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CERTIFIED QUESTION:

AS PRESENTED BY THE FACTS IN THIS CASE, IS THE COMPULSORY DRUG TESTING OF POLICE OFFICERS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING OR, IN THE ALTERNATIVE, MAY A GOVERNMENTAL ENTITY REQUIRE ITS POLICE OFFICERS TO SUBMIT TO DRUG TESTING WITHOUT HAVING FIRST ENTERED INTO COLLECTIVE BARGAINING REGARDING THE SUBJECT?

- I. THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 6 PROVIDES A FUNDAMENTAL RIGHT TO BARGAIN COLLECTIVELY, WITH THE EXCEPTION OF THE RIGHT TO STRIKE, FOR PUBLIC EMPLOYEES IN FLORIDA.

The Third District Court of Appeal en banc decision in City of Miami, v. F.O.P., Miami Lodge 20, 571 So.2d 1309, 1320 (Fla. 3rd DCA 1990) analyzed the issue of whether or not drug testing of police officers was a mandatory topic of collective bargaining and whether or not the implementation of this program is subject to collective bargaining. In its analysis the court recognized:

that the right to bargain is a fundamental right guaranteed to public employees by the Florida Constitution and as such requires a showing of special circumstances or a compelling state interest to justify its abridgment. Id. at 1328, fn. 17.

Assuming arguendo that a balancing test between the fundamental right to bargain of employees versus special

circumstances¹ or a compelling state interest to justify abridgment of this fundamental right is the correct test to use, the en banc court creates a public policy, allegedly in an attempt to stop the "expansion of subjects of bargaining in the public sector" (see, City of Miami, supra, at 1328, fn. 18), and finds that the issue of drug testing of police officers is "central to the operation of the police force as an enterprise" and thus is excluded as a mandatory topic of bargaining and instead fits within the managerial prerogative doctrine. Id. at 1325.

First, we would assert that permitting the collective bargaining of a drug testing policy for police officers in Florida would not expand the scope of collective bargaining but not permitting collective bargaining on this issue would, in fact, restrict the scope of bargaining based on artificial public policy reasons articulated by the en banc court. Secondly, there is no precedent from the Supreme Court to support such a restriction. See, Dade County Classroom Teachers' Association, Inc. v. Ryan, 225 So.2d 903 (Fla. 1969) and City of Tallahassee v. Public Employees Relations Commission, 410 So.2d 487 (Fla. 1981). Nor does the en banc court rely on legislative history or

¹ **Exigent** circumstances were not pled in the lower court and the City did not argue it on appeal City of Miami, supra, at 1319.

on authority **from other district courts** of appeal in Florida to support this restriction.

The en banc court makes much of the language in cases such as the ones cited above to the effect that private sector bargaining rights are not **"identical"** to public sector bargaining rights; **"are not coextensive"** (see Pinellas County PBA v. Hillsborough Aviation, 480 So.2d 801 (Fla. 2nd DCA 1977) and are **"equal but not necessarily identical rights."** City of Tallahassee, supra, at 490-91. It is important to remember that the City of Tallahassee court held that collective bargaining regarding retirement issues for public employees could not be statutorily **excluded** from the constitutional provision allowing them to bargain. The **court** held the rights of private employees and public employees were **"commensurate."** Id. at 490.

The right to bargain over the implementation of **procedures for drug testing** is **even clearer** in the **case law**. It **is** a quantum leap from saying that because these rights are **not "identical"** that they are not subject to the collective bargaining process.

Certainly, the **Florida'** Supreme Court has not as yet identified an issue to be carved from the public sector collective bargaining rights on the impact of management's decision to unilaterally change a term or condition of employment. See, City of Tallahassee, supra.

Additionally, four of the nine judges in the en banc opinion wrote to say that how drug testing procedures are implemented should, at the very least, be submitted to the collective **bargaining process**. Judge Hubbart (dissenting), Judge Baskin (dissenting), City of Miami, supra, at 1330, Judge Jorgenson, concurring in part and dissenting in part, Id. at 1330-1333 and Judge Gersten, concurring in part and dissenting in part. Id. at 1333. There is a wide split on the en banc court on the issue of implementation procedures of any mandatory drug testing program. In **fact** Judge Baskin states:

The majority opinion resurrects the long-buried Hamiltonian view that government is too important to be left to the governed. Mindful of Thomas Jefferson's declaration that governments derive "their just powers from the consent of the governed," Declaration of Independence (U.S. 1776), I disagree. Id. at 1330.

Judge Jorgenson states:

The court assumes that collective bargaining **over** implementation of drug testing is not necessary because the City Fathers, the employers here, have the union's best interests at heart. That questionable assumption neither cures nor prevents any evils **and** the court should not **add its** blessing to such a paternalistic assumption. Id. at 1332.

II. MANDATORY TOPIC OF BARGAINING

The en banc decision contains a long discussion as to whether or not the credibility of police officers is central to the operation of the police force as an enterprise. Id. at 1325. With all deference to the court, and as stated elsewhere in this opinion, the issue is not whether or not drug testing is good. The issue is whether or not requiring drug testing for police officers is a mandatory topic of collective bargaining and whether the implementation of such procedures is subject to collective bargaining. To this end, the court views the compelling interest of the public to a "drug-free police force" to outweigh the bargaining of such testing and the rights of the police officers involved, without any record developed that the protection of the public could not be accomplished through collectively bargained procedures. Id. at 1326².

The original Third District Court of Appeal opinion noted that the City of Miami and F.O.P., Lodge 20 were in the process of collectively bargaining such a procedure. Id. at 1318, fn. 10; and 1331. Between the time of the original opinion on January 31, 1989, and the en banc opinion issued on April 17, 1990, this contract was bargained.

² The implication that the City of Miami has the right, under the language of the en banc decision, to regulate the off-duty conduct of its police officers is not addressed in this brief.

Thus, the en blanc court's contention that the "potential for delay which is inherent in a mandatory collective bargaining requirement (Id. at 1326) has no basis in developed facts. This opinion is rather in the nature of an advisory opinion. Indeed, the affirmative defense of exigent circumstances which may be pled **and**, if proven, provide an exception to collective bargaining recognized by the Public Employees Relations Commission, was not even pled in the lower court nor argued on appeal. It was simply ignored.

Many other public employee contracts regarding **the** drug testing of safety-sensitive employees have also been accomplished in the State of **Florida** without going to impasse and without causing unnecessary delay. For example, the collective bargaining contract in force between the Lake County Education Association, FEA/United, AFT, AFL-CIO, and the District School **Board** of **Lake** County contains a drug-testing provision, and the contract between United Teachers of Dade, FEA/United, AFT, AFL-CIO and the Dade County School District also contains **such** a provision. There **is** no history presented in this record that the use of this subject as a "powerful tool **for** achieving delay" exists. Id. at 1326.

III. JUSTICIABILITY

Another aspect of the argument above is that the exceptions to an issue becoming moot justifying the retention of jurisdiction do not apply in the instant case. For example, if a case has become moot, jurisdiction may be retained "to resolve the [constitutional] issue because it is a matter of great importance and of general public interest and will probably recur..." *Plant v. Smathers*, 372 So.2d 933, 935 (Fla. 1979). This issue is a matter of great importance and interest to the public, however, because there is no record developed showing that public employee unions and public employers have been unable to reach agreement on collectively bargaining the issue of drug testing for safety-sensitive employees, it is not likely to recur. The importance lies only in having a drug-free police force, not in having a drug-free police force who have had no say whatsoever in either the drug testing issue itself or the issue of how these procedures will be implemented.

Another exception to the mootness question is "if the effect of not deciding the issue differs from the relief that might be granted by ruling on the issue." *Curless v. County of Clay*, 395 So.2d 255 (Fla. 1st DCA 1981). In that case the court held that the appellants:

seek to have a repealed ordinance declared invalid, which might ordinarily make the issue moot, [although] such a ruling would also have the effect of nullifying the Zoning

Commission's denial of the rezoning application **and** would entitle the Curlesses to a **de novo** hearing under the new ordinance. **Id.** at 258.

In the issue at hand, the relief that might **be** granted the City of **Miami is** not different than the effect of not deciding the issue. The issue **is** whether **or** not a police officer has been impaired **by** substance abuse, **and** thus the employment **or** non-employment of such an employee remains the essential "**relief**" to **the** City of Miami, the union, and the affected employee. See also, *Montgomery v. Dept. of Health and Rehab. Serv.*, 468 So.2d 1014 (Fla. 1st DCA 1985). This case contains a detailed discussion of the "**mootness**" doctrine. In this **case** the appellants wished the **court** to remand their case to the hearing officer for the determination of the validity of a proposed rule. The court declined to **do so** because any determination "**would** have no present effect on **appellants,**" stating:

Thus, **our** opinion follows the general principle of current ripeness law: that a regulation "**is** ripe for challenge when an affected person has to choose between disadvantageous compliance **and** risking sanctions." **Id.** at 1017.

In the case on appeal, **the** police officers in the City of Miami are not faced with a choice between disadvantageous compliance **and** risking sanctions **because** a **drug** testing policy and procedures **for** implementation of such a policy have already

been negotiated between the parties, without the City of Miami having to impose language on the union, and there is no evidence that unreasonable delay would be created upon contract renegotiation. This issue is not a justiciable controversy.

IV. PUBLIC POLICY

With all due respect, the public policy reasons enunciated by the Third District Court of Appeal's en banc decision are, intentionally or unintentionally, a thinly disguised assault on public employee unions. It constitutes an impermissible restriction on the scope of the collective bargaining rights of all public employees in Florida.

The en banc court stated its reasons quite clearly, citing with approval Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J., 1156 (1969) at 571 So.2d 1328-29, saying:

Thus, Summers suggests that because public sector employees already have a larger voice in deciding the scope of mandatory bargaining than private sector employees, the duty to bargain should extend only to decisions where **the** interests of the voting public as a whole run counter to the employees' interests in increased wages and reduced workload. Id. at 1328.

This court goes on to conclude:

A subject should be required to be bargained **only** where the interests of the public and the interests of the public employee are adverse. Id. at 1329.

This language is not limited to police officers or safety-sensitive employees, but speaks to "public sector employees." This constitutes an impermissible restriction on the scope of collective bargaining rights for Florida's public employees. The en banc court recognized that federal cases involving the National Labor Relations Act have held that drug testing is a subject of mandatory collective bargaining. See e.g., Johnson-Bateman Co., 295 NLRB No. 26 (1989). However, the court goes on to state "we believe those cases are inapplicable here for the various policy reasons discussed throughout this opinion [and] would not be followed by our Florida Supreme Court." City of Miami, supra, at 1326, fn. 15.

As argued above, based on existing case law from the Florida Supreme Court, FEA/United believes that the subject of drug testing is a mandatory subject of collective bargaining. This limitation on the scope of collective bargaining between public employees and public employers in the State of Florida is not supported by precedent from the Florida Supreme Court. To the contrary, see Dade County Classroom Teachers Association, Inc. v. Ryan, supra at 905; City of Tallahassee v. Pub. Emp. Rel. Com., supra at 490; City of Casselberry v. Orange Cty. Police, 482 So.2d 336, 337 (Fla. 1986); Hillsborough Cty. G.E.A. v. Aviation Auth., 522 So.2d 358, 362 (Fla. 1988).

V. COMPELLING STATE INTEREST

The issue of whether or not the **state** has demonstrated a compelling interest to justify abridgment of the public employees' constitutionally mandated fundamental right to bargain collectively (Article I Section 6) cannot be "**overlooked or excused for reasons of convenience.**" City of Tallahassee, susra, at 490.

FEA/United submits that no compelling interest has **been shown** by the City of Miami because there is no history of public employees in **the** State of Florida using collective bargaining as a "powerful tool **for** achieving delay", City of Miami, supra, at 1326, nor is there evidence that the stated **goal** of a drug-free police force cannot **be** accomplished through collectively bargained procedures.

Other topics which are as "fundamental to the basic direction of a [corporate] enterprise", Id. at 1322, as is drug testing of police officers, are collectively bargained at the present time. The artificial creation of a "public policy" to support such a premise is not warranted. The policy created, and stated very succinctly by the Third District Court of Appeal en banc decision contends that:

To fully translate private sector collective bargaining rights to the public sector would result in "institutionaliz[ing] the power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage." Id. at 1328, fn. 18.

Again, this language **is** not limited to police **officers**. This limitation on the collective bargaining rights of **public** employees in **the** state of Florida **is** not constitutionally permitted nor has a compelling state interest been established which the court must recognize to uphold an abridgment of a fundamental right to collectively bargain. Florida Constitution, Article I, Section 6.

The doctrine of managerial prerogative should not be raised unless an abridgment of a constitutional right may be sustained. Id. at 1323.

VI. BALANCING TEST

Florida Statutes state at 447.309(1) that:

The bargaining agent **for** the organization and 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.

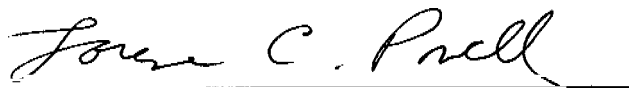
No one argues that the drug testing of police officers **is** not a term or condition of employment. Thus, the balancing test is foreclosed. Only by creating an issue of public policy which would result in limiting the scope of collective bargaining and applying the managerial prerogative doctrine to the issue, does drug testing and the implementation of such procedures for police officers in the State of Florida become **outside** the plain

language of the statute. See, e.g., School Board of Indian River County v. Indian River County Education Association, 373 So.2d 412 (Fla. 4th DCA 1979). **The** balancing test should not be **applied** under these circumstances.

CONCLUSION

The FEA/United requests that this **Court find** the Third District **Court of Appeal** en banc decision creates an impermissible abridgment of the collective bargaining rights of public employees in the State of Florida and that drug-testing of police officers **is** a mandatory topic of collective bargaining, or alternatively, that the cause **is** not a justiciable controversy.

Respectfully submitted,



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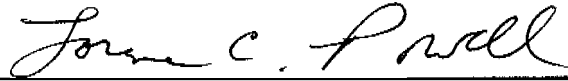
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