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THE CASE OF FRUSTRATED OR UNSUCCESSFUL PUBLIC EMPLOYEE COLLECTIVE BARGAINING: A REVIEW OF THE DEVELOPING LEGAL CONCEPTS IN FLORIDA

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INTRODUCTION

In a small but significant number of instances, the parties to Florida's new public employee collective bargaining process have failed to ratify labor contracts. The constitutional, statutory and administrative legal implications of these unsuccessful or frustrated bargaining efforts are the subject for review in this article. Interest in the law applicable to these matters has grown dramatically as participation in public employee bargaining has rapidly increased.[1] Furthermore, public awareness of collective bargaining problems has been heightened by frustrated or unsuccessful bargaining attempts which have resulted in either significant community disturbances or illegal strikes.[2]

Successful collective organization of public employees and the implied threat of collective bargaining to the continuity of all public services are contemporary facts.[3] Rational and effective legal concepts, applicable when bargaining fails, are therefore of the highest social importance. This article represents a review of the relevant legal concepts as they have developed to date in Florida. The article includes: a discussion of the historical and political background of Florida public employee bargaining, an analysis and survey of the bargaining obligation, impasse procedures and anti-strike pro-

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1. The effective date of Florida's current collective bargaining law was January 1, 1975. According to statistics compiled by the Florida Public Employees Relations Commission, as of December 13, 1978, more than 435 employee organizations had been certified representing in excess of 247,500 of the State's approximately 490,000 public employees. As of the same date, 10 additional elections were scheduled or pending scheduling and numerous negotiations for consent election agreements were then under way. Interview with Charles Magalian, Supervisor of Elections of the Florida Public Employees Relations Commission (Dec. 13, 1978). *See also* R. Johnson, *Recession Stalls Florida Unions*, FLORIDA TREND (November 1976.)

2. The last strikes of which this author has knowledge were the Hollywood security guards' strike of August 1976 and the Halifax Hospital Strike of April 1976. But see the discussion of the expanded definition of a strike in the text accompanying note 97 *infra*.

3. *See generally* U.S. DEP'T OF LABOR, SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS (1975) [hereinafter cited as *Summary*], in which every state except Mississippi is reported as having developed some legislative or policy guidelines for public sector labor relations.

visions of Florida law, and a discussion of the role of administrative procedure when bargaining fails.

Historical and Political Background of Public Employee Bargaining in Florida

Presaging much of modern labor theory, American economist, Henry Carter Adams, in 1896 suggested that collective bargaining, the formal labor contract, and grievance arbitration were imperative concepts in the continuing development of Anglo-American jurisprudence.[4] Adams argued that avoidance of industrial strife could be avoided only by recognizing some enforceable interest of the workers. In the system of production Adams, however, rejected the communist or socialist solution of collective ownership as falling outside the "regime of contract" which he regarded as "the vital principle of liberty in the industrial world."[5]

Adams' self-labeled "conservative" solution to the problem of industrial strife was clearly reflected some forty years later in the Wagner Act, the original enactment of the National Labor Relations Act (NLRA).[6] Authorities explain that the sponsors of the Wagner Act felt and still feel that the creation of enforceable rights to organize and bargain collectively in the private sector was the best method of achieving industrial peace while protecting personal and economic liberty to the maximum extent.[7] The Wagner Act was upheld by the Supreme Court in 1937 as a valid exercise of the congressional power to regulate interstate commerce.[8]

A state's authority to provide for public sector collective bargaining is based upon the state's residual police powers and does not depend upon the United States Constitution's commerce clause. Furthermore, under the majority holding of the United States Supreme Court in *National League of Cities v. Usery*,[9] it now appears that most prospective federal legislation in the area cannot rest directly upon the commerce clause as a constitutional foundation.[10]

Public sector collective bargaining laws together with comparable laws in the private sector share the purpose of protecting the public from disruptions in the flow of important goods and services of which the government has become a major provider.

In Florida, prior to the adoption of the 1968 constitution, public employees did not possess an absolute right to bargain collectively with their employers.[11]

4. Adams presented these thoughts in the first Presidential Address before the American Economic Association. H.C. Adams, *Economics and Jurisprudence*, in Two Essays by Henry Carter Adams 135-62 (1969).

5. *Id.* at 153.

6. 29 U.S.C. §§151-168 (1970) (originally enacted as Nat'l Labor Relations Act, ch. 372, §§151-168, 49 Stat. 449 (1935)).

7. A. Cox & D. Bok, Cases and Materials on Labor Law, 96-97 (1969).

8. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

9. 426 U.S. 833 (1976).

10. ABA Section of Labor Relations Proceedings 57 (1977). Consider, however, the familiar "indirect" funding oriented controls which the federal government widely uses.

11. *See* Craver & LaPeer, *The Legal Obligations of Governmental Employers and Labor*

In article I, section 6 of the new constitution, however, a new combination of three state labor relations principles was ratified as follows:

> 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.[12]

The next year in *Dade County Classroom Teachers Ass'n v. Ryan*,[13] the Florida supreme court interpreted the latter two provisions together to mean 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."[14]

Thus, three constitutional principles are operative with respect to public employees: the choice as to union membership or non-membership is privileged,[15] the collective bargaining right is privileged, and the right to strike is denied.[16] An inherent tension is apparent among these three principles which is not present in private sector collective bargaining. The right to bargain collectively in the private sector is usually accompanied by the right to engage in an economic strike, as well as the right to contract for a union shop unless the right to work concept is recognized.[17]

The *Ryan* court also pointed to the fact that public employees' bargaining rights were not fully implemented under the existing Florida statutes. The court urged the legislature to fill the definitional and procedural void. Three years later, in 1972, the court in *Dade County Classroom Teachers Ass'n v. The Legislature*,[18] indicated that it would soon be forced to judicially implement public employees' bargaining rights unless the legislature acted. Comprehensive public employee bargaining was initiated in Florida

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Organizations Under the Recognition-Certification Provisions of the Florida Public Employees Relations Act, 27 U. FLA. L. REV. 705, 705 n.2 (1975).

12. FLA. CONST. art. I, §6 (1968).

13. 225 So. 2d 903 (Fla. 1969).

14. *Id.* at 905.

15. In Florida Education Association/United, No. 76E-854 (Jan. 14, 1976), the Florida Public Employees Relations Commission denied a petition for Adoption of Agency Rules which called for allowance of a "fair share" fee assessment from non-union unit members for services rendered by an employee organization to all members. The Commission reasoned that such an assessment would violate the "right to work" doctrine of article I, section 6 of the Florida Constitution. That decision and reasoning were affirmed on appeal. Florida Educ. Ass'n/United v. Pub. Employees Relations Comm'n, 346 So. 2d 551 (Fla. 1st D.C.A. 1976).

16. It can be argued that a statutorily granted "privilege" to strike under controlled circumstances would not be unconstitutional. Note, however. that in FLA. STAT. §447.201(4) (1977), the Statement of Policy to the PERA, the legislature refers to a "constitutional prohibition against strikes by public employees. . . ."

17. The right to work concept is an assurance that a person will not be denied employment because of non-membership in a labor organization. For an example of a right to work provision, *see* FLA. CONST. art. I, §6 (1968).

18. 269 So. 2d 684 (Fla. 1972).

in 1975 when the legislature replaced the year-old Fire Fighters Bargaining Act[19] wth the Florida Public Employees Relations Act (PERA).[20]

The Act is as broad as article I, section 6 of the Florida Constitution. It creates a Public Employees Relations Commission (PERC) to administer and enforce its terms.[21] The PERA clearly reflects the right to work doctrine,[22] sets forth a sophisticated statutory structure supporting the constitutional right to bargain collectively,[23] and provides severe sanctions for engaging in a public employee strike.[24] Thus, the inherent tension among the constitutional principles is carried forward into the Act. Nowhere is the tension more apparent than in the statutory sections which are the particular concern of this article – those provisions dealing directly or indirectly with the exceptional case of frustrated or unsuccessful bargaining. Such unsuccessful bargaining accentuates the internal stress resulting from a legal right to bargain collectively coupled with a prohibited right to strike.

The Role of Statutory Provisions Dealing With Frustration in the Bargaining Process

The first step in analyzing the function of those statutory provisions in the PERA concerned with frustration in the bargaining process is the examination of the nature and scope of the statutory bargaining process in general. Statutes addressing public sector bargaining are frequently divided into two broad categories: those mandating collective negotiations comparable to the bargaining obligation imposed in the private sector, and those which impose upon the public employer only an obligation to meet and confer with employees before unilaterally making decisions about terms and conditions of employment. Most state public sector labor statutes do not fit completely into one category or the other, although the trend appears to be away from the meet and confer model and toward the stronger obligation imposed in a modified collective negotiations framework.[25]

The Florida PERA contains provisions typical of a collective negotiations statute. The bargaining obligation is set forth in section 309 of the Act as follows:

> After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. The chief executive officer or

19. Fla. Stat. §§447.20-.34 (repealed 1975).

20. Fla. Stat. §§447.201-.607 (1977).

21. The statute as amended in 1977 provides for a full time commisison of three members. Fla. Stat. §447.205 (1977).

22. *See* Fla. Stat. §§447.301, .303 (1977).

23. See text accompanying notes 25-32 *infra*.

24. See text accompanying notes 94-120 *infra*.

25. *See generally* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 895-933 (1973) [hereinafter cited as *Edwards*].

his representative and the bargaining agent or its representative shall meet at reasonable times and bargain in good faith.[26]

In a 1977 amendment to the Act, the legislature attempted to define "good faith bargaining," using both positive examples of good faith efforts and negative examples of conduct indicating bad faith.[27] The amended statutory language generally reflects established private sector principles and does not appear to conflict with announced decisions under the prior law.[28]

The Act designates "refusal to bargain collectively" or "failing to bargain collectively in good faith" as forbidden unfair labor practices for either side.[29] As a general rule, unfair labor practices are subject to administrative sanctions under the PERA[30] with ultimate enforcement power vested in the district courts of appeal.[31]

While the statutory scheme mandating and enforcing collective negotiations in the PERA draws heavily on similar provisions in private sector labor law,[32] the analogy is not precise. The modifications from a pure collective negotiations scheme are numerous and fundamental, particularly with respect to those provisions dealing with frustration in the bargaining process.

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26. FLA. STAT. §447.309 (1977).

27. FLA. STAT. §447.203(17) (1977) reads as follows: "'Good faith bargaining' shall mean, but not be limited to, the willingness of both parties to meet at reasonable times and places, as mutually agreed upon, in order to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord. It shall include an obligation for both parties to participate actively in the negotiations with an open mind and a sincere desire, as well as making a sincere effort, to resolve differences and come to an agreement. In determining whether a party failed to bargain in good faith, the commission shall consider the total conduct of the parties during negotiations as well as the specific incidents of alleged bad faith. Incidents indicative of bad faith shall include, but not be limited to, the following occurrences: (a) Failure to meet at reasonable times and places with representatives of the other party for the purpose of negotiations. (b) Placing unreasonable restrictions on the other party as a prerequisite to meeting. (c) Failure to discuss bargainable issues. (d) Refusing, upon reasonable written request, to provide public information, excluding work products as defined in §.447.605. (e) Refusing to negotiate because of an unwanted person on the opposing negotiating team. (f) Negotiating directly with employees rather than with their certified bargaining agent. (g) Refusing to reduce a total agreement to writing."

28. *See, e.g.*, Duval County School Bd. v. PERC, 353 So. 2d 1244 (Fla. 1st D.C.A. 1978); School Bd. of Escambia County v. PERC, 350 So. 2d 819 (Fla. 1st D.C.A. 1977).

29. *See* FLA. STAT. §447.501(1)(f) (1977) with respect to a public employer and FLA. STAT. §447.501(2)(c) (1977) with respect to a public employee organization.

30. FLA. STAT. §447.503(4)(a) 1977).

31. FLA. STAT. §447.504 (1977).

32. The Second District Court of Appeal has expressly noted that the procedures incorporated in the PERA were similar to those followed in labor matters at the federal level. Public Employees Relation Comm'n. v. City of Naples, 327 So. 2d 41 (Fla. 2d D.C.A. 1976). Private sector labor precedent is, because of that similarity, widely cited under the Act. PERC has held that private sector precedent, while not binding, should be given "great weight." Liuna, Local Union 517, 1 FPER 39 (Oct. 10, 1975). Moreover, the Florida Supreme Court has held that court decisions under a statute or statutory provisions of another jurisdiction should be accepted in Florida when the legislature in Florida enacts a substantially similar statute or provision. State v. Aiuppa, 298 So. 2d 391, 394 (Fla. 1974).

Usually in the private sector, frustration in collective bargaining will ultimately be resolved by a test of the relative economic strength of the parties. Both the strike and lockout are permissible within the parameters of good faith bargaining. The general rule in the private sector is that an economic showdown may be continued indefinitely without interference by law. In Florida and a majority of other jurisdictions, such economic combat is not permitted in the context of public employee collective bargaining. Part of the PERA provisions for frustrated or incomplete bargaining is, therefore, a complex set of anti-strike provisions.[33]

In addition, the Act sets forth a series of provisions designed to relieve the tension arising when bargaining breaks down and the exercise of collective economic power by public employees is foreclosed. The relevant statutory provisions are designated "impasse procedures."[34] Summarily described, impasse procedures under the PERA include four major sequential components: (1) permissive mediation, (2) public advisory arbitration, (3) public hearing, and (4) resolution of remaining issues by legislative hearing of the government involved.[35]

A number of arguments have been advanced justifying the proscription of economic confrontation in public sector labor relations.[36] Apparently widespread public acceptance of these arguments has shaped the present Florida law, including the statutory impasse procedures and anti-strike provisions, as well as the constitutional prohibition of a right to strike for public employees.

One of the primary and most readily accepted justifications for precluding direct economic confrontation in the public sector is the danger of harm to the public health or safety when public services, especially critical public services, are curtailed or suspended.[37] Examples of devastating property loss or death allegedly the result of walkouts or slowdowns in New York, Dayton, San Francisco, Memphis, and other locations are frequently cited by critics of public employee unionism.

Advocates of the public employee strike argue, on the other hand, that few legitimate distinctions can be made between the public and private sectors in this regard since each sector provides a range of similar or identical services to the public. They contend that the public can be adequately protected from unacceptable loss in a number of ways: by injunction if legally justified,[38] by other legal limitation or qualification of the confrontation,[39]

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33. See text accompanying notes 94-120 *infra*.

34. *See* FLA. STAT. §447.409 (1977).

35. For more complete discussion, see text accompanying notes 55-86 *infra*.

36. *See generally* A. ABOUD & G. ABOUD, THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT 1-9 (Key Issues Series No. 15, 1974) [hereinafter cited as THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT].

37. In THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT, *supra* note 36, at 5-6, this issue is discussed in terms of "essentiality of public services."

38. There is a body of law which recognizes the residual power of the states to enjoin extreme conduct. For the latest analysis of this area by the Supreme Court. *see* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 98 S. Ct. 1745 (1978). *See also* International Union, UAW-CIO v. Russell, 356 U.S. 634 (1958); Dade County v.

by voluntary employee restraint, or by traditional countermeasures used in the private sector, including replacement of strikers by emergency, temporary or permanent personnel.[40]

Economic confrontation in the public sector is a political matter which the people of Florida have emphatically and repeatedly disallowed by statute and constitutional amendment.[41] That political judgment undoubtedly reflects an underlying assumption that a fundamental distinction exists between the public and private sectors. The validity of the underlying assumption deserves further discussion.

An elementary principle of public finance is that public institutions generally provide services which are of extremely high social importance. In many instances, such services would be prohibitively expensive if offered by the private sector without public subsidy. In some instances, no profit margin whatsoever would be available to attract private investment. Arguably, therefore, restrictions upon economic confrontation in the public sector are justifiable because their suspension or curtailment would have a disproportionately higher social cost than would abatement of private sector services.

Other commonly accepted justifications for prohibiting economic confrontation in the public sector arise from a perceived need to protect the democratic political process. These arguments in essence are based upon the proposition that the choice as to quantity and quality of public services is a political question.[42] Therefore, the public employees' use of economic power, in the form of collective activity such as a strike, will ultimately result in disproportionately high employee representation in the political decision-making process. Ideally, according to this view, the public should decide on a one-man one-vote basis whether to tax itself in order to increase public services or to increase public employee compensation. Alternatively, assuming the choice to be in the hands of an elected representative, that representative's discretion should be unfettered by the economic, as opposed to the political, power of the public employee group.[43]

A different exposition of the same argument is found in the proposition that a right to strike for public employees is based upon a false analogy to the adversary relationship between private equity owners and employees made necessary by the ultimate issue of division of profits. Critics of the public

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Street Elec. Ry. & Motor Coach Employees, 157 So. 2d 176 (Fla. 3d D.C.A. 1963), *cert. denied*, 379 U.S. 971 (1965).

39. An interesting example is a 1969 Montana nurses act which grants a qualified right to strike. The strike is prohibited, however, if a simultaneous strike is possible at health care facilities within 150 miles of each other. MONT. REV. CODES ANN. §41-2209 (1977).

40. The legal status of strikers and the terms and conditions of their replacements have been dealt with in many cases. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Laidlaw Corp., 171 N.L.R.B. 175 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

41. See notes 92-118 *infra* and accompanying text.

42. In THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT, *supra* note 36, at 4-5, this argument is described in terms of "the normal American process."

43. *See generally* R. DOHERTY & W. OBRER, TEACHERS, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD, 96-113 (1967).

employee strike reason that such strikes will damage democratic government by unjustifiably fostering adversary factions among public servants and within the general public.

Upon careful analysis, it can be observed that each of the foregoing arguments in favor of prohibiting economic confrontation in the public sector omits any consideration of the interests of the employee groups involved. Among employee groups the interests affecting wages, hours, and conditions of employment are similar whether the employer is a public, a private or an intermediate entity. Congress may have had this very similarity in mind when it amended the NLRA in 1974 to bring most private health care institutions within the jurisdiction of the National Labor Relations Board.[44]

The most logical and readily acceptable conclusion to any discussion of economic confrontation in the public sector is that service interruptions should be avoided, whenever possible, by the use of effective impasse resolution techniques. An attempt to implement that conclusion is clearly reflected in the PERA's impasse procedures.[45]

It is apparent that both the statutory impasse and anti-strike provisions are intended to prevent the curtailment of public services which might occur if collective negotiations allowed economic confrontation when public employee bargaining is frustrated or incomplete. In the following sections of this article, the relevant statutory structure is surveyed and critically analyzed.

A Survey of the Statutory Provisions Relating to Frustration in the Bargaining Process

The increasing scope of public employee bargaining in Florida will cause correspondingly more professional contact with those provisions of the PERA concerning frustrated or incomplete bargaining.[46] The need for professional assistance will also increase because parties who negotiated successfully during initial contracts may, for a wide variety of reasons, legitimately assert the statutory privilege not to agree[47] as that relationship continues and circumstances change. This section is intended to briefly survey a number of relevant statutory provisions.

The Nature and Statutory Definition of an Impasse

Impasse, as a legal term, arises in the collective bargaining context. In the private sector, an impasse occurs when parties are deadlocked in negotiations directed toward an agreement. The parties are only in agreement that each is unyielding in its position and that no further progress can be made in negotiating any mandatory bargaining subject.[48] It is important to note that

44. See 29 U.S.C.A. §§152, 158, 169, 183 (1978).
45. See text accompanying notes 55-80 *infra*.
46. See note 1 *supra*.
47. Fla. Stat. §447.203(14) (1977).
48. *See generally* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395 (1952).

most negotiations never reach a true impasse, although firm positions may be taken before an agreement is finally reached. The National Labor Relations Act does not define the term "impasse," and the presence or absence of an impasse under federal law is usually determined on a case-by-case basis.[49]

In contrast, the term "impasse" is defined in the PERA. Until the 1977 legislative session, section 447.403 (1) of the Florida Statutes (1975) set forth three circumstances under which an impasse was deemed to exist. Two were deleted in that session. The definition presently retained in the statute provides that an impasse is a dispute which continues after a reasonable period of negotiations, concerning the terms and conditions of employment to be incorporated into a collective bargaining agreement.[50] The revised statute provides that in this situation an impasse may be declared in writing by either party to both the other party and to the commission.[51] It is significant that the term impasse as thus defined by statute is fundamentally dissimilar to the private sector concept because a statutory impasse occurs before the end of the parties' obligations to participate in good faith bargaining.[52]

The two additional circumstances originally set forth in the statute created automatic impasse conditions. An impasse was deemed to exist if no agreement was reached within sixty days after the commencement of collective bargaining, or if no agreement was reached seventy days prior to the budget submission date of the public employer. The legislature, however, has repealed these provisions[53] as well as a broad, somewhat confusing definition of "budget submission date."[54] In so doing, the legislature removed arbitrary time restraints upon the bargaining parties. In this respect, Florida statutory law now more closely parallels the general principles of private sector case law.

Impasse Resolution Procedures Under the PERA

As presently written, the PERA contemplates the use of three distinct impasse resolution techniques. Mediation is optional and confidential. Special master's proceedings are public and, under the 1977 amendment to the Act, mandatory only in the absence of mediation or at the request of either party.[55] The legislative hearing is public and mandatory if the dispute between the parties continues.[56] A brief discussion of these three techniques follows.[57]

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49. The presence or absence of an impasse has been held relevant to such issues as: (1) the legality of a lockout, *see* Evening News Ass'n, 166 N.L.R.B. 219 (1967); and (2) the scope of the duty to bargain in good faith, especially as related to unilateral changes in working conditions by the employer, *see generally* NLRB v. Katz, 369 U.S. 736 (1962).

50. FLA. STAT. §447.403(1) (1977).

51. FLA. STAT. §447.403(2) (1977).

52. See text accompanying note 32 *supra.*

53. FLA. STAT. §447.403(1) (1975) *as amended by* Laws 1977, c. 77-343, §15.

54. FLA. STAT. §447.403(2) (1975) *as amended by* Laws 1977, c. 77-343, §15.

55. FLA. STAT. §447.403(2) (1977).

56. FLA. STAT. §447.403(4) (1977).

57. Research for this subsection was greatly facilitated by examination of an unpublished booklet, *Use and Abuse of Impasse Procedures,* furnished by the Alachua County

Mediation

The Act provides that when an impasse occurs, the public employer, the public employee bargaining agent, or both parties acting jointly may appoint or secure the appointment of a mediator to assist in the resolution of the impasse.[58] The Florida Public Employees Relations Commission maintains a list of qualified mediators.[59] The statute does not, however, prevent the parties from selecting a mediator of their own or from declining mediation altogether.

As a result of the 1977 amendments, the costs of mediation are borne equally by the parties.[60] The amended statute supercedes a PERC regulation which placed the financial burden upon the party or parties requesting the mediation.[61]

Although mediation has a long history in labor relations,[62] the mediator's role is frequently misunderstood. Mediators have no ultimate power or authority and neither negotiate for the parties nor impose settlements. The mediator is only incidentally concerned with the merits of either side's position in a dispute. Traditionally, the mediator's proper concern is with a settlement acceptable to the parties, not with a right settlement, a wrong settlement, or the best settlement.

Successful mediators use a number of systematic techniques or devices in the settlement of disputes. One very important technique is the identification of semantic misunderstandings. Disagreements may turn upon a given word or phrase rather than the merits of either side's position. For example, a party may be able to accept a "proposal" which is remarkably similar to a previously rejected "demand." The mediator may find that in the heat of collective bargaining the parties have neglected to fully discuss the substance of their disagreements and have, instead, focused on emotional conflicts and matters of form.

A second mediation technique frequently used and especially important to public employee impasse resolution in Florida involves functioning as an intermediary between physically separated negotiating teams. Parties may be willing to consider concessions in private discussion with the mediator which they would never publicly put "on the table" without a tentative prior discussion. Furthermore, learning the relative importance of the various bargaining postures, the mediator may be able to suggest a compromise which ultimately leads to settlement. The intermediary technique is especially helpful when one party wishes to present or question a single element or subsection of a complex proposal.

Local of FEA/United and by discussions with officers and members of that Local. Acknowledgment and thanks are due.

58. FLA. STAT. §447.403(1) (1977).

59. FLA. STAT. §447.207(5) (1977); 4 FLA. ADMIN. CODE 8H-5.05 (1974).

60. FLA. STAT. §447.407 (1977).

61. 4 FLA. ADMIN. CODE 8H-5.07 (1974).

62. *See generally* W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971).

Perhaps the least understood mediation technique is simply the application of personal pressure. A mediator using this technique will typically pressure both sides to settle. He or she will typically present all of the arguments from both sides while criticizing and calling for reexamination of position. Frequently the mediator will apply the most pressure to the weakest side, perhaps by encouraging one member of a bargaining team to break from the cohesive stance and to consider or state the position of the other side.

A mediator applying the pressure technique may also attempt to "ride the impasse out" simply by wearing down the resistance to settlement. Mediators may thus call for extremely lengthy bargaining sessions which continue day after day. Overall, mediation is probably the most effective of the various available techniques,[63] but one that is time consuming, costly, and not guaranteed.

Despite these limitations, provisions for mandatory mediation would constitute one of the most helpful changes possible in Florida's public employee collective bargaining law. Professional mediation from the moment of impasse, as defined by statute, until the termination of the obligation to bargain would undoubtedly help to avoid or minimize many of the problems discussed in following sections of this article.

The Special Master's Hearing and Recommended Decision

The PERA, as recently amended, provides that if a mediator is not appointed or if requested by either party, the commission shall appoint and submit all unresolved issues to a special master.[64] The parties may, however, continue to use mediation at any time during collective bargaining.[65]

The special master is charged with holding public hearings to define the disputed areas, determine the related facts, and decide all unresolved contract issues.[66] At the hearing, each side may present evidence and argument supporting its position and rebut opposing submissions. The master is empowered to administer oaths at the hearing and to issue subpoenas requested by the parties or *sua sponte*. The Act sets forth the factors to be considered by the master in reaching his decision. These factors include comparison of annual income of other similarly employed persons in the local area, comparison of annual income of public employees employed in governmental bodies of similar size, the welfare of the public, comparison of the peculiarities of the employment involved including qualifications or hazards, and availability of public funds.[67]

Within fifteen calendar days of the close of final hearing, the master must transmit his or her decision to the commission. Within five additional

63. Research indicates that mediation may be the most frequently used and most effective impasse resolution technique. *See* R. JONES, PUBLIC SECTOR LABOR RELATIONS: AN EVALUATION OF POLICY RELATED RESEARCH. FINAL REPORT, 161-62 (1975) [hereinafter cited as JONES].

64. FLA. STAT. §447.403(2) (1977).

65. *Id.*

66. FLA. STAT. §447.403(3) (1977).

67. FLA. STAT. §447.405 (1977).

working days after receipt, the commission must transmit the decision to the parties.[68] The report is discussed in further negotiations and is deemed approved by both parties unless rejected by written notice filed with the commission within twenty calendar days after the mailing of the special master's decision to the parties.[69] The 1977 amendments to the PERA require that the written notice of rejection include a statement of the cause of rejection and be served upon the other party.[70]

The use of the special master as an impasse resolution technique is largely unique to public sector collective bargaining.[71] It is intended to invite public attention to the facts of the dispute. For this reason, the device is termed "fact finding" in other jurisdictions with similar laws.[72] The underlying theory is that, given sufficient public attention to the dispute, no party will sustain an unreasonable position. Public pressure, however, is thought to have a negligible effect.[73]

Like mediation, this device demands that disputing parties reassess their position. Unlike mediation, the master's report can furnish a means of political face saving for one side or the other. Internal or external politics may require the public employer or the employee representative to take a position through impasse which the negotiator for that party realistically knows is not presently obtainable. In such a case, complying with the master's report may be feasible while relenting in negotiations would not be acceptable.

The special master's report or fact-finding technique has been moderately successful as an impasse resolution device in other jurisdictions.[74] It has, however, been subject to abuse. The parties may, for example, present the special master with a long list of unresolved salient issues. Faced with a "grocery list" of issues, the master may himself begin mediation or otherwise insist upon further negotiations to clarify or limit the scope of the hearings and report. Such situations would typically indicate lack of in-depth discussion before the master became involved.

In some situations, the lack of meaningful discussion when first negotiating may result from unwitting failure to consider the special master as an integral part of the collective bargaining process. Since the public hearing and report were previously mandatory and are now obtainable at the request of either party, this procedure may become an end in itself. One or both parties may treat the original negotiations merely as a forum for building a record for the master rather than reaching an agreement. In this situation, the politics of public employee labor relations will overshadow the collective bargaining system.

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68. FLA. STAT. §447.403(3) (1977).

69. *Id.*

70. *Id.*

71. The device is used regularly in the quasi-public railroad and related industries but seldom in the purely private sector.

72. The term "fact finding board" is used in §209(3)(b) of New York's Taylor Act. N.Y. CIV. SERV. LAW §209(3)(b) (McKinney 1973).

73. *See* JONES, *supra* note 63, at 164.

74. *Id.* at 162.

Failure to negotiate in good faith in the opening sessions may be deliberate. If one of the parties wishes to avoid bargaining, it may ignore the original negotiations or drag out the proceedings before the special master. Public apathy encourages such behavior. Like mediation, the master's proceedings are initiated upon request, are not binding, and are automatically followed by another procedure. In theory, this device stands for public participation and thoughtful advisory arbitration by a neutral third party. In practice, the relationship of this device to the overall statutory structure may, on occasion, avoid both.

The Legislative Hearing

The PERA provides a two step procedure in the event that any part of the special master's report is rejected by either party.[75]

Initially, the chief executive officer of the government involved has the responsibility of reporting the master's decision to that government's legislative body within ten days after the recommended decision is rejected, together with the officer's recommendations for settling the dispute.[76] At the same time, the offiicer must submit his recommendations to the employee organization, and the employee organization must submit its recommendations for settlement to the chief executive officer and to the legislative body involved.[77]

The legislative body, or an authorized committee thereof, conducts a public hearing at which the parties are required to explain their position with respect to the master's report.[78] Then, the legislative body takes "such action as it deems to be in the public interest, including the interest of the public employees involved."[79]

The legislative hearing provisions of the statutory impasse procedure suggest that three distinct non-legislative entities may attend the hearing: the employee representative, the public employer and the general public. The PERA then requires the legislative body to act as a neutral decision-maker, determining the overall best interest of the public, specifically including the employees.

It requires only minimal understanding of political reality and human nature to perceive how unlikely it is that the legislative body will function with the dispassionate detachment contemplated by the statutory scheme. Consider, for example, a dispute involving an organization of public school teachers and a county school board. Under the PERA definitions the county school board is both the public employer and the legislative body.[80] Logic

75. FLA. STAT. §447.403(4) (1977).

76. FLA. STAT. §447.403(4)(a) (1977). If the public employer is the Board of Regents, the Governor may also submit his recommendations. *Id.*

77. FLA. STAT. §447.403(4)(a)-(b) (1977).

78. FLA. STAT. §447.403(4)(c) (1977).

79. FLA. STAT. §447.403(4)(d) (1977).

80. The exact identity of the "public employer" with the "legislative body" is not an infrequent occurence under present interpretations of the PERA. The terms are respectively defined in FLA. STAT. §447.203(2), (10) (1977).

and common sense dictate that, in most instances, the board will have the same conception of the public's best interests at the legislative hearing, a conception which its agent, the superintendent/chief executive officer, has propounded throughout the bargaining and impasse procedures.

In a recent decision,[81] the commission considered the impasse duty of a legislative body having legal identity with the public employer and announced that the duty includes the "strictest observance of the principles of fairness, and impartiality."[82] Although the possibility of commission review thus provides some hope of relief for an employee organization aggrieved by action of a biased legislative body, the general deficiency of the statutory scheme remains apparent. The bias problem would hold constant, to a greater or lesser extent, as to any public employer and legislative body in Florida government, although in all instances the two would not be identical.[83] In all cases, the negotiating representative of the public employer is required by the Act to "consult with, and attempt to represent the views of, the legislative body of the public employer,"[84] throughout the bargaining process.

Aside from considerations of possible prejudice on the part of the legislative body, the legislative hearing provisions of the Act are in need of amendment because of probable constitutional deficiency. The 1977 negotiations between the Florida Board of Regents and the United Faculty of Florida aptly illustrate the problem. During part of the negotiations and all of the impasse, the legislature was not in session within the meaning of the Florida Constitution.[85] Thus, the statute required the board to consult with a legally nonexistent legislative entity. Impasse resolution by any committee of an inactive legislature would also have had doubtful validity.

In other jurisdictions, legislative bodies have chosen to return one or more issues to the parties for further negotiations. In essence, however, the legislative hearing represents the last legal step in the public sector dispute settlement procedure. Occasionally in Florida and in other states, this hearing has been treated more as a political or even theatrical event than as a recognizable component of a collective bargaining system. However, this phenomenon may be justifiable and, in fact, inevitable because public employee bargaining ultimately raises political issues.[86]

Procedural and Substantive Issues Arising After the Termination of Formal Impasse Procedures

The legislative hearing represents the termination of formally designated

81. City of Boca Raton, 4 FPER ¶4040 (Jan. 12, 1978).

82. *Id.* at 88.

83. For example, the Act designates the Board of Regents as the public employer for the State University System. FLA. STAT. §447.203(2) (1977). The appropriate legislative body would appear to be the Florida Legislature. *See* FLA. STAT. §447.203(10) (1977). An "authorized committee" would probably be appointed for purposes of a legislative hearing. *See* FLA. STAT. §447.403(4)(c) (1977).

84. FLA. STAT. §447.309(1) (1977).

85. FLA. CONST. art III, §3.

86. See text accompanying notes 35-43 *supra*.

impasse procedures. In actual practice, however, a number of complex procedural and substantive issues arise after the legislative body of the government involved has finished its deliberations.

The Act does not specify the proper procedure to be followed by the parties after the legislative hearing. In practice, questions associated with contract ratification by vote of the employee organization membership and legislative action of the government involved, frequently arise soon after the legislative hearing or at the hearing itself.

The structure of the PERA is very awkward at this juncture. The ratification provisions[87] precede the impasse procedures[88] in the Act and do not explicitly contemplate previously disputed items or items which have been resolved in a legislative hearing. If an agreement is not ratified by the public employer or approved by majority vote of employees voting in the unit, it is returned to the parties for further negotiation.[89]

Thus, a number of questions arise: May the public employer ratify the entire contract at the legislative hearing if the public employer and the legislative body of the government involved are identical? Does resolution of the disputed items also constitute ratification of those items? If a later hearing is required for ratification purposes (and this appears to be the majority position in practice), may the public employer refuse to ratify the contract based upon the contents of previously signed or non-impasse items without sending all items, including impasse items, back to the table? At the ratification hearing, may the public employer refuse to ratify items resolved at the legislative hearing? If the employee organization refuses to ratify the contract, are the terms of the legislative resolution nevertheless legally enforceable? Does an enforceable contract exist with respect to previously signed or non-impasse items if the entire contract is ratified by the public employer but only non-impasse items are ratified by the employee organization?

Recent decisions of the commission have touched upon some of these issues.[90] A comprehensive set of answers should be provided, however, by

87. FLA. STAT. §447.309(1), (4) (1977). Subsection 1 provides in part, "Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3). However, with respect to statewide bargaining units, any agreement signed by the Governor and the bargaining agent for such a unit shall not be binding until approved by the public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3)." Subsection 4 provides, "If the agreement is not ratified by the public employer or is not approved by a majority vote of employees voting in the unit, in accordance with procedures adopted by the commisison, the agreement shall be returned to the chief executive officer and the employee organization for further negotiations."

88. FLA. STAT. §§447.403-.409 (1977).

89. FLA. STAT. §447.309(4) (1977).

90. In City of South Miami, 4 FPER ¶4065 (Feb. 2, 1978), the Commisison determined that a public employer, by disapproving a contract because of dissatisfaction with its own prior resolution of impasse items, committed an unfair labor practice. The most comprehensive recent discussion of the Commission's view of the legislative hearing and ratification procedures is found in City of Winter Park, 4 FPER ¶4278 (Aug. 9, 1978),

PERC exercising its express rulemaking authority with respect to ratification procedures[91] or by amendment to the Act. An appropriate rule or statutory amendment with respect to these issues would embody the following general propositions intended to harmonize the impasse and ratification procedures:

> 1. At the legislative hearing, all impasse items and the "signed off" negotiated items should be adopted by the legislative body.
> 2. The package adopted by the legislative body should be offered as a whole contract to the employee organization for rejection or acceptance.
> 3. If no contract is reached, past practice, along with resolved impasse items, should continue in effect[92] until new negotiations result in a contract or another impasse to be resolved by further action of the legislative body.

The statutory provision dealing with legislative appropriations is also a notable matter of concern. Section 309 (2) of the Act provides as follows:

> Upon execution of the collective bargaining agreement, the chief executive 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, nor be evidence of, any unfair labor practice.[93]

Clearly, this provision represents a major retention of political veto power over the bargaining process when negotiations are successful. An important question is whether the PERA requires a similar result when issues arising from unsuccessful negotiations are resolved by legislative hearing and later accepted by the employee organization as part of a ratified contract. Like the ratification provisions, this subsection precedes the formal impasse procedures and does not explicitly contemplate their operation. The broad exculpatory

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which held *inter alia*, that the legislative resolution of impasse items was "effective" from the date it was passed, despite refusal of the employee organization to ratify the proposed overall agreement.

91. The commission has broad rule making authority subject to the right of the legislature to amend or rescind such rules. FLA. STAT. §447.607 (1977). Various specific sections of the Act also refer to the promulgation or adoption of rules or procedures, including FLA. STAT. §447.309(4) (1977), which deals with ratification. It is not entirely clear how wide the mandate of subsection (4) is intended to be.

92. An exception to this proposition would probably be appropriate where the legislative body has been guilty of refusal to bargain or failure to bargain in good faith with respect to impasse items. See text accompanying notes 145-147 *infra*. *See also* Geiger v. Duval County School Bd., 357 So. 2d 442 (Fla. 1st D.C.A. 1978), in which the First District Court of Appeal affirmed a circuit court order which ordered a public employer and employee organization to continue under most of the terms of an expired agreement as part of an order enjoining a "threatened" strike.

93. FLA. STAT. §447.309(2) (1977).

language dealing with unfair labor practices arising from appropriations may, therefore, not apply to impasse items which become part of a contract. If the legislature did intend the exculpatory language to apply under such circumstances, the meaningfulness of the legislative hearing would frequently be minimal. The form of disputed items would be resolved at the legislative hearing but not their substance in the sense of fiscal implications. This subsection should be repealed or at least amended to clarify and limit the scope of its applicability.

The Anti-Strike Provisions

In the statement of policy to the PERA, the Florida legislature has declared that it is the public policy of the state "to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."[94] Further, that policy is, in part, best effectuated by "[r]ecognizing the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition."[95]

The PERA implements the constitutional prohibition against public employee strikes in a series of complex and interrelated anti-strike provisions. The term "strike" is defined very broadly in the Act as follows:

> "Strike" means the concerted failure of employees to report for duty; the concerted absence of employees from their positions; the concerted stoppage of work by employees; the concerted submission of resignations by employees; the concerted abstinence in whole or in part by any group of employees from the full and faithful performance of the duties of employment with a public employer for the purpose of inducing, influencing, condoning, or coercing a change in the terms and conditions of employment or the rights, privileges, or obligations of public employment, or participating in a deliberate and concerted course of conduct which adversely affects the services of the public employer; the concerted failure of employees to report for work after the expiration of a collective bargaining agreement; and picketing in furtherance of a work stoppage. The term "strike" shall also mean any overt preparation, including but not limited to, the establishment of strike funds with regard to the above-listed activities.[96]

The strike is prohibited twice in the PERA. Instigating or supporting a strike in any positive manner is designated as unfair labor practice for an employee organization.[97] After charge, investigation and hearing, a strike is subject to the broad remedial powers of the PERC set forth in the operative provision of the Act dealing with unfair labor practice procedures.[98] The Act also makes clear[99] that a strike brought to the attention of the commission

94. FLA. STAT. §447.201 (1977).

95. FLA. STAT. §447.201(4) (1977).

96. FLA. STAT. §447.203(6) (1977). The final sentence of this definition was added during the 1977 legislative session along with a definition of "strike funds." FLA. STAT. §447.203(7) (1977). The constitutionality of the amendments is questionable.

97. FLA. STAT. §447.501(2)(e) (1977).

98. FLA. STAT. §447.503 (1977).

99. *See* FLA. STAT. §447.501(2)(e) (1977).

as an unfair labor practice is subject to the independent strike penalties provision located in the separate section.[100]

Participating in a strike by instigating or supporting a strike in any positive manner is also generally prohibited for an employee organization or an employee by section 505 of the Act.[101] Violations of section 505 are penalized under section 507 provisions[102] which prescribe both judicial and administrative sanctions.

As of this writing, only one subsection of the penalties provision has consistently been given effect – that subsection allowing the commission or any involved or affected public employer to seek a temporary and permanent injunction against a public employee strike.[103] The First District Court of Appeal has rejected the contention that the commission cannot exercise its standing under this subsection unless an unfair labor practice charge has been filed.[104]

Suits to enjoin public employee strikes may be brought in the circuit court having proper jurisdiction and venue under the statutes and rules of civil procedure.[105] Such suits are granted "priority over all matters on the court's docket except other emergency matters."[106] If an injunction issued pursuant to the penalties provision is not promptly complied with, the circuit court is directed by statute, upon application of the plaintiff, to initiate contempt proceedings against those who appear to be in violation.[107] Fines are authorized within statutory limitations against the responsible employee organizations and responsible officers, agents or representatives.[108]

The Act also states that an employee organization is liable for damages sustained by the public employer as a result of a section 505 violation.[109] In such cases, the circuit court is empowered to enforce judgments by attachment or garnishment of union initiation fees or dues ordinarily deducted by public employers.[110] However, the civil action for damages may not be maintained until matters pending before the commission at the time of the strike or initiated within thirty days after the strike's inception have been finally adjudicated.[111] Also, the circuit court's computation of damages must take into consideration administrative assessments already recovered by the public employer.[112]

100. FLA. STAT. §447.507 (1977).
101. FLA. STAT. §447.505 (1977).
102. FLA. STAT. §447.507 (1977).
103. FLA. STAT. §447.507(2) (1977).
104. Broward County Classroom Teachers Ass'n v. PERC, 331 So. 2d 342 (1st D.C.A.), *cert. denied*, 341 So. 2d 1080 (Fla. 1976).
105. FLA. STAT. §447.507(2) (1977).
106. FLA. STAT. §447.507(1) (1977).
107. FLA. STAT. §447.507(3) (1977). There is some question as to whether criminal or civil contempt proceedings are intended by this subsection. A statutory amendment would be helpful.
108. FLA. STAT. §447.507(3) (1977).
109. FLA. STAT. §447.507(4) (1977).
110. *Id.*
111. *Id.*
112. *Id.*

The Act grants the commission a range of sanctions to be imposed as a result of violation of section 505.[113] This includes an assessment of penalties against both employees and employee organizations. When action against an employee is involved, the Act calls for a hearing on notice conducted according to rules to be promulgated by the commission to determine if an employee has violated section 505.[114] If the commission determines that a violation has taken place, it may order termination of employment or set a probationary employment period with certain other associated penalties.[115]

If the commission determines that an employee organization has violated section 505, available remedial actions are numerous. Summarily described, they include: (1) the issuance of cease and desist orders; (2) the suspension or revocation of the employee organization's certification; (3) the revocation of the privilege of check off; and (4) the assessment of a fine up to $20,000.00 per day or the damage to the public employer, whichever is higher.[116] Further, no employee organization may be certified until one year after final payment of any fine assessed.[117]

It is apparent upon review of the statutory structure that the legislature has considered very seriously its announced intention to recognize the constitutional prohibition of a public employee right to strike. However, the internal tension among the provisions of article I, section 6, of the Florida Constitution prevails even in these statutory anti-strike provisions. An attempt to balance the constitutional right to bargain collectively with the constitutional strike prohibtion is apparent in the legislative determination that "any action or inaction by the public employer or its agents that provoked or tended to provoke the strike by the public employees"[118] should be taken into account when assessing monetary damages. Both the circuit court in a civil action[119] and the commission[120] are explicitly required to consider this factor.

Criticisms of the Statutory Provisions Relating to Frustration in the Bargaining Process

The following section contains a critical analysis of the overall approach taken in the PERA to frustrated bargaining. There is, however, a basic and underlying question which should be considered first: Does effective collective

113. Fla. Stat. §447.507(5), (6) (1977).

114. Fla. Stat. §447.507(5) (1977). The Commission has not yet promulgated rules dealing with any of the anti-strike provisions. In *Broward County Classroom Teachers Ass'n*, the First District Court of Appeal rejected appellants' contention that the PERC did not have standing to seek an injunction until such regulations were promulgated. Appellants' case would probably have been stronger if the particular facts contemplated by this subsection had been involved (*i.e.*, administrative action against an individual employee). 331 So. 2d 342 (Fla. 1st D.C.A.), *cert. denied*, 341 So. 2d 1080 (Fla. 1976).

115. Fla. Stat. §447.507(5) (1977).

116. Fla. Stat. §447.507(6)(a) (1977).

117. Fla. Stat. §447.507(6)(b) (1977).

118. Fla. Stat. §447.507(6)(a)(4) (1977).

119. Fla. Stat. §447.507(4) (1977).

120. Fla. Stat. §447.507(6)(a)(4) (1977).

bargaining require a credible strike threat, or at least some significant concession of bargaining power to the public employee organization in exchange for waiver of the strike?

This issue, in essence, concerns the relative economic and political power of the parties. Public employee organizations are growing in strength. Common sense dictates that once these organizations become strong, they will not accept a legal structure which legitimizes the form but not the substance of collective bargaining. The substance of bargaining for an employee organization, includes the consistent ability to influence decisions concerning wages, hours and working conditions of members by any morally acceptable means.

Restated at a broader conceptual level, the issue concerns the fundamental nature of an effective collective bargaining system. Given that the public desires its employees to bargain collectively, it follows that the laws implementing that system should affirm the right of the employees to assert all of their bargaining power; otherwise, the bargaining is a sham. The Supreme Court of the United States has on several occasions implicitly recognized this argument as it applies to the private sector.[121] The right to strike is specifically protected under the National Labor Relations Act[122] although it is not a fundamental right[123] or an implied constitutional right.[124]

At the policy level, the issue involved is the respect for law. Since both experience and theory indicate that collective bargaining implies collective exercise of employee strength, why pass a law which is bound to be broken? The rest of this analysis is familiar political science and common sense. Unenforceable laws engender disrespect for government in general and the legal system in particular, because such laws eventually result in mass civil disobedience or criminality. Attempts to enforce such laws on a mass basis place unnatural stress on the legal system, and successful enforcement on an individual selective basis[125] risks violation of equal protection rights.

If effective and successful bargaining requires a credible strike threat or a meaningful concession in return for waiver of the strike, then the question is: Does the present Florida law provide for either one? Arguably, the threat of an unconstitutional and statutorily prohibited strike is sufficiently credible to support a collective bargaining system for public employees. A de facto recognition of public employee economic power may be all that is needed. However, considerations of respect for law make that approach unacceptable.

In considering whether the present statutory structure provides a meaningful concession in exchange for waiver of the strike, one should recall the foregoing survey of pertinent statutory provisions. Recall that the formal impasse procedures terminate with a political decision-making device rather

121. Consider the reasoning of the Court in NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477 (1960). In that case, the Court held, in essence, that the use of unprivileged economic power as harassment was not inconsistent with the duty to bargain in good faith.

122. The right to strike is privileged under the NLRA except as specifically disallowed. 29 U.S.C. §§157-158 (1970).

123. UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

124. United Federaton of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971).

125. See notes 114-115 *supra* and accompanying text.

than a traditional bargaining device[126] and that the political decision is not made by a neutral third party but by the legislative body of the public employer, an entity frequently identical to the public employer or whose policies are reflected in the employer's bargaining position by law.[127] Also recall that the PERA vests in the same legislative body control of appropriations to meet negotiated obligations and arguably that same control with respect to impasse items later ratified by both parties.[128]

A careful reading of the Act will not support the conclusion that any meaningful concession in exchange for the strike threat has been granted. A public employer indisposed to reach an agreement and willing to approach negotiations in bad faith is almost invited to ignore the Act's general collective negotiations framework. The employer may view its bargaining obligation in light of the impasse procedures merely as a requirement to meet and confer before unilaterally adopting the policies of the appropriate legislative body. It seems indisputable that the statutory structure provides a public employer in Florida less motivation to bargain fully, fairly and in good faith than a private sector employer subject to legal economic confrontation by a union.

A related criticism of the Act can be raised with respect to employee organizations. Because impasse procedures are slow, costly, and weighted in favor of the public employer, an employee organization may be motivated to initiate a work stoppage in order to hasten the intervention of a third party[129] or, at least, to attract public attention to the one-sided political dispute. Faced with an intolerable bargaining position by a public employer or with bad faith bargaining, a public employee organization may, as an indirect result of the statutory structure, have less motivation to refrain from a work stoppage than a private sector union.

There are other matters to consider when evaluating those provisions in the PERA which relate to frustrated bargaining. The first is that the constitutional right to bargain collectively has been successfully exercised pursuant to the present statutory scheme in at least a substantial majority of cases. Impasse is the exception, not the rule.[130] In most cases the Act is working despite its underlying tensions.

Also, political decision-making in the face of unsuccessful negotiations represents a logical and democratic means of effectuating the constitutional

126. See text accompanying notes 78-84 *supra.*

127. See text accompanying note 84 *supra.*

128. See text accompanying note 29 *supra.*

129. See note 139 *infra* and accompanying text discussing a strike situation in which the PERC sought an emergency injunction against both parties after which bargaining was expeditiously restored.

130. This observation is substantiated by the partial statistics available from the Public Employees Relations Commission. The Commission statistics indicate that approximately 100 special masters were assigned in 1976 and 1977 and 96 through December 13, 1978. To approximate the "impasse rate" very roughly, these figures may be compared with an increasing number of certified units totaling 435 on December 13, 1978. Interview with Charles Magalian, Supervisor of Elections of the Florida PERC (Dec. 13, 1978). A direct comparison would be somewhat misleading, however, for a number of reasons, including multiple special master assignments and multiple year contracts not yet due for renegotiation.

prohibition of the right to strike. Any mechanism for resolving public sector labor disputes in Florida is bound to reflect the incessant tension between the constitutional right to bargain collectively and the proscription of services.

Of course, the present statutory scheme does not represent the only means of avoiding unlimited economic confrontation between Florida's public employers and employee organizations. Binding arbitration has been adopted in a number of jurisdictions, especially with respect to critical services.[131] A number of jurisdictions allow designated employee groups to strike under controlled circumstances.[132] Non-stoppage or graduated strikes have also been proposed.[133]

Finally, present criticisms of the Act should be qualified and cautious. Because the PERA is so recent an addition to the Florida law, there is an absence of well-established judicial or administrative interpretation. Judicial clarification as well as the pattern and practice of continued administration may have highly significant effects.

The Role of the Public Employees Relations Commission When Frustration in Bargaining Occurs

The statement of policy in the PERA states that the PERC was created "to assist in resolving disputes between public employees and public employers."[134] It might then be expected that the commission's policies and procedures would have salutary effect when frustration occurs in the bargaining process. Ideally, thoughtful administration of the Act should help lessen the inherent tension present in both the constitution and statutes. Current indications are that the commission is conscientiously striving to achieve that goal.

The commission has a formal and an informal mediation function. Informally, the commission staff is available to assist bargaining parties by helping them understand the Act and its requirements. Formally, the commission acts in a supervisory capacity with respect to mediation and post-mediation impasse procedures.[135]

As noted above, the commission also plays an extensive statutory role if

131. Binding arbitration is permissible or mandatory in the District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Vermont, Washington, and Wisconsin. See note 133 *infra*.

132. Controlled strikes are permitted in Alaska, Oregon, Pennsylvania, and Vermont. See note 133 *infra*.

133. A detailed discussion of such alternatives is beyond the scope of this article. Interested readers are referred to a thorough summary of enacted statutory provisions published by the United States Department of Labor, U.S. Dep't of Labor, Summary of State Policy Regulations for Public Sector Labor Relations (1975), as well as an outstanding discussion of alternatives for policy matters, R. Jones, Public Sector Labor Relations: An Evaluation of Policy Related Research, Final Report (1975).

134. Fla. Stat. §447.201(3) (1977).

135. Fla. Stat. §447.207(5) (1977). Although the statute contemplates mediators employed by PERC, none have been employed to date.

bargaining frustration reaches the ultimate extreme of an illegal work stoppage.[136] As of this writing, the commission has moved expeditiously to enjoin the relatively few public employee strikes which have occurred in Florida. In at least two instances, however, the commission also successfully sought injunction of the public employers' activities which allegedly had provoked the strike.[137]

In addition, the commission has substantial powers to prevent and prohibit unfair labor practices. Frustration in the bargaining process cannot adequately be discussed without at least a peripheral consideration of the scope of the duty to bargain. This issue arises most frequently in the context of a refusal to bargain allegation or a charge of bargaining in bad faith.[138] Commission procedures upon the filing of such a charge have in some instances had a salutary effect upon frustrated bargaining. These procedures are based on the general statutory provision for the processing of an unfair labor practice charge.[139]

When the commission receives a charge of unfair labor practice, the charge and supporting materials are analyzed to determine if there is substantial evidence indicating a prima facie violation of the Act.[140] The commission has largely discontinued its previous practice of extensive field investigation. Faced with a formal charge to spur communications, parties occassionally reconsider their respective positions and proceed to more amicable bargaining.

A settlement may result from these initial procedures. If not, one of two actions will be taken by the commission or its agent. One is the issuance of a dismissal report.[141] In this circumstance, the parties will have available a formal analysis of the reasons why the charge was dismissed, which may clarify their bargaining relationship. The second alternative is formal action against the charged party by the commission filing a complaint.[142] The commission has largely discontinued its previous practice of issuing a probable cause letter to the parties before filing its complaint.

Although the commission has not yet squarely faced the issue, an important question which the commission is destined to face in the context of an unfair labor practice charge is whether and to what extent the duty to

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136. See text accompanying notes 94-120 *supra*.

137. These events occurred in the context of strikes by Broward and Duval County teachers. It is interesting to note that PERC is explicitly mandated to balance "provocation" only in the case of an administrative assessment of fines, and Florida circuit courts face an identical mandate only with respect to a civil damage action. See notes 118-119 *supra* and accompanying text. However, the Commission actions seem to have been equitable albeit not required. The injunctions did facilitate a rapid return to bargaining.

138. See text accompanying notes 25-31 *supra*.

139. FLA. STAT. §447.503 (1977).

140. FLA. STAT. §447.503(1) (1977).

141. FLA. STAT. §447.503(2) (1977). A dismissal by the Commission's General Counsel may be appealed to the full Commission. *Id.* at (3).

142. FLA. STAT. §447.503(3)(a) (1977). The 1977 amendments to this subsection make a helpful distinction between the "charges" of the complaining party and the "complaint" issued by the Commission after investigation.

bargain will be expanded beyond traditional private sector concepts in order to fulfill public sector needs.

Preliminary indications are that the commission has, at least in part, accepted the argument that an expansion of private sector concepts is appropriate under the PERA, and that the relatively unyielding posture characteristic of private sector impasse[143] is not tolerable in Florida public sector labor relations.[144]

An extension of the duty to bargain beyond private sector concepts may be analyzed in terms of its possible effect on the overall scheme of the Act with respect to implementation of article I, section 6. The present impasse procedures may be viewed as weakening the constitutional right to bargain in favor of the constitutional prohibition of a right to strike. An extension of the duty to bargain may be viewed as having the opposite effect. Such an adjustment in public sector bargaining requirements has been labeled "compensation" for lack of the strike weapon.[145]

Whether or not the commission and the Florida judiciary ultimately accept an extension of the duty to bargain beyond private sector concepts, the administrative remedy which may be imposed after successful prosecution of a refusal to bargain or a bad faith bargaining charge is highly significant. With respect to pre-impasse bad faith bargaining by a public employer, the commission has issued cease and desist orders and affirmatively commanded the parties to return to the table.[146] That remedy has been enforced on appeal despite the fact that the legislative body involved had subsequently resolved the disputed issues.[147] Nullification of impasse procedures by a commission command to return to the bargaining table may be seen as strengthening the constitutional right to bargain at the cost of the political control retained by the legislative body under the Act. Where bad faith bargaining or refusal to bargain is proven, however, the cost is not assessed against the constitutional strike prohibition. In fact, it might be expected that nullification of actions taken by a party in bad faith would have the opposite effect – lessening the risk of a work stoppage.

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143. *See generally Edwards, supra* note 25, at 924-25. It bears notice that the relatively "unyielding status of private section impasse" is not itself a permanent status. The NLRA does not require a party to participate in "fruitless marathon discussion at the expense of frank statements and support of his position." When impasse is reached, the duty to bargain is not terminated but only suspended.

144. In City of Winter Park, 4 FPER ¶4278 (Aug. 9, 1978), the Commission held, *inter alia,* that a legislative impasse resolution: (1) may not cover all of the subject which would properly be the subject of a collective bargaining agreement; (2) is only effective for one year; and (3) does not terminate the public employer's duty to bargain, on demand, for the next fiscal year.

145. *Edwards, supra* note 25, at 933.

146. *See, e.g.,* Hernando County School Board, 3 FPER ¶246 (Sept. 15, 1977).

147. In Duval County School Bd. v. PERC, 353 So. 2d 1244 (Fla. 1st D.C.A. 1978), the First District Court of Appeal rejected the public employer's argument that PERC lacked jurisdiction to order negotiations after termination of the impasse procedures. The court approved the following statement of the Commission, "An employer will not be permitted to engage in a course of conduct tantamount to a refusal to bargain and subsequently be allowed to 'cleanse' its illegal activity through the statutory impasse procedures." *Id.* at 1249.

CONCLUSION

The developing legal concepts relevant to frustration in collective bargaining among Florida public employees and employers are of extremely high social importance. The Florida PERA has developed as part of a nationwide expansion of public sector bargaining, the major objective of which is prevention of disruptions in the flow of government furnished goods and services. The Florida Constitution grants public employees the right to bargain but prohibits their right to strike. The tension between these constitutional principles is clearly reflected in the Act.

The PERA is based on a collective negotiations structure imposing an obligation on all parties to bargain collectively in good faith. That structure may be distinguished from a simple meet and confer requirement which explicitly retains the public employer's unilateral decision-making power with respect to conditions of employment after consultation with employees.

The impasse procedures present in the Florida Act are generally helpful but tend in the case of extreme frustration to make the dispute resolution process highly political, while substantially equating the public employer with the political decision-maker. As a result, the Act clearly provides less motivation for a Florida public employer to bargain in good faith than a private sector employer. Florida public employees may also be positively motivated by the Act to engage in an illegal strike in order to attract public attention to the political dispute.

After impasse procedures have been exhausted, the relationship of those procedures to the ratification procedures under the Act is not well delineated. Important questions also arise concerning the duty of the legislative body to appropriate funds called for by previous legislative impasse resolutions.

Severe penalties for public employee strike are provided in the PERA, reflecting the constitutional prohibition. However, the Act calls for analysis of employer provocation before fines are assessed against public employee organizations. Provocation has similarly been considered in decisions to seek and grant equitable injunctions against both parties when employer provocation allegedly motivated a strike.

Thoughtful administration of the PERA is important in effectuating the public policies which underlie it. The PERC is charged with balancing both the interests of parties and competing social policies under the Act. That role is apparent in the commission's largely undeveloped mediation function, its anti-strike function and its unfair labor practice jurisdiction. The commission has the potential to substantially alleviate bargaining frustration through careful and thoughtful administration.

The Florida judiciary and legislature face the challenge of further developing the relevant legal concepts by interpretation and amendment. The task is made difficult by the complexity of the issues and the strength of the competing social policies. The importance of the task to all of Florida's citizens, including several hundred thousand public employees, cannot be overemphasized.