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# The Legal Obligations of Governmental Employers and Labor Organizations Under the Recognition-Certification Provisions of the Florida Public Empoyees Relations Act

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# THE LEGAL OBLIGATIONS OF GOVERNMENTAL EMPLOYERS AND LABOR ORGANIZATIONS UNDER THE RECOGNITION-CERTIFICATION PROVISIONS OF THE FLORIDA PUBLIC EMPLOYEES RELATIONS ACT

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In 1968 the State of Florida adopted a revised constitution containing a provision[1] that presaged the right of public employees to engage in collective bargaining.[2] Although the language of article I, section 6 was vague concerning the specific rights granted to public employees, the Florida supreme court expeditiously interpreted the new provision to provide governmental workers with meaningful, although limited, representation privileges. In *Dade County Classroom Teachers' Association v. Ryan*[3] the court held "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."[4] However,

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1. FLA. CONST. art. I, §6 provides: "*Right to Work*—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike." *See also* N.J. CONST. art. I, §19.

Florida is one of the few jurisdictions in the United States that constitutionally guarantees public employees collective bargaining rights. This factor may place an important limitation upon the right of the Florida Legislature or PERC to restrict unduly the organizing and negotiating rights of public employees. *Cf.* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972).

2. Prior to 1968 public employees in Florida apparently did not possess the right to engage in true collective bargaining with their governmental employers. *See* Miami Water Works Local 564 v. City of Miami, 26 So. 2d 194 (Fla. 1946); Longshoremen's Local 1526 v. Broward County Port Authority, 183 So. 2d 257 (4th D.C.A. Fla. 1966); Dade County v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees, 157 So. 2d 176 (3d D.C.A. Fla. 1963), *appeal dismissed,* 166 So. 2d 149 (Fla. 1964), *cert. denied,* 379 U.S. 971 (1965). *See also* 1961-1962 FLA. ATT'Y GEN. BIENNIAL REP. 428; 1959-1960 FLA. ATT'Y GEN. BIENNIAL REP. 241, 246-47. *But see* Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction, 214 So. 2d 34, 36 (Fla. 1968), wherein the court, in dictum, inexplicably indicated that former Fla. Stat. §839.221(2) (1969), *see* note 7 *infra,* which had been enacted in 1959, granted public employees "the right to bargain as a member of a union or labor organization . . . ." *See* McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future,* 1 FLA. ST. U.L. REV. 26, 34-40 (1973); Comment, *Labor Relations; Public School Teachers, The Right To Strike and Collectively Bargain,* 21 U. FLA. L. REV. 403, 404-05 (1969).

3. 225 So. 2d 903 (Fla. 1969).

4. *Id.* at 905. The court examined the legislative history surrounding the adoption of

despite the well recognized right under the National Labor Relations Act (NLRA),[5] of a labor organization selected by a majority of private sector employees in an appropriate bargaining unit to be the exclusive representative of all the workers in that unit,[6] the *Ryan* court construed Florida Statutes, section 839.221(2)[7] as limiting the negotiation right of a public employee union to the representation of only those workers who had specifically designated it as their bargaining agent.[8]

The Florida supreme court recognized that article I, section 6, even when read in conjunction with section 839.221(2), did not provide the substantive definition and procedural rules necessary to implement fully the intent expressed in the revised constitution. The court urged the legislature to fill the void.[9] In 1972, after several years of legislative inaction, the court indicated that if the legislature did not enact provisions defining the collective bargaining rights of public employees in the near future, the court would be forced to establish the requisite guidelines itself.[10] Finally, in 1974, the Florida Legislature passed the Public Employees Relations Act (PERA).[11]

The PERA created the Public Employees Relations Commission (PERC),[12] which is responsible for the effectuation and administration of that enactment. It is empowered to protect the statutory labor rights of public employees[13] by

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article I, §6, and concluded that "the Legislature intended both private and public employees to be included in the word 'employees' in the second sentence of Section 6." *Id.* at 905 n.1. For a good discussion of the pertinent legislative history, see McGuire, *supra* note 2, at 42-44 n.64.

5. 29 U.S.C. §§151-68 (1970). *See generally* AMERICAN BAR ASS'N, THE DEVELOPING LABOR LAW (C. Morris ed. 1971).

6. 29 U.S.C. §159(a) (1970). *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944). *See generally* Craver, *Minority Action Versus Union Exclusivity: The Need To Harmonize NLRA and Title VII Policies,* 26 HASTINGS L.J. 1, 29-32 (1974).

7. Former Fla. Stat. §839.221(2) (1969) provided: "All employees who comply with the provisions of this section [dealing with illegal strike activity or support] are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization."

This section was repealed by the PERA, FLA. STAT. §§447.201 *et seq.* (Supp. 1974).

8. 225 So. 2d at 906. It should be noted that this portion of the *Dade County Classroom Teachers' Ass'n* decision has been substantially affected by the PERA, which expressly provides public employee labor organizations with exclusive repersentation rights similar to those granted to majority unions under the National Labor Relations Act (NLRA). *See* FLA. STAT. §447.307(3)(b) (Supp. 1974).

9. Dade County Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903, 906 (Fla. 1969).

10. Dade County Classroom Teachers' Ass'n v. Legislature, 269 So. 2d 684, 687-88 (Fla. 1972).

11. FLA. STAT. §§447.201 *et seq.* (Supp. 1974).

12. FLA. STAT. §447.205 (Supp. 1974).

13. *See* FLA. STAT. §§447.205, .301 (Supp. 1974) (protected rights of public employees).

enforcing provisions proscribing unfair labor practices by employers[14] and labor organizations.[15] The Commission is also authorized to resolve all questions concerning the representational claims of labor organizations.

Section 447.307(6)[16] delineates two methods by which an employee organization may obtain certification from PERC as the exclusive collective bargaining representative of a defined group of public employees. If a public employer is willing to concede that a particular employee organization has been designated by the majority of workers in an appropriate bargaining unit[17] to represent them for collective bargaining purposes, it may voluntarily extend recognition, thus permitting the organization to petition PERC for certifica-

14. *See* FLA. STAT. §447.501(1) (Supp. 1974) (employer unfair labor practices).

15. *See* FLA. STAT. §447.501(2) (Supp. 1974) (unfair labor practices of labor organizations).

16. FLA. STAT. §447.307 (Supp. 1974), provides in relevant part:

"(1) Any employee organization which is designated or selected by a majority of public employees in an appropriate unit as their representative for purposes of collective bargaining shall request recognition by the public employer. The public employer shall, if satisfied as to the majority status of the employee organization and the appropriateness of the proposed unit, recognize the employee organization as the collective bargaining representative of employees in the designated unit. Upon recognition by a public employer, the employee organization shall immediately petition the commission for certification. The commission shall review only the appropriateness of the unit proposed by the employee organization. If the unit is appropriate according to the criteria used in this part, the commission shall immediately certify the employee organization as the exclusive representative of all employees in the unit.

"(2) If the public employer refuses to recognize the employee organization the employee organization may file a petition with the commission for certification as the bargaining agent for a proposed bargaining unit. The petition shall be accompanied by dated statements signed by at least thirty (30) percent of the employees in the proposed unit indicating that such employees desire to be represented for purposes of collective bargaining by the petitioning employee organization. Any employee, employers or employee organization having sufficient reason to believe any of the employee signatures were obtained by collusion, coercion, intimidation or misrepresentation or are otherwise invalid shall be given a reasonable opportunity to verify and challenge the signatures appearing on the petition.

"(3)(a) The commission or one of its designated agents shall investigate the petition to determine its sufficiency; if it has reasonable cause to believe that the petition is sufficient, the commission shall provide for an appropriate hearing upon due notice. Such a hearing may be conducted by an agent of the commission, who shall not make any recommendations with respect thereto. If the commission finds upon the record of the hearing that the petition is sufficient, it shall immediately:

"1. Define the proposed bargaining unit and determine which public employees shall be qualified and entitled to vote at any election held by the commission;

"2. Identify the public employer or employers for purposes of collective bargaining with the bargaining agent;

"3. Order an election by secret ballot. . . . (b) Where an employee organization is selected by a majority of the employees voting in an election, the commission shall certify the employee organization as the exclusive collective bargaining representative of all employees in the unit. (c) In any election in which none of the choices on the ballot receives the vote of a majority of the employees voting, a run-off election shall be held according to rules promulgated by the commission. (d) No new election may be conducted in any appropriate bargaining unit to determine the exclusive representative if a representative election has been conducted within the preceding twelve month period."

17. *See* FLA. STAT. §447.307(4) (Supp. 1974) (factors to be utilized by PERC when determining whether a proposed unit is appropriate for negotiation purposes).

tion.[18] However, where a labor organization is unable to obtain voluntary recognition from the governmental employer, it must seek certification through a secret ballot election.[19]

Since there is no established body of decisional law interpreting the recently enacted PERA, the initial cases confronting the Commission will require it to define the appropriate parameters of the various sections of the Act before it can apply those provisions to the specific fact situations presented. PERC, however, will not be forced to interpret the PERA in a vacuum. The relevant sections of the Florida Act are quite similar to those found in the NLRA, and the Florida supreme court has indicated that in such circumstances the decisions interpreting such analogous legislation should be highly persuasive in Florida.[20]

Several of the early cases that have arisen under the PERA have focused upon the interpretation and application of sections 447.307(1) and (2).[21] In three representation cases public employers raised issues under those provisions requiring the Commission to delineate the prerequisite obligations of labor organizations seeking collective bargaining certification from PERC. In a fourth case, involving an unfair labor practice charge filed against a governmental employer, an employee organization requested that the Commission define the statutory duties of a public employer presented with a demand for collective bargaining recognition by a union claiming to have majority support among the workers in an allegedly appropriate unit.

This article will examine the cases and decisions that have arisen under sections 447.307(1) and (2). In addition, decisions by the National Labor Relations Board (NLRB) concerning similar labor issues that have arisen in the private sector will be discussed in an effort to suggest the approach that should be taken under the PERA with respect to recognition and certification cases.

## PERC Cases

### *Representation Cases*

In each of the three pertinent representation cases[22] a certification petition had been filed by a labor organization requesting a secret ballot election to determine whether it should be certified by PERC as the exclusive bargaining representative of the employees in the proposed unit. On January 21, 1975, the State of Florida, the governmental employer, filed motions to dismiss the three

18. FLA. STAT. §447.307(1) (Supp. 1974). Where such voluntary recognition has been accorded a labor organization by a public employer, PERC is merely empowered to review the appropriateness of the proposed bargaining unit. *See* note 16 *supra.*

19. FLA. STAT. §447.307(2) (Supp. 1974); see note 16 *supra.*

20. *See, e.g.*, State v. Aiuppa, 298 So. 2d 391, 394 (Fla. 1974); Flammer v. Patton, 245 So. 2d 854, 859 (Fla. 1971).

21. FLA. STAT. §§447.307(1)-(2) (Supp. 1974); see note 16 *supra.*

22. State of Florida & Florida Police Benevolent Ass'n, Case No. 8H-RC-746-2026; State of Florida, G. Pierce Wood State Mental Hosp., Case No. 8H-RC-741-0026; State of Florida, Sumter Correctional Institution, Case No. 8H-RC-741-0023.

petitions.[23] The state claimed that the three labor organizations had failed to demand voluntary recognition from the employer prior to the filing of their respective petitions and contended that, under sections 447.307(1) and (2), they were required to request such recognition as a statutory prerequisite to their right to petition PERC for a certification election. The motions to dismiss were accompanied by affidavits from the acting personnel director of the State Department of Administration, averring that in none of the three cases had he received a request for voluntary recognition from the petitioning labor organization since the effective date of the PERA.

In *State of Florida, G. Pierce Wood State Mental Hospital,*[24] although the certification petition filed by the petitioning labor organization indicated that a request for voluntary recognition had been made on the date the PERA became fully operative, no affidavits or other documents were filed contesting the contrary assertion contained in the state's affidavit. It should also be noted that while the proposed bargaining unit comprised approximately 850 employees, the petition indicated that only 337 authorization cards had been signed in support of the union. Similar circumstances were present in *State of Florida & Florida Police Benevolent Association,*[25] where the petitioning employee organization also claimed to have made a timely request for recognition from the public employer, but failed to file any document controverting the state's affidavit. Furthermore, the evidence indicated that in the originally proposed bargaining unit the labor organization had no more than 46 per cent employee support. The third representation case, *State of Florida, Sumter Correctional Institution,*[26] involved similar facts. The petitioning labor union claimed to have requested voluntary recognition in a timely manner, but it too failed to present documentation challenging the state's affidavit. In addition, the union claimed to possess authorization cards from only 70 of the almost 200 employees in the proposed unit.

The three cases were consolidated for hearing. In the *Sumter Correctional Institution* case,[27] the PERC general counsel filed a memorandum opposing the state's dismissal motion.[28] It contended that any requirement that might exist under sections 447.307(1) and (2) obligating a petitioning labor organization to request voluntary recognition as a prerequisite to its right to file a certification petition seeking a representation election should not be applicable to a union that does not possess cards evidencing majority employee support, since other PERA provisions prohibit the extension of voluntary recognition to a nonmajority labor organization.[29] Despite the opposition of the general coun-

23. State of Florida, Sumter Correctional Institution, Dec. No. 75E-3-25 (April 22, 1975); State of Florida, G. Pierce Wood State Mental Hosp., Dec. No. 75E-4-26 (April 15, 1975); State of Florida & Florida Police Benevolent Ass'n, Dec. No. 75E-I-5 (April 15, 1975).

24. Case No. 8H-RC-741-0025, Dec. No. 75E-4-26 (April 15, 1975).

25. Case No. 8H-RC-746-2026, Dec. No. 75E-1-5 (April 15, 1975).

26. Case No. 8H-RC-741-0023, Dec. No. 75E-3-25 (April 22, 1975).

27. *Id.*

28. Memorandum for PERC General Counsel in State of Florida, Sumter Correctional Institution, Case No. 8H-RC-741-0023.

29. See text accompanying notes 70-75 *infra.*

sel, the Commission granted the dismissal motions in all three cases. It unanimously ruled that, under sections 447.307(1) and (2), a request for voluntary recognition was a statutorily imposed condition precedent to the filing of a petition asking for a certification election and determined that the three petitioner labor organizations had failed to demonstrate that they had made the requisite demand for recognition.[30]

On February 25, 1975, the PERC general counsel petitioned the Commission for clarification of the three dismissals.[31] The motion was based upon the fact that PERC had not, when it orally announced its dismissal decisions, clearly indicated whether the voluntary recognition request prerequisite to the filing of a representation election petition was applicable both to unions that have been able to obtain only minority employee support and to those enjoying majority support.[32] The Commission granted the general counsel's motion. Following oral argument, PERC reaffirmed the dismissals of the *G. Pierce Wood State Mental Hospital*[33] and *Police Benevolent Association*[34] cases. However, the Commission reversed its dismissal of the *Sumter Correctional Institution* petition, holding that "a labor group selected by less than a majority of public employees in the proposed unit need not make a written demand to the public employer for recognition as the exclusive bargaining agent for a proposed unit as a condition precedent for filing a representation petition . . . ."[35] PERC concluded: "To require a [minority] group . . . to use the same procedures of section [447.307(1)] that a group with at least a fifty percent showing of interest must use would be to require excessive delay in the exercise by a minority group of a constitutional right to collectively bargain."[36] Since the petition filed in *Sumter Correctional Institution* clearly indicated that the labor organization in question did not possess majority support, it was relieved of the recognition demand prerequisite, which the Commission ruled was applicable only with respect to unions having majority support.[37]

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30. Dec. Nos. 75E-3-25; 75E-4-26; 75E-1-5 (1975). Although the Commission orally voted to grant the requested dismissals on Feb. 14, 1975, based upon the stated principle, no formal written orders were issued, since on Feb. 25, 1975, the General Counsel filed a Motion for Clarification of the above dismissals, which was granted. As a result, rehearing by the Commission was ordered before any written orders were provided.

31. Motion for Clarification filed by PERC General Counsel, Case Nos. 8H-RC-764-2026; 8H-RC-741-0023; 8H-RC-741-0025.

32. "The Commission appeared to indicate both a majority and minority union [*sic*] are required to make a similar demand. It was not clear from the decision under what circumstances a demand would be a prerequisite to the filing of a Petition." *Id.* at 2.

33. Dec. No. 75E-4-26 (April 15, 1975).

34. Dec. No. 75E-1-5 (April 15, 1975).

35. Dec. No. 75E-3-25 (April 22, 1975), at 2.

36. *Id.* at 1-2.

37. It is informative to note that in upholding the dismissal pertaining to the *G. Pierce Wood State Mental Hospital* case, the Commission did not require proof by the state that the petitioning labor organization actually enjoyed majority employee support. It instead indicated that it would be incumbent upon a petitioning union that had not satisfied the voluntary recognition request prerequisite to affirmatively assert that it did not have majority support. The Commission stated: "Nowhere on its petition for a representation election did

*Unfair Labor Practice Case*

On January 24, 1975, an unfair labor practice charge was filed with PERC[38] requesting a delineation of the obligations of a public employer under sections 447.307(1) and (2) of the PERA. The labor organization filing the charge had requested voluntary recognition from the city of Winter Park, based upon its submission of authorization cards signed by 51 of the 54 employees in the proposed bargaining unit. The governmental employer had refused to examine the evidence provided by the union to establish its claim of majority support and had rejected the request for voluntary recognition, precipitating the unfair labor practice charge.[39]

The PERC general counsel dismissed the charge, concluding that sections 447.307(1) and (2), even when read in conjunction with section 447.501(1)(c), did not impose a duty upon a public employer to investigate a union's claim of majority support.[40] Therefore, the refusal by the city of Winter Park to accede to the union's request for voluntary recognition did not ipso facto constitute an unfair labor practice.[41] The labor organization involved appealed the dismissal decision to the Commission,[42] which decided to reinstate the unfair labor practice charge and order the issuance of a complaint,[43] thus providing an opportunity for a resolution on the merits of the case.

By analyzing the issues raised in the four PERC cases heretofore discussed, and by extrapolating to other related areas of inquiry, it should be possible to review sections 447.307(1) and (2) as well as other interconnected PERA provisions, in order to evaluate the manner in which those provisions should be interpreted and applied.

## Analysis of PERA Provisions in Light of Relevant Principles of Law Established Under the NLRA

Public sector labor relations enactments generally have been patterned after the NLRA,[44] which has protected the organizational and collective

the Organization assert that the requirement of a request for recognition was inapplicable. Nowhere did it affirmatively show less than majority status. Although the number of signatures on the attached cards was clearly less than a majority of employees in the proposed unit, there was no indication on the petition that the Organization had submitted all its cards." Dec. No. 75E-4-26 (April 15, 1975), at 2.

38. City of Winter Park, Case No. 8H-CA-756-2019.

39. The charging party contended that the City of Winter Park, by its refusal to afford it the requested bargaining recognition, breached its statutory collective bargaining obligations under FLA. STAT. §447.501(1)(c) (Supp. 1974), which provides: "(1) Public Employers or their agents or representatives are prohibited from: . . . (C) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit." *See also* FLA. STAT. §§447.203(14), .309 (Supp. 1974).

40. Dismissal Report, City of Winter Park, Case No. 8H-CA-756-2019 (March 3, 1975), at 2-3.

41. *Id.*

42. *See* FLA. STAT. §447.503(3) (Supp. 1974).

43. Reinstatement of Unfair Labor Practice Charge Order, Case No. 8H-CA-756-2019 (June 10, 1975).

44. 29 U.S.C. §§151-68 (1970).

bargaining rights of private sector workers since 1935. For this reason, the procedures and substantive principles that have evolved under the NLRA frequently have provided significant guidance in interpreting and applying such public sector labor laws.[45] Furthermore, since the relevant representation[46] and unfair labor practice[47] provisions of the Florida PERA are very similar to the corresponding sections of the NLRA, it would be beneficial to consider the decisional rules that have developed in private sector labor relations.

Although the NLRA specifically provides that only through an election may a labor organization be *certified* as the exclusive bargaining representative of employees comprising an appropriate negotiating unit,[48] this is not the only manner by which a union may become a legally recognized exclusive bargaining agent. In addition to obtaining NLRB certification through a secret ballot election, an employee organization may achieve exclusive representative bargaining status in two other ways: (1) where an employer voluntarily recognizes the union as the bargaining representative of the employees in an appropriate unit, where a majority of such employees have selected that labor organization as their negotiating agent through the execution of authorization cards; or (2) where the NLRB determines that an employer has committed unfair labor practices precluding a fair representation election and undermining the organizing union's previously obtained majority support, and orders the offending employer to recognize the labor organization involved as the exclusive bargaining agent for the employees in the appropriate unit affected, in order to remedy effectively the labor act violation that the employer committed.[49] A comparison of the pertinent PERA and NLRA provisions would certainly indicate that relatively analogous methods for obtaining representation rights should be available to labor organizations seeking to represent public employees in Florida, since many of the doctrines established under the NLRA are relevant to situations arising under the PERA.

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45. See cases cited note 20 *supra*.

46. *Compare* Fla. Stat. §447.307 (Supp. 1974), *with* 29 U.S.C. §159 (1970). *Compare* FLA. STAT. §§447.203(14), .309(1), .501(1)(c), .501(2)(c) (Supp. 1974), *with* 29 U.S.C. §§158(a)(5), (b)(3), (d) (1970) (regarding the duty to bargain in good faith with the duly selected negotiating agent concerning wages, hours, and other terms and conditions of employment).

47. *Compare* FLA. STAT. §§447.501(1), (2) (Supp. 1974), *with* 29 U.S.C. §§158(a), (b) (1970) (regarding the specific unfair labor practice provisions in the respective enactments); *Compare* FLA. STAT. §447.501(3) (Supp. 1974), *with* 29 U.S.C. §158(c) (1970) (regarding the specifically protected right of free speech, despite the general unfair labor practice provisions in the respective enactments).

48. *See* 29 U.S.C. §§159(c), (e) (1970), which provide for certification only where a union has won an NLRB conducted representation election.

49. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-16 (1969), and cases cited therein. Once a labor organization has obtained exclusive representative status, the employer is obligated to continue to recognize that organization for a reasonable period of time — usually considered to be twelve months. *See* Brooks v. NLRB, 348 U.S. 96 (1954); NLRB v. Montgomery Ward & Co., 399 F.2d 409 (7th Cir. 1968); Universal Gear Serv. Corp., 157 N.L.R.B. 1169 (1966), *enforced*, 394 F.2d 396 (6th Cir. 1968).

*Representative Status Through Voluntary Recognition*

*Obligation of Employer Presented with Request for Recognition.* Once a union seeking representation rights under the NLRA has obtained authorization cards signed by a majority of employees[50] in a proposed bargaining unit, it may request that the employer voluntarily accord it recognition. If the employer is satisfied that the requesting labor organization in fact enjoys majority support[51] and agrees that the proposed unit is appropriate, it may voluntarily recognize the union as the exclusive bargaining representative of the workers in that unit. However, the employer is not legally obligated by the NLRA to accede to the labor organization's request, nor is it even required to petition the NLRB for a representation election.[52] It may simply reject the union's demand and do nothing. Unless the employer engages "in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the [National Labor Relations] Board's election procedure."[53] The PERA, on the other hand, arguably has rejected this approach by imposing an affirmative duty upon public employers that are presented with a request for voluntary recognition by a labor organization.

Section 447.307(1) of the PERA specifically provides:

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50. Authorization cards are valid if they are: (1) signed by employees in the proposed bargaining unit; (2) dated; (3) unambiguous in designating the union in question as exclusive bargaining agent; (4) not restricted to a nonbargaining purpose, such as merely indicating the desire for a representation election without unequivocally and presently obligating the signers to the union as their negotiating representative; and (5) not obtained through coercion or objectively demonstrable and material misrepresentation. *See* John Barnes Corp., 180 N.L.R.B. 911 (1970); Marie Phillips, Inc., 178 N.L.R.B. 340 (1969); C. E. Collins, 177 N.L.R.B. 221 (1969); Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963). *See generally* Welles, *The Obligation To Bargain on the Basis of a Card Majority,* 3 GA. L. REV. 349 (1969); Note, *Union Authorization Cards,* 75 YALE L.J. 805 (1966).

It should be noted that for majority recognition purposes, the NLRB will generally accept other forms of employee commitment, such as a union membership card, NLRB v. Federbrush Co., 121 F.2d 954 (2d 1941); an application for union membership, NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756 (2d Cir. 1940); or a union dues checkoff authorization card, Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1972), *cert. denied,* 317 U.S. 659 (1942). However, in the public sector where many organizations presently vying for representation rights have traditionally existed as professional societies, which were joined by many persons for occupational and social reasons wholly unrelated to collective bargaining considerations, it would generally be preferable to require unambiguous authorization cards as evidence of support for an employee organization's representative status, rather than such other equivocal indicators of employee sentiment. *But see* McGuire, *supra* note 2, at 65 n.133.

51. See text accompanying notes 70-75 *infra* regarding the unfair labor practice liabilities involved when an employer accords exclusive representative status to a minority union.

52. *Cf.* 29 U.S.C. §159(c)(1)(B) (1970).

53. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974). However, if the employer utilizes independent means to verify objectively the requesting union's assertion of majority support, it may thereby obligate itself to grant voluntary recognition if the evidence clearly establishes the truth of the majority claim. *See* Sullivan Elec. Co., 199 N.L.R.B. 809 (1972); Pacific Abrasive Supply Co., 182 N.L.R.B. 329 (1970); Dixon Ford Shoe

> Any employee organization which is designated or selected by a majority of public employees in an appropriate unit as their representative for purposes of collective bargaining *shall request recognition* by the public employer. *The public employer shall, if satisfied as to the majority status of the employee organization and the appropriateness of the proposed unit, recognize the employee organization* as the collective bargaining representative of employees in the designated unit.[54]

The seemingly mandatory nature of the emphasized language would appear to be an effort by the Florida Legislature to obviate the necessity of time-consuming and expensive representation elections in most instances where employee organizations claim to possess majority support.

When a union seeking representation rights has obtained authorization cards from a majority of the employees in a proposed unit, the first sentence of section 447.307(1) would clearly obligate it to request voluntary recognition from the public employer involved. This was the holding in *G. Pierce Wood State Mental Hospital*.[55] Once the union has requested voluntary recognition, it could be argued that the second sentence of section 447.307(1) would then impose upon the affected public employer an affirmative duty to ascertain both the correctness of the labor organization's majority claim and the appropriateness of the proposed unit. Such a statutory interpretation presumably would obligate the employer to make an expeditious and reasonably thorough investigation of the relevant circumstances surrounding the union's claim.[56] At the completion of such an undertaking,[57] the employer would presumably be bound by its conclusions. If it were to ascertain that the requesting union in fact enjoyed majority support among the employees in a proposed unit that the employer determined was appropriate for bargaining purposes, the employer would be legally required to extend voluntary recognition to that labor organization and the union could then petition PERC for

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Co., 150 N.L.R.B. 861 (1965); Kellogg Mills, 147 N.L.R.B. 342, 345 (1964); Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962); *cf.* Linden Lumber Div., Summer & Co. v. NLRB, *supra* at 310 n.10.

54. FLA. STAT. §447.307(1) (Supp. 1974) (emphasis added).

55. Dec. No. 75E-4-26 (April 15, 1975); see notes 22-37 *supra* and accompanying text.

56. If the employer were to endeavor to evaluate the actual extent of union support by polling the employees in the proposed unit, it should reasonably be expected to follow the safeguards established by the NLRB regarding such employee polls to prevent undue intimidation or coercion of workers: (1) The purpose of the poll must be to determine the truth of the union's claim of majority status; (2) this purpose must be communicated to the employees; (3) assurances against any reprisals being taken must be given to the employees; (4) the employees must be polled by secret ballot to preserve the anonymity of union supporters; and (5) the employer must not engage in contemporaneous unfair labor practices or otherwise create a coercive atmosphere that would impermissibly inhibit union support or activity. Northeastern Dye Works, 83 L.R.R.M. 1225 (1973); Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967). *See also* Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954). *Cf.* General Mercantile Hardware Co. v. NLRB, 461 F.2d 952 (8th Cir. 1972); Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964).

57. Under this approach the failure of the public employer to make a good faith investigation of the union's claim would likely constitute a violation of the PERA. *See* FLA. STAT. §§447.501(1)(a), (c) (Supp. 1974).

certification.[58] On the other hand, were the employer either to question the employee organization's claim of majority support or challenge the appropriateness of the proposed unit, the union, in the absence of employer unfair labor practices precluding the holding of a fair representation election,[59] would be forced to invoke the certification election authority of PERC.[60] However, while an interpretation imposing such a substantial affirmative burden upon public employers presented with recognition demands might initially be appealing, other considerations militate in favor of a less obligatory approach.

If public employers were affirmatively required to investigate thoroughly the propriety of every recognition claim they received, substantial problems would undoubtedly develop. While endeavoring to ascertain true employee sentiment regarding the union presenting the recognition demand, many unsophisticated employers would likely utilize techniques that might well constitute technical violations of the strict rules established to protect employees from intimidating or coercive questioning concerning their opinions regarding a labor organization.[61] In addition, in those instances where an employer decided to decline a union's request for recognition, it might be presented with an unfair labor practice charge that it had not utilized sufficiently thorough investigatory techniques or that it had challenged the appropriateness of the proposed bargaining unit in bad faith.[62] In such situations, the resulting litigation would be expensive and undoubtedly more protracted than the procedure required to conduct a regular PERC certification election. Futhermore, while it might be argued that a public employer easily could avert these difficulties by merely examining the authorization cards presented by the labor organization and comparing the number of such cards with the total complement of employees in the proposed unit, this approach might fail to protect fully the rights of the workers. It would mandate the certification of a labor organization based solely upon authorization cards, which are sometimes executed by employees because of social pressure, union misrepresentations,[63] or

58. *See* FLA. STAT. §447.307(1) (Supp. 1974), set forth in note 16 *supra*. Pursuant to this certification procedure, PERC is authorized to consider only the appropriateness of the unit agreed upon by the union and employers. *But see* text accompanying notes 70-75 *infra* regarding the legal consequences occasioned by the voluntary grant of recognition by an employer to a labor organization that does not in fact enjoy majority support.

59. See text accompanying notes 112-128 *infra*, regarding the legal effect of employer unfair labor practices that would prevent a fair election.

60. *See* FLA. STAT. §§477.307(2), (3) (Supp. 1974), set forth in note 16 *supra*. Regarding the certification election procedures prescribed by the PERA, see text accompanying notes 90-112 *infra*.

61. See note 56 *supra* regarding the strict rules that have evolved under the NLRA pertaining to this area. It should also be noted that an approach imposing such an affimative investigative duty upon public employers would place an extreme burden upon governmental entities employing large numbers of workers, particularly where they work at various facilities located in different geographical regions.

62. *See* note 57 *supra*.

63. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 602-03 (1969); Marie Phillips, Inc., 178 N.L.R.B. 340 (1969), *enforced*, 443 F.2d 667 (D.C. Cir. 1970); Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963).

even actual coercion. Recognizing these realities, the United States Supreme Court has clearly indicated that a secret ballot representation election, which is generally free from such pressures, is the preferred method for safeguarding the rights of employees.[64]

The problems that would be created by a statutory interpretation imposing a substantial affirmative investigatory obligation upon public employers presented with recognition demands could best be avoided by adopting an approach analogous to that currently followed[65] under the NLRA.[66] Once a public employer is presented with a request for recognition by a labor organization claiming majority support in a proposed bargaining unit, that employer should have two alternatives open to it. If it so desires, the employer should be permitted merely to decline the union's request, thereby forcing the union to seek a PERC certification election should it desire to pursue the matter.[67] So long as the employer does not commit subsequent unfair labor practices

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64. *See* NLRB v. Gissell Packing Co., 395 U.S. 575, 603 (1969). It is informative to note that the original NLRA permitted the Labor Board to base its certification of a labor union upon either a secret ballot election or majority support established by "any other suitable method." 49 Stat. 449, 453 (1935). However, recognizing the preferability of secret ballot elections, Congress amended the Act in 1947 to permit certification to be based only upon the results of a representative election. 61 Stat. 136, 144 (1947); 29 U.S.C. §§159(c), (e) (1970).

Although it is certainly true that an employer could itself eliminate the problems created by reliance upon authorization cards by conducting its own secret ballot election, it would certainly be better to have such an election conducted under the auspices of PERC, since no significant delay would necessarily be involved and the statutory rights of all of the interested parties would be optimally protected.

65. Although the NLRB had initially established a rule requiring an employer to accede to a union's request for recognition in the absence of a good faith doubt concerning the propriety of the labor organization's claim to majority status, it increasingly recognized that it would be preferable to eschew such a subjective test in favor of the relatively objective approach presently followed, which is much easier to administer and which it believes best effectuates the purposes of the NLRA. *See* Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718 (1971), *aff'd*, 419 U.S. 301 (1974); Aaron Brothers Co., 158 N.L.R.B. 1077 (1966); Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). *See generally* Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965); Note, *Refusal-To-Recognize Charges Under §8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966). For a discussion of the post-*Gissel Packing* rules, see Christensen & Christensen, Gissel Packing *and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411 (1970).

66. See notes 50-53 *supra* and accompanying text. It should be emphasized that nothing in the specific language of §447.307(1) of the PERA clearly imposes such a heavy affirmative obligation upon public employers, thus it would in no way do violence to that provision to interpret it in a manner consistent with the practice presently followed under the corresponding NLRA section. *See* 29 U.S.C. §159(a) (1970).

67. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974). This would not impose any significant burden upon the requesting union, since it would surely possess authorization cards signed by over 30% of the employees in the proposed unit. *See* FLA. STAT. §447.307(2) (Supp. 1974). Furthermore, except in unusual cases, PERC would be able to have a certification election expeditiously conducted, which would normally resolve the entire representation issue.

that would preclude the holding of a fair representation election,[68] it should be entitled to withhold any recognition of a bargaining representative until a labor organization has been certified by PERC as the winner of a properly conducted certification election.[69] On the other hand, were the public employer to be satisfied that the requesting union actually possesses majority support with respect to a proposed unit that the employer agrees would be appropriate for collective bargaining purposes, it would be free to accord that labor organization immediate voluntary recognition. However, before extending such recognition to an employee organization, the public employer should be certain that the requesting organization *in fact* enjoys majority support.

*Extension of Recognition to Minority Unions.* In *International Ladies Garment Workers Union v. NLRB*,[70] the United States Supreme Court held that, where an employer granted exclusive recognition to a labor organization that did not actually possess majority support among the employees in the proposed unit at the time recognition was extended, both the employer and the union committed unfair labor practices.[71] The Court indicated that the good faith belief of both the employer and the union that the labor organization enjoyed majority status at the time representation rights were granted was irrelevant, since the infringement of employee rights concomitant with the extension of recognition to a union that did not in fact possess majority support constituted a per se violation of the NLRA.[72] Thus neither good faith nor honesty of purpose could excuse the parties' improper conduct. Furthermore, the fact that the union had obtained actual majority support soon after it had received recognition was similarly no defense, since the attainment of such majority status could well have resulted from the impermissible advantage that had been provided to it by the premature extension of exclusive representation rights.[73]

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It should be noted that this is the approach recommended by the Office of the PERC General Counsel. *See* Dismissal Report, City of Winter Park, Case No. 8H-CA-756-2019 (March 3, 1975). However, on June 10, 1975, the Commission reversed the dismissal recommendation of the General Counsel and ordered the refusal to bargain unfair labor practice charge reinstated, thus indicating that PERC would prefer to consider the entire matter before deciding whether to accept either the NLRA approach, or the affirmative obligation concept suggested by the charging labor organization. Unfair Labor Practice Charge Reinstatement Order, City of Winter Park, Case No. 8H-CA-756-2019 (June 10, 1975). See text accompanying notes 38-43 *supra*.

68. See text accompanying notes 76-80 *infra* regarding the rules applicable to the situation where an employer actually commits unfair labor practices affecting a labor union's organizing efforts.

69. See text accompanying notes 90-112 *infra* regarding certification election procedures under the PERA. Support for the interpretation proposed herein is found in McGuire, *supra* note 2, at 61, 66.

70. 366 U.S. 731 (1961).

71. The employer's conduct constituted a violation of §§8(a)(1), (2) of the NLRA, while the union was culpable under §8(b)(1)(A).

72. 366 U.S. at 737-39.

73. *Id.* at 736. For NLRB decisions finding unfair labor practice violations in cases involving similar circumstances, see Lion Country Safari, Inc., 194 N.L.R.B. 1227 (1972); Ellery

Since the language contained in the pertinent sections of the PERA is, in all relevant aspects the same as that found in the corresponding NLRA provisions,[74] it would reasonably appear that a public employer acts at its peril in extending voluntary recognition to a labor organization where it has not been conclusively established that the union actually enjoys majority support among the employees in the proposed bargaining unit.[75] Nevertheless, where a public employer has carefully satisfied itself that a union's claim of majority status is well-founded, it may, if it desires, accord voluntary recognition to it, and the union may then petition the PERC for certification.

*Recognition-Certification Procedure Before PERC.* Under the recognition-certification procedure of section 447.307(1),[76] PERC is empowered only to review the appropriateness of the unit agreed upon by the public employer and the recognized labor organization.[77] Furthermore, a literal reading of that provision would appear to require the Commission either to accept and certify the actual unit stipulated by the parties, should it find the unit appropriate, or reject the certification petition entirely, should it determine that the agreed upon unit is inappropriate. However, such an "all or nothing" approach should be eschewed in favor of a more reasonable alternative that would not do violence to the legislative intent expressed in section 447.307(1).

If PERC were to conclude that a technically inappropriate proposed unit would become appropriate if it were modified slightly, it should certainly be empowered to certify the petitioning union with respect to the modified unit, assuming, of course, that its majority status remains intact.[78] If the public employer had no objection to the slight alteration of the proposed unit, this procedure would eliminate the need for a time-consuming repetition of the formal recognition-certification procedural steps.[79] On the other hand, even if

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Prods. Mfg. Co., 149 N.L.R.B. 1388 (1964); Kenrich Petrochems., Inc., 149 N.L.R.B. 910 (1964); Sinko Mfg. & Tool Co., 149 N.L.R.B. 201 (1964).

74. *Compare* FLA. STAT. §§447.501(1)(a), (e), (2)(a) (Supp. 1974), *with* §§8(a)(1), (2), 8(b)(1)(A) of the NLRA.

75. Extreme circumspection would certainly be required where more than one labor union is engaging in simultaneous organizing efforts regarding the same employees, since it is generally considered to constitute an unfair labor practice where an employer extends recognition to one of several competing unions. In such cases, a real question concerning representation is deemed to exist, which can reasonably be resolved only through resort to the certification election process. *See* Shea Chem. Corp., 121 N.L.R.B. 1027 (1958); Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945); *cf.* Cleaver-Brooks Mfg. Corp. v. NLRB, 264 F.2d 637 (7th Cir.), *cert. denied*, 361 U.S. 817 (1959).

76. *See* FLA. STAT. §447.307(1) (Supp. 1974), set forth in note 16 *supra*.

77. *But see* text accompanying notes 70-75 *supra*, regarding the unfair labor practice liabilities pertaining to the grant of exclusive representation status to a union that does not actually enjoy majority support.

78. *See* McGuire, *supra* note 2, at 69 n.213. PERC has apparently decided to follow this course of action. *See* City of Titusville, Case No. 8H-RA-756-2090, Dec. No. 75C-73-108 (July 2, 1975).

79. *See* 2 FLA. ADMIN. CODE 8H-2.01-.06. An additional caveat relating to PERC's processing of recognition-certification petitions should be noted. Although the PERA specifically limits the Commission's function with respect to such petitions to a review of the

the employer were not satisfied with the modified unit, it would not have any bona fide basis for complaining to the PERC about its certification order, since the labor organization would still enjoy clear and indisputable majority support[80] over a unit found by the Commission to be appropriate. The prior unit determination decision would be *res judicata* with respect to PERC itself, and the public employer, if it desired to contest the decision, would be forced to seek judicial review by a district court of appeal.

*Judicial Review of PERC Certification Determinations.* Section 447.503(7) of the PERA[81] provides in relevant part:

> Any person aggrieved by a final order of the commission granting or denying in whole or in part the relief sought, may obtain a review of such order by filing in the appropriate district court of appeal a petition praying that the order of the commission be modified or set aside.

Although it might initially appear that this provision would grant a public employer dissatisfied with a PERC certification decision the right to direct judicial appeal, a careful examination of the section indicates that such direct appellate review is not available.

It is important to recognize that the judicial review provision is part of the over-all section pertaining to "charges of unfair labor practices."[82] Further-

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appropriateness of the proposed units (*see* note 76 *supra* and accompanying text) there may well be a situation that would require the consideration of other fundamental principles. If while a properly filed recognition-certification petition were pending, a petition seeking a secret ballot representation election was timely filed by a competing labor organization seeking to represent the same group of employees and that was accompanied by a requisite 30% showing-of-interest (*see* note 92 *infra* and accompanying text), the Commission probably should dismiss the recognition-certification petition and process the election-certification petition instead. The filing of the latter petition by the competing union would certainly be sufficient to indicate that a real question concerning representation existed that only could be fairly resolved through a secret ballot election (*see* note 75 *supra*). The labor organization that initially filed the recognition-certification petition would surely have sufficient support to intervene in the resulting representation proceeding, thus guaranteeing all employees a fair opportunity to select the true representative of their choice. If, on the other hand, PERC were merely to continue to process the prior recognition-certification petition, ignoring the competing election-certification petition, it would create the substantial risk that the Commission would inadvertently become involved in a situation where it might improperly grant certification to a union when it was not sufficiently clear that it in fact enjoyed majority support (*see* discussion notes 70-75 *supra*). However, if the subsequent election-certification petition were not filed until *after* PERC had processed the prior recognition-certification petition and had extended certification to the specified labor organization, the election-certification petition should then be dismissed due to the eleven-month bar contained in the Commission rules. 2 FLA. ADMIN. CODE 8H-3.3(a).

80. Since the public employer would have itself already independently verified the clear majority status of the union before initially agreeing to grant it recognition, it would most likely constitute an unlawful refusal to bargain were the employer to deny the labor organization representation status with respect to the slightly modified unit based upon an alleged doubt as to the majority support issue. See cases cited note 53 *supra*.

81. *See also* FLA. STAT. §447.503(5) (Supp. 1974).

82. *See* FLA. STAT. §447.503 (Supp. 1974).

more, appeal is granted only with respect to a "*final order* of the commission." Although sections 447.503(4)(a) and (b),[83] which define the unfair labor practice authority of PERC, specify that at the conclusion of any such proceeding the Commission shall cause to be issued *"an order"* either remedying unfair labor practice violations or dismissing the charge if no such violations are found, the PERC is not empowered to issue "orders" under the PERA certification provisions. Sections 447.307(1) and (3)(b)[84] specifically authorize only the issuance of a "certification." It clearly appears that the legislature intended to permit only direct judicial review of final PERC *orders* pertaining to unfair labor practice cases.[85] Since the PERA conspicuously eschews the term "order" with respect to certification decisions, no such direct court appeal would be available regarding such decisions.[86]

A public employer that desires judicial review of representation issues raised in a certification case would generally have to refuse to bargain with the certified labor organization to achieve its goal.[87] The Commission would most likely consider its prior representation determination to be *res judicata* with respect to the case,[88] and expeditiously issue an unfair labor practice order, from which the employer could then obtain direct appellate review.[89] Although this rather convoluted appeal procedure might appear to some to be unreasonably cumbersome, it does provide public employers with court review of representation determinations that they strongly oppose, while simultaneously encouraging parties to accept the decisions of PERC in most instances, thereby avoiding needless delays before bona fide collective bargaining can commence.

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83. FLA. STAT. §§447.503(4)(a), (b) (Supp. 1974), provide in relevant part:

"(a) If . . . the commission finds substantial evidence that an unfair labor practice has been committed, then it shall state its findings of fact and issue and cause to be served *an order* requiring the respondent party to cease and desist from the unfair labor practice . . . .

"(b) If . . . the commission finds that the person or entity named in the charge has not engaged in and is not engaging in the unfair labor practice, the commission shall state its findings of fact and issue *an order* dismissing the charge." (emphasis added).

84. *See* FLA. STAT. §§447.307(1), (3)(b) (Supp. 1974), set forth in note 16 *supra*.

85. Although the legislative history does not clearly disclose the precise reason for the distinction between unfair labor practice and certification cases, it may well have been premised upon the desire to expedite certification procedures by generally precluding protracted judicial review of such PERC determinations.

86. The United States Supreme Court has recognized the propriety of the analysis set forth herein. It has specifically interpreted §10(f) of the NLRA, which utilizes language almost identical to that found in §447.503(7) of the PERA to define the scope of judicial review of "final orders" of the NLRB, as only permitting direct review of unfair labor practice decisions, and not of representation determinations. See American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940). *But see* Minnesota State College Bd. v. PERB, 89 L.R.R.M. 2833 (Minn. 1975).

87. Only where PERC issues a certification decision that clearly violates an express provision of the PERA should direct resort to a judicial tribunal be permitted. Boire v. Greyhound Corp., 376 U.S. 473 (1964); Leedom v. Kyne, 358 U.S. 184 (1958).

88. *Cf.* NLRB v. Magnesium Casting Co., 401 U.S. 137 (1971).

89. *See* AMERICAN BAR ASS'N, *supra* note 5, at 887. Unfortunately, no similar procedure would be available to labor organizations that desired judicial review of PERC representation decisions with which they did not agree.

*Representation Status Through a Certification Election*

If a labor organization is unable to utilize the recognition-certification procedures available under the PERA because it has not obtained the required voluntary recognition from the public employer,[90] it can alternatively seek certification by petitioning the PERC for a secret ballot representation election.[91] To obtain such an election, the union would first have to satisfy several statutory prerequisites.

*General Prerequisites to Filing of Election Petition.* A petition seeking a certification election will only be considered by PERC where it is filed in a timely manner and is accompanied by properly executed authorization cards signed by at least 30 per cent of the employees in the unit for which the union is seeking certification.[92] If a valid representation election covering the employees in the unit for which certification is currently being sought[93] has been conducted during the past year, the petition may not be filed prior to eleven months from the date of that election,[94] and no election may be held until twelve months have elapsed.[95] Furthermore, if another labor organization currently representing the employees in the proposed unit has already negotiated a collective bargaining agreement covering such employees, that contract will generally[96] preclude the filing of a certification election petition until the last 90 to 150 days before its expiration date.[97] In order to permit the present

90. See text accompanying notes 50-69 *supra*.

91. *See* FLA. STAT. §§447.307(2), (3) (Supp. 1974), set forth in note 16 *supra*.

92. *See* FLA. STAT. §447.307(2) (Supp. 1974), set forth in note 16 *supra*. It should also be noted that any labor organization that desires recognition or certification status under the PERA must previously have satisfied the registration requirements of FLA. STAT. §447.305 (Supp. 1974).

93. PERC should follow the NLRB practice of applying only the prior election bar rule to the situation where the election being sought would involve either the same unit covered by the prior representation election or a subdivision thereof. A prior election in a given unit should not preclude an election within one year covering a broader, more inclusive unit, since it would not be appropriate to deny those who did not have the opportunity to vote in the prior election the chance to have an immediate representation election. *See* Robertson Bros. Dep't Store, Inc., 95 N.L.R.B. 271 (1951); AMERICAN BAR ASS'N, *supra* note 5, at 164.

94. 2 FLA. ADMIN. CODE 8H-3.3(a).

95. *See* FLA. STAT. §447.307(3)(d) (Supp. 1974), set forth in note 16 *supra*. It should be noted, however, that an election conducted within the preceding year would not prevent a public employer from presently extending voluntary recognition to a requesting labor organization, since the twelve-month statutory bar pertains only to the holding of another *election*. *Cf.* Concren, Inc., 156 N.L.R.B. 592 (1966), *enforced*, 368 F.2d 173 (7th Cir. 1966), *cert. denied*, 386 U.S. 974 (1967).

96. If the existing contract contained a clearly illegal union dues checkoff provision, *cf.* Gary Steel Supply Co., 144 N.L.R.B. 470 (1963), or provided for illegal forms of discrimination, *cf.* Pioneer Bus Co., 140 N.L.R.B. 54 (1962), it should not be permitted to operate as a bar to an election petition. However, the mere inclusion of an illegal clause that does not act as a restraint upon the labor rights of employees should not ipso facto disqualify the contract as a bar. *Cf.* Food Haulers, Inc., 136 N.L.R.B. 394 (1962).

97. 2 FLA. ADMIN. CODE 8H-3.3(b). No collective bargaining agreement may provide for a term of existence exceeding three years. *See* FLA. STAT. §447.309(5) (Supp. 1974).

parties to have the opportunity to negotiate a new contract without the disruptive influence of a competing union, no election petition may be filed during the last 90 days of a collective bargaining agreement.[98] However, if the existing agreement expires without a new contract being negotiated, a petition may then be filed any time prior to the execution of a new agreement.[99]

*Prerequisite Obligations of Majority and Minority Petitioners.* PERC has decided that different petition prerequisites pertain to labor organizations, depending upon whether they possess majority employee support in their proposed units at the time their election petitions are filed.[100] If a union enjoying majority support does not request voluntary recognition from the public employer involved prior to the time it files its election petition, the Commission will dismiss the petition as it did in the *G. Pierce Wood State Mental Hospital* case.[101] However, if the petitioning labor organization possesses only minority support, no such prerequisite is to be imposed.[102]

The doctrine announced by PERC is clearly supported by the relevant language of sections 447.307(1) and (2). Section 447.307(1) expressly provides: "Any employee organization which is designated or selected by a *majority* of public employees in an appropriate bargaining unit as their representative for purposes of collective bargaining *shall request recognition* by the public employer." Furthermore, section 447.307(2) provides: "If the public employer *refuses to recognize* the employee organization the employee organization may file a petition" for a certification election. The inescapable conclusion to be drawn from this language is that once a labor organization obtains majority support with respect to a proposed unit, it must first request voluntary recognition from the relevant public employer *and* have that request be denied before it can properly petition for a certification election.[103] However, while PERC's enunciated policy does conform to the strict statutory language, it might be appropriate for it to consider a slight alteration of its rule regarding

98. It should be noted, however, that if an election petition were timely filed during the ninety- to one-hundred-fifty-day period preceding the expiration date of an existing collective bargaining contract, the public employer should not be permitted thereafter to negotiate with the incumbent labor organization concerning a new agreement until the question concerning representation raised by the petition of the competing union has been definitively resolved. *Cf.* Shea Chem. Corp., 121 N.L.R.B. 1027 (1958). Nevertheless, the incumbent union should still be allowed to continue administering the existing agreement.

99. *Cf.* Deluxe Metal Furniture Co., 121 N.L.R.B. 995 (1958).

100. See text accompanying notes 22-37 *supra.*

101. Dec. No. 75E-4-26 (April 15, 1975).

102. State of Florida, Sumter Correctional Institution, Dec. No. 75E-3-24 (April 22, 1975). The petitioner would, of course, still have to demonstrate at least 30% support. See note 92 *supra* and accompanying text.

103. Since the number of employees in a proposed unit could easily be ascertained by an inspection of the public personnel records of the governmental entity involved, a labor organization could definitively know whether it possessed majority support, except in the unusual situation where it possessed only authorization cards signed by approximately 50% of the workers in a proposed unit and it was not sure which workers might be excludable from the unit because of their managerial or confidential status. *See* FLA. STAT. §§447.203(3)-(5) (Supp. 1974).

majority unions that would ameliorate the time-consuming effects of the present doctrine while still effectively accomplishing the objective apparently intended by the legislature.[104]

PERC should consider following the general doctrine established under the NLRA, which treats the filing of a representation election petition as an automatic request for employer recognition.[105] Pursuant to the Florida public documents law,[106] the governmental employer could then examine the authorization cards filed by the union with PERC. If the employer does not, within a reasonable period of time, grant voluntary recognition to the petitioning labor organization, the Commission could consider the constructive recognition request as having been denied, and could then proceed with its processing of the election petition. This would avoid needless waste of valuable time and eliminate the necessity of requiring the union to repeat the entire election petition procedure. Nevertheless, no such problem should be encountered by a petitioning minority union.

Since a minority union would not be "designated or selected by a majority of public employees in an appropriate unit," the recognition request requirement of section 447.307(1) would be inapplicable with respect to such a union, as PERC recognized in *Sumter Correctional Institution*.[107] However, since section 447.307(2) seems to imply that a labor organization must be refused recognition by an employer before it may petition for a certification election, one must still consider whether an unsuccessful demand for recognition should be a *sine qua non* to the filing of a representation election petition by even a minority union.[108] Although the mere request for exclusive recognition by a labor organization not enjoying majority support might not constitute an unfair labor practice,[109] it would clearly be unlawful both for an employer to accede to such a request and for the requesting minority union to accept such recognition.[110] Thus, if a denial by a public employer of a request for recogni-

104. Presumably the legislature desired to obviate the necessity of a certification election where the organizing labor union and the public employer both agreed that the union possessed clear majority support in a concededly appropriate bargaining unit.

105. *See* "M" System, Inc., 115 N.L.R.B. 1316 (1956). *See also* §9(c)(1)(A) of the NLRA, which imposes a similar requirement that a union first unsuccessfully request recognition before it files an election petition.

106. *See* FLA. STAT. §§119.01-.10 (1973).

107. State of Florida, Sumter Correctional Institution, Dec. No. 75E-3-25 (April 22, 1975); see text accompanying notes 22-37 *supra*.

108. Although it might be possible to argue that by reading §§447.307(1) and (2) of the PERA in conjunction, one might discern a legislative desire to permit only unions possessing majority support to petition PERC for certification elections, such a statutory interpretation should be rejected. It would appear to ignore entirely the 30% showing-of-interest requirement of §447.307(2), for if only majority unions were supposed to be able to petition for elections, surely a 50% showing-of-interest would have been required. Therefore, to avoid the undesirable prospect of rendering the 30% language mere surplusage, it would be reasonable to assume that the legislature contemplated that minority unions that possessed at least 30% support would be allowed to petition for elections. *See* McGuire, *supra* note 2, at 71-72.

109. *See* NLRB v. Drivers, Chaufferus, Helpers, Local 639, 362 U.S. 274 (1960).

110. International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961); see text accompanying notes 70-75 *supra*.

tion were a prerequisite to the filing of an election petition by even a minority labor organization, the implication would be that the legislature intended for such a minority union to request that the public employer join it in committing an unfair labor practice. Surely such an absurd result could not have been contemplated by the legislature.[111] Therefore, a prior unsuccessful recognition request should not be considered a statutory prerequisite to the filing of a certification election petition by a minority union.[112]

*Representation Status Through an Unfair Labor Practice Proceeding*

Under the NLRA a labor organization does not necessarily have to win a representation election or be the recipient of voluntary employer recognition to become the exclusive bargaining representative for employees constituting an appropriate unit. It has been traditionally recognized that a labor union could obtain exclusive representative status through an unfair labor practice proceeding culminating in an order requiring an offending employer to recognize and bargain with an adversely affected union in order to rectify the improper effects of the unlawful employer practices. For many years, in such cases, the NLRB utilized evaluative techniques that focused primarily upon the subjective intent of the employer involved. If an employer refused to grant recognition to a union claiming majority support for the bad faith purpose of thereafter dissipating its employee support, the Labor Board would issue a remedial bargaining order to prevent the employer from benefiting from its unlawful conduct.[113] However, in recent years the NLRB has favored an approach that objectively evaluates the effects of an employer's unfair labor practices upon the representation election process and the United States Supreme Court has specifically sanctioned this method for resolving such cases.

When an employer is presented with a request for voluntary recognition from a labor organization asserting majority support, it is not legally required to accede to that request. In fact, not only may the employer reject the request, but it may thereafter do nothing, thus forcing the requesting union to file a representation election petition with the NLRB.[114] However, if the employer

111. While a union lacking majority support could avoid this problem by informing the public employer at the time of its recognition request of its minority status, such a procedure would certainly be a fruitless and unnecessarily time-consuming endeavor.

112. Although the PERC election procedures are fairly straightforward, brief mention should be made of the fact that the Commission currently requires the public employer and the petitioning labor organization to split the costs of the certification election, 2 FLA. ADMIN. CODE 8H-3.29. Since it is the Commission that is directed to effectuate the administrative provisions of the PERA election process and not the parties themselves, this requirement may well constitute action in excess of PERC's authority. It might further constitute an impermissible monetary impediment to the exercise by public employees of their Florida constitutional right to select representatives for collective bargaining purposes. To alleviate this unfortunate circumstance, the legislature should endeavor to increase the Commission budget sufficiently to enable it to carry out its statutory duties without having to depend upon monetary support from the parties invoking its assistance.

113. See citations note 65 *supra*. *See generally* Lesnick, *Establishment of Collective Bargaining Rights Without an Election*, 65 MICH. L. REV. 851 (1967).

114. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974). *See also* notes 65-69 *supra* and accompanying text.

subsequently commits unfair labor practices, it may thereby forfeit its right to have the representation question resolved through a secret ballot election by subjecting itself to the possibility of becoming the object of an NLRB remedial bargaining order obligating it to recognize the union immediately.[115]

In *NLRB v. Gissel Packing Co.*[116] the United States Supreme Court recognized the propriety of the NLRB's practice of dividing employer unfair labor practices into three categories in determining whether it would be appropriate to order an offending employer to recognize and bargain with the affected labor organization. Where the employer unfair labor practices are relatively minor, with a minimal impact upon the free choice of the employees involved, the Labor Board will refuse to issue a bargaining order, since its usual cease-and-desist authority should be sufficient to remedy adequately the unlawful practices and permit the holding of a fair representation election.[117] On the other hand, where the employer violations are sufficiently opprobrious to undermine the majority support already obtained by the adversely affected labor organization and to interfere significantly with the NLRB election process, a bargaining order may be utilized.

> If the Board finds that the possibility of erasing the effects of past [employer unfair labor] practices and of ensuring a fair election (or a fair rerun)[118] by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[119]

The *Gissel Packing* Court also indicated that in extreme cases involving "outrageous" and "pervasive" employer unfair labor practices that could not be ameliorated through the application of regular remedies, with the result that no fair and reliable election could possibly be conducted, a bargaining order might be issued without even inquiring into the question of whether the union ever actually enjoyed majority support.[120]

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115. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *See generally* Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards*, 6 GA. L. REV. 779 (1970); Note, NLRB v. Gissel Packing: *Bargaining Orders and Employee Free Choice*, 45 N.Y.U.L. REV. 318 (1970).

116. 395 U.S. 575 (1969).

117. *Id.* at 615.

118. Even where a representation election has been conducted that the petitioning union lost, a bargaining order in its favor may still be issued if the labor organization has filed proper objections to the election alleging unlawful employer practices that are both sufficient to cause the prior election to be set aside and of such magnitude as to convince the Labor Board that a bargaining order should be issued to protect the statutory rights of the employees involved. *See* Photobell Co., 158 N.L.R.B. 738 (1966); *cf.* Pure Chem. Corp., 192 N.L.R.B. 681 (1971); Irving Air Chute Co., 149 N.L.R.B. 627 (1964), *enforced*, 350 F.2d 176 (2d Cir. 1965).

119. 395 U.S. at 614-15. Such a bargaining order is considered appropriate only where it is established that at one time the labor organization actually possessed majority support. *Id.* at 614.

120. 395 U.S. at 613-14; *see, e.g.*, J. P. Stevens Co. v. NLRB, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971). It is apparently presumed in such extraordinary cases that

When deciding whether employer unfair labor practices have been so substantial as to preclude the holding of a fair representation election, the NLRB generally considers the circumstances and atmosphere as they existed at the time of the unlawful conduct, rather than considering subsequent occurrences that might have ameliorated the adverse effects of such practices and thus might inure to the wrongdoer's benefit.[121] However, several circuit courts have disagreed with this approach, contending that no bargaining order should issue unless the NLRB has concluded that at the time such order is issued, the electoral atmosphere is such as to preclude the likelihood of a fair election.[122] Although the Labor Board practice of focusing upon circumstances existing at the time of the commission of the employer unfair labor practices perhaps ignores the preference for secret ballot representation elections whenever they can be conducted fairly,[123] it must be recognized that evaluating the situation at the time the bargaining order would be directed has the effect of rewarding recalcitrant employers who successfully protract the unfair labor practice litigation. Nevertheless, the latter approach is the more appropriate, since the rationale underlying the issuance of a bargaining order is premised upon the impossibility of conducting a fair representation election. If such an election can be held at the time a bargaining order is issued, it would negate this rationale and indicate that the order was really being utilized to punish the unfair labor practice violator. Since the remedial authority of the NLRB is generally to be exercised only in a compensatory manner, it would appear that such a punitive measure would transcend the Labor Board's statutory authorization.[124]

With the exception of the NLRB's refusal to consider the effect on the election process of events occurring subsequent to employer unfair labor practice violations, the Florida Public Employees Relations Commission should adopt and apply principles similar to those currently used by the NLRB when determining whether a bargaining order should be utilized to remedy an employer's practices adversely affecting the right of its employees to select a bargaining representative. A comparison of the relevant PERA unfair labor practice provisions with their counterparts in the NLRA discloses

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the labor organization would certainly have obtained majority support but for the nefarious acts of the employer.

121. *See, e.g.,* Gibson Prods. Co., 185 N.L.R.B. 362 (1970). *Accord,* New Alaska Dev. Corp. v. NLRB, 441 F.2d 491 (7th Cir. 1971); NLRB v. L. B. Foster Co., 418 F.2d 1 (9th Cir. 1969).

The NLRB recently indicated that it would henceforth make bargaining orders retroactive to the date of the employer unfair labor practices that rendered such remedial action necessary, rather than allowing such orders to be only prospective from the date of their issuance. Trading Port, Inc., 219 N.L.R.B. No. 76, 89 L.R.R.M. 1565 (1975). Such an approach appropriately permits the affected labor organizations to endeavor through collective bargaining to deprive the recalcitrant employers of the benefit that they might otherwise derive from tactics intended to postpone improperly the representation rights of their employees.

122. *See, e.g.,* General Steel Prods., Inc. v. NLRB, 445 F.2d 1350 (4th Cir. 1971); NLRB v. American Cable Sys., Inc., 427 F.2d 446 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970).

123. See notes 63-64 *supra* and accompanying text.

124. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961); Consolidated Edison Co. v. NLRB, 305 U..S. 197 (1938).

that the two enactments are basically identical.[125] Furthermore, the remedial authority of PERC under section 447.503(4)(a)[126] is fundamentally the same as that provided the NLRB under section 10(c) of the NLRA.[127] It would thus seem most reasonable to expect PERC to interpret and apply the pertinent PERA provisions in a manner consistent with the way in which the NLRB effectuates the NLRA. For this reason, PERC should be willing to utilize a remedial bargaining order in most situations in which such an order would be issued by the NLRB if the offending employer involved were private. However, to conform to the specific procedural rules of the PERA, the Commission should not issue bargaining orders per se, but rather orders directing the public employer involved to grant voluntary recognition to the adversely affected labor organization as bargaining agent for the unit determined by the Commission to be appropriate. That labor organization could then petition PERC under section 447.307(1) for certification, and the governmental employer would thereafter be statutorily obligated to negotiate in good faith with it.[128]

## CONCLUSION

Although the recently enacted PERA provides public employees in Florida with significant and meaningful organizational and collective bargaining rights, that enactment unfortunately does not clearly define the exact procedures that an employee organization must utilize to obtain certification as the exclusive negotiating representative for a group of government workers. PERC will thus have the important task of interpreting the occasionally ambiguous PERA provisions in order to determine the procedures that should be followed. However, the PERA should not be interpreted in a vacuum. Since its pertinent provisions are analogous to those found in the NLRA, the Commission should find decisions that have interpreted that federal enactment to be of persuasive significance.

A labor organization should be able to obtain collective bargaining certification through three alternative methods. If it can convince a public employer that it possesses majority support among the employees in a concededly appropriate bargaining unit, that employer may accord it voluntary recognition, which it could use to obtain certification. Nevertheless, such a governmental employer should not be statutorily obligated to verify the veracity of a union's claim to majority status. So long as the employer does not independently ascertain the credibility of the labor organization's majority claim, it should be permitted to withhold voluntary recognition, thereby forcing that organization to seek certification through a secret ballot election. However, if the public employer were to commit unfair labor practices that would have

125. *Compare* FLA. STAT. §§447.501(1)(a)-(e) (Supp. 1974), *with* 29 U.S.C. §§158(a)(1)-(5) (1970).

126. FLA. STAT. §447.503(4)(a) (Supp. 1974).

127. 29 U.S.C. §160(c) (1970).

128. *See* FLA. STAT. §447.501(1)(c) (Supp. 1974), which makes it an unfair labor practice for a public employer to fail or refuse to bargain in good faith with the certified representative of its employees.

the effect of undermining the labor union's majority support and preclude the likelihood of a fair certification election, PERC should be willing to remedy the unlawful employer conduct by ordering it to provide voluntary recognition to the aggrieved labor organization. Such recognition would then enable the union to petition PERC for certification. Such procedures would be wholly consistent with those that have been adopted under the NLRA, and they would best effectuate the policies expressed in the PERA.