powers granted to the arbitrator and ruling upon matters arguably covered by Chapter 447, Part II, Florida Statutes, and within the preemptive jurisdiction of the Commission. *See Indian River County School Board v. Communications Workers of America*, 10 Fla. L. Weekly Supp. 895 (Fla. 19th Cir. Ct. Aug. 28, 2003), *aff'd*, 888 So. 2d 96 (Fla. 4th DCA 2004), *rev. denied*, 901 So. 2d 873 (Fla. 2005). The Commission did not participate as a party in the lawsuit.

Elections Verified and Certifications Issued

Palm Beach County Police Benevolent Association, Inc., Chartered by the Florida Police Benevolent Association, Inc. v. Town of Juno Beach, Case No. EL-2007-003; Election previously reported; Certification 1624.

Florida Police Benevolent Association, Inc. v. Sheriff of Alachua County, Case No. EL-2007-005; Election previously reported; Certification 1625.

Teamsters, Chauffeurs and Helpers, Local Union #79 v. Collier County School Board v. Collier Support Personnel – NEA, Case No. EL-2006-060; Election previously reported; Certification 1626.

Brandon A. Smith v. Coastal Florida Police Benevolent Association, Inc. v. Sheriff of Nassau County, Case No. EL-2007-007; Election 3/20 – 4/10/2007; Union lost.

Professional Firefighters of Citrus County, Local 4562 v. Citrus County Board of County Commissioners, Case No. RA-2007-004; Certification 1627.

Polk County Professional Firefighters, Local 3531, IAFF v. Polk County Board of County Commissioners, Case No. EL-2007-009; Election 3/27 – 4/17/2007; Union won; Certifica-tion 1628.

Florida Police Benevolent Association, Inc. v. Sheriff of Hendry County, Case No. EL-2007-008; Election 3/30 – 4/20/2007; Union lost.

Wheeler v. Coastal Florida Police Benevolent Association, Inc. v. Sheriff of St. Lucie County, Case No. EL-2007-012; Election 5/1 – 5/2/2007; Union defeated decertification effort.

Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Nassau County, Case No. EL-2007-010; Election 4/17 – 5/7/2007; Union lost.

Hillsborough County Police Benevolent Association, Inc., d/b/a West Central Florida Police Benevolent Association v. City of Zephyrhills, Case No. EL-2007-011; Election 4/17 – 5/8/2007; Union won; Certification 1629.

Professional Fire Fighters/Paramedics of Palm Beach County, Local 2928, IAFF, Inc. v. Village of Tequesta, Case No. EL-2007-013; Election 5/8 – 5/29/2007; Union won; Certifica-tion 1630.

Napier v. Florida Police Benevolent Association, Inc. v. City of Niceville, Case No. EL-2007-014; Election 5/24 – 6/14/2007; Union lost.

Local 2601, Fort Walton Beach Fire Fighters Association, IAFF v. City of Fort Walton Beach, Case No. RA-2007-005; Certification 1631.

Florida State Lodge, Fraternal Order of Police, Inc. v. Sheriff of Santa Rosa County v. Florida Police Benevolent Association, Inc., Case No. EL-2007-015; Election 6/7 – 6/28/2007; Union won; Certification 1632.

Federal Legislation of Interest

On July 17, 2007, the U.S. House of Representatives passed H.R. 980, the Public Safety Employer-Employee Cooperation Act of 2007. This Act applies to all state/local public safety officers, defined as: law enforcement officers, fire fighters, and emergency medical services personnel (emergency medical technicians, paramedics, and first responders). H.R. 980 grants public safety officers minimum collective bargaining rights in states where they do not have them already, and the bill authorizes the Federal Labor Relations Authority (Authority) to determine whether a state's collective bargaining laws substantially provide the rights and responsibilities described in the Act. If the Authority determines that a state's law does not substantially provide the rights and responsibilities provided in H.R. 980, such state is subject to the Authority's regulations and procedures.



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