SUPREME COURT OF FLORIDA

CASE NO. SC08-617

GLEN IKALINA,

Petitioner,

vs.

THE CITY OF PEMBROKE PINES,

Respondent.

Express & Direct Conflict Jurisdiction
Fourth District Court of Appeal Case No. 4D06-2411

AMENDED RESPONDENT'S BRIEF IN OPPOSITION OF JURISDICTION

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TABLE CONTENTS

TABLE OF AUTHORITIES

Cases

I. SUMMARY OF ARGUMENT

At no time did Petitioner Glen Ikalina ("Petitioner") raise the issue that the Fire & Police Pension Board of the City ("Pension Board") was the appropriate party to decide this issue. While Petitioner did claim that the Arbitrator had no authority to decide the issue in the Circuit Court, his basis for that appeal was a claim that the Arbitrator was somehow "interpreting" City Ordinances. All the Arbitrator did was determine that Petitioner was no longer employed for purposes of participating the Deferred Retirement Option Plan ("D.R.O.P.").

Additionally, the cases Petitioner claims are in conflict with the Fourth District's opinion were never raised by Petitioner in the Circuit Court, presented to the Arbitrator in his brief, Supplemental Brief of Petitioner ("Petitioner's Supplemental Brief"), cited in either of Petitioner's briefs to the Fourth District. Petitioner's failure to raise the objection below in any fora dooms his attempt to seek the discretionary review of this Court.

Finally, neither case conflicts with the ruling of the Fourth District. Both cases are opinions interpreting Chapter 447 regarding the jurisdiction of the Public Employees Relations Commission ("PERC"). Both cases deal with facts involving employee labor union disputes with public employers. There is no labor union here and the issue between the City and Petitioner

was directly referred to arbitration by the Collective Bargaining Agreement. No conflicts raising the issue of PERC's jurisdiction or Chapter 447 have anything whatsoever with Petitioner's retirement from employment with the City.

II. JURISDICTION OF SUPREME COURT

Petitioner claims that the decision by the Fourth District Court of Appeal directly conflicts with decisions of other districts. In order to invoke this discretionary jurisdiction, an petitioner must show that

> [The Supreme Court's] jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance.

Mancini v. State of Florida, 312 So. 2d 732, 733 (1975).

IV. FAILURE TO RAISE IN THE LOWER TRIBUNAL

Petitioner never relied upon, referenced, or mentioned either of the above cases during any portion of this extensive litigation. While the initial appeal was regarding the authority of the arbitrator to interpret the Settlement Agreement between the Petitioner and the City, Settlement Agreement, Petitioner has never raised the issue that the wrong party was deciding this issue. Moreover, the putative conflict is predicated upon two

cases that interpret Chapter 447 regarding PERC's jurisdiction. It defies logic that generally challenging an arbitrator's authority preserves the grounds raised here for the first time. *Clock v. Clock*, 649 So. 2d 312, 315 (3d D.C.A. 1995); *Perez v. Winn-Dixie*, 639 So. 2d 109, 112 (1st D.C.A. 1994); *W.R. Grace & Co. v. Dougherty*, 636 So. 2d 746, 749 (2d D.C.A. 1994) *rev. denied*, 645 So. 2d 457 (Fla. 1994).

Petitioner did not object that the Arbitrator did not have authority because the Pension Board did. At best, the only position he took was that the trial court had jurisdiction and could hear the matter. See Transcript of October 26, 2004 Hearing, p.7, attached to Petitioner's Motion to Supplement the Record. The Circuit Court disagreed and sent the matter back to the Arbitrator. The parties filed Supplemental Briefs with the Arbitrator and the Arbitrator ruled that Petitioner had retired from employment. Arbitrator's Findings/Award. At no time did Petitioner object to the Arbitrator's jurisdiction, or that the matter should be decided by the Pension Board, or that Chapter 447 was somehow relevant.

Petitioner's appeal in the Fourth District could most generously be said to claim that the arbitrator lacked authority to interpret City ordinances and that the City acted improperly by denying Petitioner's entitlement to the D.R.O.P. program. Petitioner's current position that Chapter 447 somehow

invests the Pension Board with the jurisdiction to resolve some labor issue between Petitioner and the City was never raised. In fact, Chapter 447 was never cited; either in briefs or at oral arguments. Interestingly, the City did raise the issue that an indispensable party, the Pension Board, was missing from the case and needed to be included in this matter in its first Motion to Dismiss. City's Motion to Dismiss. The Circuit Court ruled that the matter should be referred to the Arbitrator to determine if the Settlement Agreement had been violated by the City. The Court accepted the Arbitrator's ruling that there was no such violation and dismissed the matter. Petitioner cannot now claim he made an error and should have included the Pension Board, especially since the City put him on notice of that very issue and he refused or failed to amend his pleadings to address the issue. Instead he seeks to have this Court rule upon it for the first time. This he cannot do. *Jaffe v. Endure-A-Life Time Awning Sales*, 98 So. 2d 77, 79 (Fla. 1957).

IV. CASES CITED AS CONFLICT NEVER CITED BY PETITIONER

Petitioner's Brief on Jurisdiction should be dismissed because these cases were never cited by Petitioner before the Fourth District nor were the principles for which they stand ever raised before the Circuit Court. Furthermore, neither of these cases were even referred to, let alone relied upon, by the Fourth District in its opinion and it certainly did not certify a

conflict with any case. A lower tribunal must have an opportunity to address or correct any potential conflicts with other courts. Petitioner only latched upon these two cases in a last ditch attempt to get back a job he voluntarily relinquished.

A. Opinion of the Fourth District Court of Appeal

The Fourth District correctly found that the issue was whether Petitioner had ceased his employment with the City pursuant to the Settlement Agreement. There was no usurpation of the Pension Board's powers. The question was expressly limited, both below and in the Fourth District as to whether the arbitrator was authorized to interpret the Settlement Agreement. The facts as expressed by the Fourth District clearly established that Petitioner had ceased his employment by virtue of the Settlement Agreement.

More importantly for purposes of this Court's consideration is the fact that the failure to somehow refer this matter to the Pension Board has never been raised. As indicated above, the City's first motion to dismiss pointed out specifically that Petitioner's complaint could not be heard without an indispensable party: the Pension Board. See City's Motion to Dismiss. At no time was this considered by the trial court or the Fourth District. Moreover, Petitioner never amended his pleadings nor filed a new one

claiming that the Pension Board was the appropriate party to decide this matter. Failure of an Petitioner to allow the lower courts opportunity to resolve the issue first raised on appeal is grounds to dismiss or deny this appeal. Here, it is fatal to Petitioner's plea for this Court to accept jurisdiction.

B. Decisions Do Not Conflict with Fourth's Opinion

The cases cited have no bearing upon this controversy. Both cases involved determinations of how best to address conflicts between labor unions and public employers and the jurisdiction of the PERC as delineated in Chapter 447. In both of these cases, there is a labor union and a public employer at an impasse and one party seeking to have to arbitrate when PERC clearly retains jurisdiction under Chapter 447. Petitioner attempts to insert the Pension Board into the role of PERC and himself as an aggrieved union. To be sure, there are no labor union/public employer issues in this matter.

1. Cases Interpret Chapter 447 Regarding Jurisdiction of PERC

The decisions claimed by Petitioner to be in conflict are *Local Union #2135, Int'l Assoc. of Firefighters v. City of Ocala*, 371 So. 2d 583 (1st D.C.A. 1979) and *State of Florida v. Int'l Union of Police Assoc.*, 927 So. 2d 946 (1st D.C.A. 2006). It should be noted that Petitioner's union did not

pursue this matter nor has it been involved in any way, shape, or form in Petitioner's desire to circumvent his Settlement Agreement with the City.

a. *City of Ocala*

City of Ocala dealt with an attempt by Local Union #2135, International Association of Firefighters ("Union") to compel arbitration of unresolved issues pending between the Union and the City of Ocala ("Ocala"). Primarily, the collective bargaining agreement between Ocala and the Union provided for annual automatic renewals unless there was a desire to modify the agreement. All unresolved issues would be submitted to arbitration. The parties disagreed about the matters to be included in the renewal contract and they deadlocked.

Subsequently, the Union advised PERC of an impasse and asked PERC to name a special master pursuant to §447.403. PERC named a special master, but he never met with the parties pending resolution of Ocala's alleged bad faith. To resolve that issue, the Union applied to the Circuit Court for the appointment of an arbitrator. At such time, the Union moved to stay the special master's proceedings pending arbitration, which motion PERC denied. The City then moved the Circuit Court to dismiss the application for an arbitrator, which was granted. That was the matter before the First District Court of Appeal.

First, the Court noted that "the court is at grips with a union-city disagreement relating to a governmental as distinguished from proprietary function." *City of Ocala*, 371 So. 2d at 585. The Court went on to assert "that jurisdiction in this matter had been preempted by the Public Employees Relations Commission Act, the Union by its President having activated the provisions of such act by declaring an impasse and requesting the Commission to appoint a special master." *Id.* The Court held that it was the legislature's intent "to provide the method of resolving labor disputes between public employers and public employees, with the Public Employee Relations Commission having preemptive jurisdiction[.]" *Id.*

b. ***International Union***

The second case is equally inapposite. *State of Florida v. Int'l Union of Police Assoc.*, 927 S. 2d 946 (2006) involves an appeal by the State of Florida ("State") of a Circuit Court's confirmation of an arbitrator's decision. The collective bargaining agreement ("CBA") between the State and the International Union of Police Associations ("Union") provided that all "grievances" will be resolved by arbitration. The CBA had a specific definition for grievance. *Id.* at 947. The Court agreed with the State that the matter at issue was not a grievance, but a "dispute [that] involves whether a unilateral change in a term or condition of employment has occurred." *Id.*

Then, the Court held that "the dispute falls within the exclusive jurisdiction of PERC pursuant to the provisions of Chapter 447, Florida Statutes." *Id.*

2. **Both Cases Address Union/Employer Labor Disputes**

Neither of these cases have even a passing relationship to the case at bar. The issue in the case before this Court has nothing to do with PERC, application of Chapter 447, or any disputes between labor union's and public employees. The facts of this case are simply that Petitioner sought to avail himself of the City's D.R.O.P. Program for which he was unqualified. A specific requirement to participate in D.R.O.P. was that Petitioner be employed by the City at that time of that election. The Arbitrator in his Findings/Award found that Petitioner had retired and was no longer a City employee. See Arbitrator's Findings/Award. In no way can it be said that Petitioner is representative of his labor union thus transforming this case into "a union-city disagreement relating to governmental as distinguished from proprietary function". *City of Ocala*, 371 So. 2d at 585.

VI. CONCLUSION

None of the cases cited have ever been raised or relied upon prior to Petitioner's Brief on Jurisdiction. The Fourth District did not rely on or cite to either of the cases presented by Petitioner as being in conflict. Additionally, the decisions of the First District pointed to by Petitioner do

not address the same issue as raised in Petitioner's situation. There is clearly no conflict for this Court to resolve.

WHEREFORE, for all the foregoing, the City of Pembroke Pines respectfully requests this Honorable Court deny to exercise jurisdiction in this matter as well as for any other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail on June 3, 2008, to: David B. Pakula, 1806 N. Flamingo Road, Suite 410, Pembroke Pines, FL 33028; and Julie F. Klar, Esq., 3099 E. Commercial Blvd., Suite 200, Ft. Lauderdale, FL 33308.

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Carlos E. Mustelier Jr.

CERTIFICATE REGARDING FONT

The undersigned certifies that this brief uses 14- point Times New Roman type in compliance with Fla. R. App. P. 9.210(a)(2).

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Carlos E. Mustelier Jr.