Florida Public Employees Relations Commission

39th Annual Florida Educational Negotiators Conference – May 2019

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Brief History of PERC

- **1968** - Article I, Section 6, Florida Constitution, titled "Right to Work" rewritten
- **1969** – FL Supreme Court upheld Art. 1, Sec. 6
- **1972** - *Dade County CTA v. Fla. Legislature*, 269 So. 2d 684 (Fla. 1972)
- **1974** - Public Employees Relations Act (PERA), Chapter 447, Part II, Florida Statutes
  - Jurisdiction to hear Representation and Unfair Labor Practice Cases arising out of PERA
- **1977** and **1979** changes to organization
- **1986** – Jurisdiction over career service appeals (§ 110.227)
- Later added whistleblower, veteran's preference and other jurisdictions

Unfair Labor Practice Cases under PERA

- Collective Bargaining defined: §447.203(14)
- Common ULP Charges

Common ULPs under § 447.501(1)&(2)

- Bad Faith Bargaining
- Premature Declaration of Impasse
- Unilateral Changes
- Waiver of Bargaining Rights
- Protected Activity
- Denial of Representation
- Grievance Processing
- Breach of Duty of Fair Representation

ULP for Bad Faith Bargaining

- Brought by the employer or employee organization, i.e., the parties in interest
- Section 447.501(1)(c) and (2)(c), Florida Statutes
- In considering whether parties fail to bargain in good faith, the Commission must consider the total conduct of the parties during negotiations as well as any **single act** which may constitute a **per se** violation.

Utility Board of the City of Key West v. Local Union 1990, International Brotherhood of Electrical Workers, 14 FPER ¶ 19040 (1988)

"Bad faith" Bargaining: § 447.203(17)

- Failure to meet at reasonable times and places with reps of the other party for the purpose of negotiations
- Placing unreasonable restrictions on the other party as a prerequisite to meeting
- Failure to discuss bargainable issues
- Refusing, upon reasonable written request, to provide public information, excluding work products as defined in s. 447.605
- Refusing to negotiate because of an unwanted person on the opposing negotiating team
- Negotiating directly with employees rather than with their certified bargaining agent
- Refusing to reduce a total agreement to writing

Utility Board of the City of Key West v. Local Union 1990, International Brotherhood of Electrical Workers, 14 FPER ¶ 19040 (1988)

Premature Declaration of Impasse

- In order to show that impasse was prematurely declared, a charging party must establish that a "reasonable period of negotiation" has not transpired.
- This means that the charging party must allege and demonstrate that the public employer refused to meaningfully negotiate mandatory subjects of bargaining by declaring an impasse before negotiating those issues.

IBPO, Local 621 v. City of Hollywood,
8 FPER ¶ 13334 (1982)

Unilateral Changes

Absent clear and unmistakable waiver, exigent circumstances, or legislative body action after bargaining impasse, changes in the status quo of wages, hours, and terms and conditions of employment, cannot be made by a public employer without providing notice to the employees' bargaining agent, and an opportunity to conduct meaningful negotiations, before implementing the change. Such unilateral changes constitute a per se violation of Section 447.501(1)(a) and (c), Florida Statutes.

See, e.g., The Florida School for the Deaf and the Blind Teachers United v. The Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985)

Waiver of Bargaining Rights

It is well-settled that an employer cannot impose, through legislative body action, a waiver of the right to bargain over changes in wages, hours, and terms and conditions of employment. However, it is not a ULP to impose language which constitutes a management right.

See, e.g., Amalgamated Transit Union, Local 1593 v. HARTA, 24 FPER ¶ 29247 (1998); *IAFF v. City of Cocoa*, 18 FPER ¶ 23235 (1992) (and cases cited therein)

Protected Activity

Interference, Coercion, Restraint, and Retaliation

The Commission applies the two-prong *Pasco* test:

- 1st Prong - Claimant must prove by a preponderance of the evidence that (a) his or her conduct was protected; and (b) his or her conduct was a substantial or motivating factor in the decision taken against him by the employer.

- 2nd Prong – if decision of the employer was motivated by a non-permissible reason, the burden shifts to the employer to show by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway.

Pasco County School Board v. Public Employees Relations Commission, 353 So. 2d 108 (Fla. 1st DCA 1978)

Denial of Representation (*Weingarten* Right)

- Arises under the following circumstances:
  - the employee requests representation;
  - the employee reasonably believes the interview will result in disciplinary action; and
  - the exercise of the right will not interfere with legitimate employer prerogatives
- In *Raven v. School District of Manatee County,* 34 FPER 125 (2008), the Commission expanded right to representation of entire bargaining unit.

Grievance Processing: *Westfall* Test

- A public employer may not refuse to discuss grievances in good faith pursuant to the terms of the CBA with either the certified bargaining agent for the public employee or the employee involved. *See* § 447.501(1)(f), Fla. Stat.
- Charging Party must demonstrate:
  - the grievance at issue arguably involves the interpretation or application of the collective bargaining agreement
  - the employer prohibited the employee from fully utilizing the contractual grievance procedure by the manner in which it handled the grievance at some level, usually at the arbitration step

Westfall v. Orange County Board of County Commissioners, 8 FPER ¶ 13367 at 648 (1982)

Breach of Duty of Fair Representation

- Employee Organizations have duty to fairly represent all bargaining unit employees
- Duty only exists over matters which the EO has exclusive control, such as negotiating an agreement or enforcing agreement through grievance procedure
- An EO violates its duty of fair representation when, in performing its representational capacity, its conduct toward employees is **arbitrary**, **discriminatory**, or in **bad faith**.
- Commission has defined arbitrary conduct as action taken without a rational or proper basis.

Kallon v. UFF, 15 FPER ¶ 20047 (1988)

Procedural Matters with ULPs

- Statute of Limitations
- Sufficiency Review
- Potential Remedies

Statute of Limitations—ULP Charges

- Must be filed with six months of events underlying alleged ULP charge, unless the filing was delayed by service in the armed forces. *See* § 447.503(6)(b).
- Six-month period is initiated when the charging party "knew or should have known" of the complained of actions
- Can consider events that occurred earlier, but they cannot for the basis of a violation

PERC's Sufficiency Review Process

- Charges must contain:
  - a clear and concise statement of facts constituting the alleged ULP;
  - all the names of individuals involved in the ULP; and
  - specific references to the provisions of § 447.501 alleged to have been violated.
- Charge must be accompanied by sworn statements and documentary evidence sufficient to establish a prima facie violation of the applicable ULP provision
- Requisite facts must be contained within the charge itself

Koren Test for Sufficiency Review

- Regarding charges of interference with protected activity
- Under the ***Koren*** test, a charge must allege a prima facie showing that:

(1) the employee engaged in protected activity;

(2) the employee was thereafter subjected by his or her employer to an adverse employment action; and

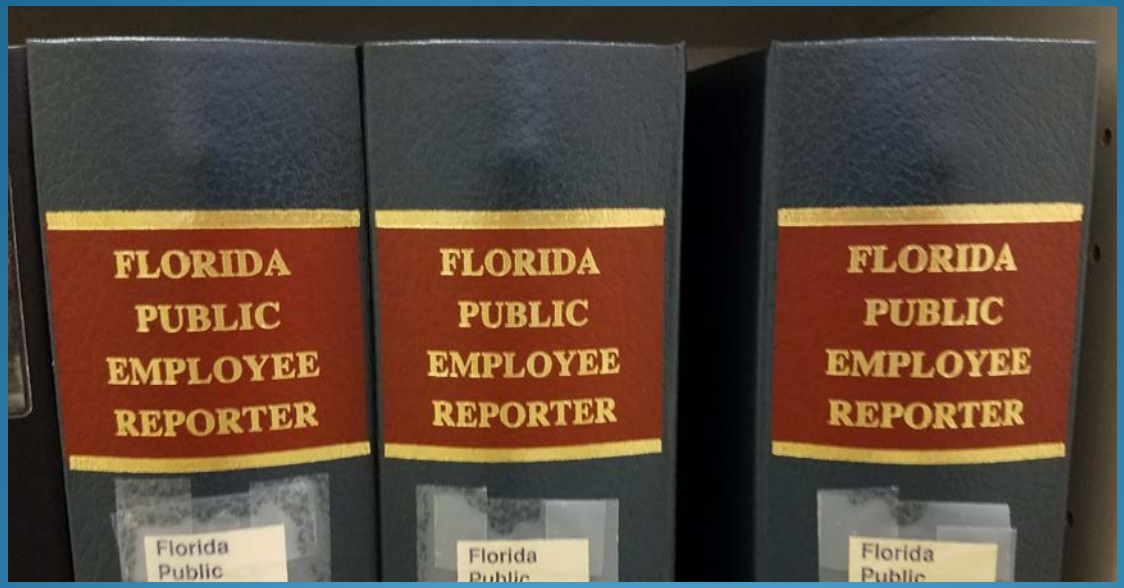
(3) there is a causal link between the protected activity and the adverse employment action.

Koren v. School Board of Miami-Dade County,
97 So. 3d 215 (Fla. 2012)

Potential Remedies

- Reinstatement and vacating discipline
- Back pay
- Attorneys' fees
- Return to status quo
- Notice posting
- Civil action to enforce Commission's order

Recent Cases



Concerted, Protected Activity

- Commission affirmed the hearing officer's recommendation that an employee's unfair labor practice charge be dismissed.
- Employee alleged he was threatened with termination in retaliation for being an active member of the union and advocating for other teachers.
- The conduct in which the employee engaged did not involve concerted activity, so it was not protected.

Charlotte FEA and Jennings v. School District of Charlotte County, Florida, 42 FPER ¶ 315, Order No. 16U-118 (PERC May 3, 2016) [Case No. CA-2015-046]

Weingarten Rights

- Principal scheduled a meeting with teacher and teacher requested union representative to attend.
- Request was refused and union representatives were denied attendance at the meeting when they showed up.
- Hearing Officer and Commission ultimately found no violation and denied both sides requests for attorney fees.
- Employee appealed to DCA that affirmed Commission decision.

Williams v. School District of Broward County, Florida, 45 FPER ¶ 107, Order No. 18U-233 (PERC 2018) [Case No. CA-2017-018]

Election of Remedies

- Charging party filed a ULP challenging the salary schedule in CBA as violating the new performance pay standards in section 1012.22(1)5., Fla. Stat.
- Charging party also filed a grievance challenging his salary.
- GC dismissed the charge based on section 447.401, Florida Statutes, which requires employees to use civil service appeal procedure, ULP, or grievance procedure from CBA.

Sexton v. School District of Lee County, Florida, 43 FPER ¶ 310, Order No. 17U-135 (PERC May 24, 2017)

[Case No. CA-2017-021]

Election of Remedies

- Charging party alleged that school district's director of compensation and labor relations (director) misled the charging party by encouraging him to file a grievance even though it involved a non-grievable issue.
- Charge was found sufficient and went to hearing..
- Hearing officer found that the director did not mislead the charging party into filing a grievance or deny the grievance as part of a grievance panel.
- Commission affirmed and did not underlying issue regarding salary schedules in CBA.

Sexton v. School District of Lee County, Florida, Order No. 18U-020 (PERC Jan. 18, 2018) [Case No. CA-2017- 043]

Unilateral Change

- Union alleged that School District failed to give pay raises provided for in the parties' CBA.
- Instead of raises, District gave lump-sum payments to members of the bargaining unit who had reached the maximum base rate of pay.
- Hearing officer found that CBA prohibited raising salaries above the maximum base rate of pay by the civil service rules, which were incorporated in the CBA.

Jacksonville Supervisors Association, Inc. v. School District of Duval County, Florida, 45 FPER ¶ 8, Order No. 18U-136 (PERC 2018) [Case No. CA-2017-061]

Leave Time for Union Officials

- Section 447.501(1)(e) prohibits public employers from contributing financial support to a public sector union.
- In 2015, Commission held that any paid release time for union officials must be strictly limited to time spent directly representing employees.

Del Pino Allen v. Miami-Dade College Board of Trustees,
43 FPER ¶ 6, Order No. 16U-144 (PERC 2016)
[Case No. CA-2015-070]

Leave Time for Union Officials

- Order Affirming Partial Summary Dismissal of Amended Charge.
- Union president was given leave and paid salary and benefits by district, with Union providing full reimbursement of that amount.
- Commission determined that arrangement complied with *del Pino Allen*.

Scott v. School District of Lee County, Order No. 19U-131 (PERC 2019) [Case No. CA-2018-042]

Retaliation

- Charging party alleged that the School District violated section 447.501(1)(a), Florida Statutes, by failing to renew his employment contract in retaliation for his having filed two grievances.
- The hearing officer found that the charging party's two grievances were not a substantial or motivating factor in the School District's decision not to renew his annual contract under *Pasco* test.
- The hearing officer credited testimony that the district created positions and eliminated several positions in an effort to further structure career pathways and facilitate college and career readiness of students.
- The Commission adopted the hearing officer's recommended order and dismissed the charge. This case has been appealed to the Fourth District Court of Appeal, Case No. 4D18-2793.

Goldman v. School District of Broward County, Florida,
45 FPER ¶ 57, Order No. 18U184 (PERC 2018)
[Case No. CA-2017-066]

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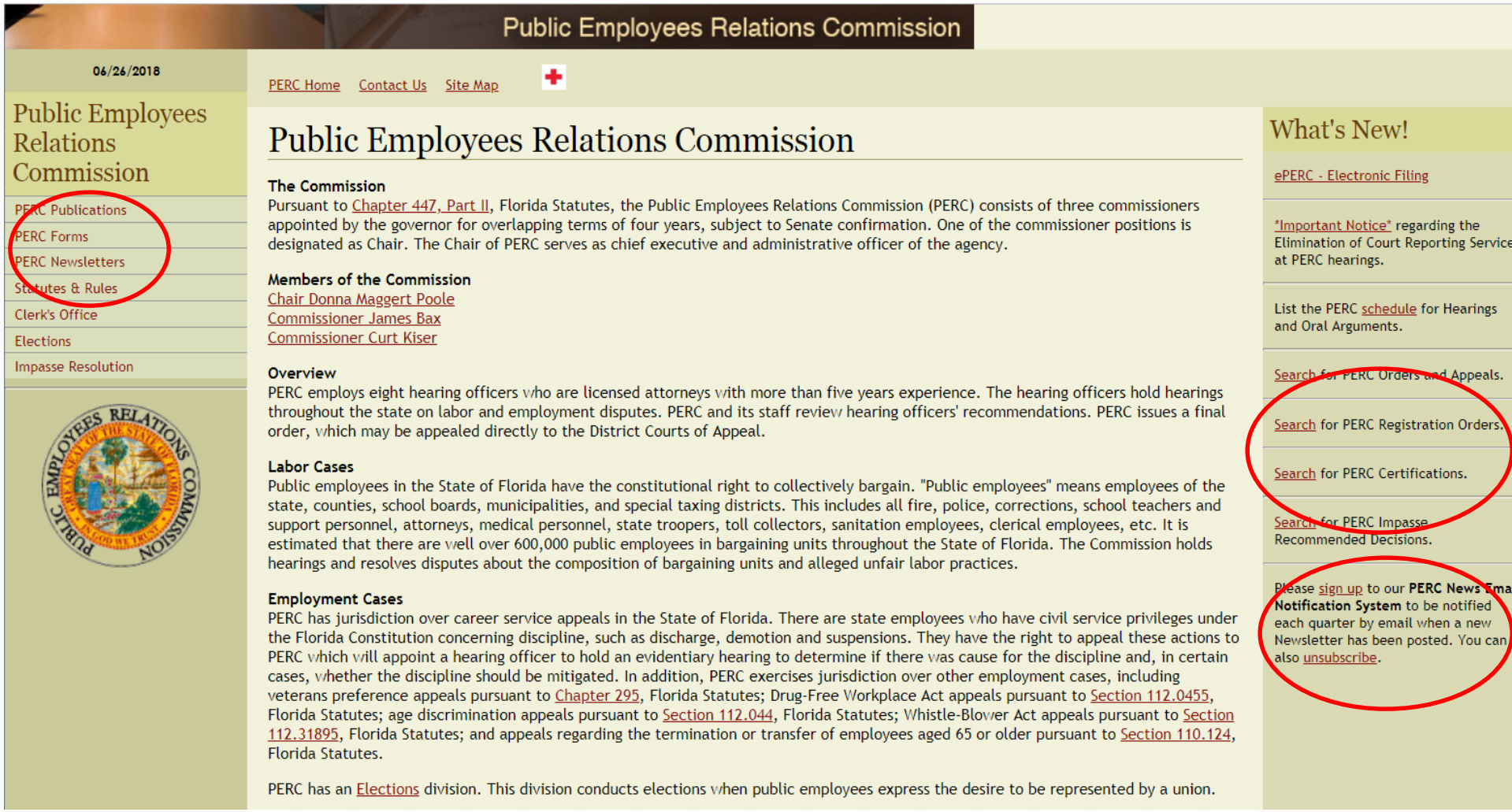
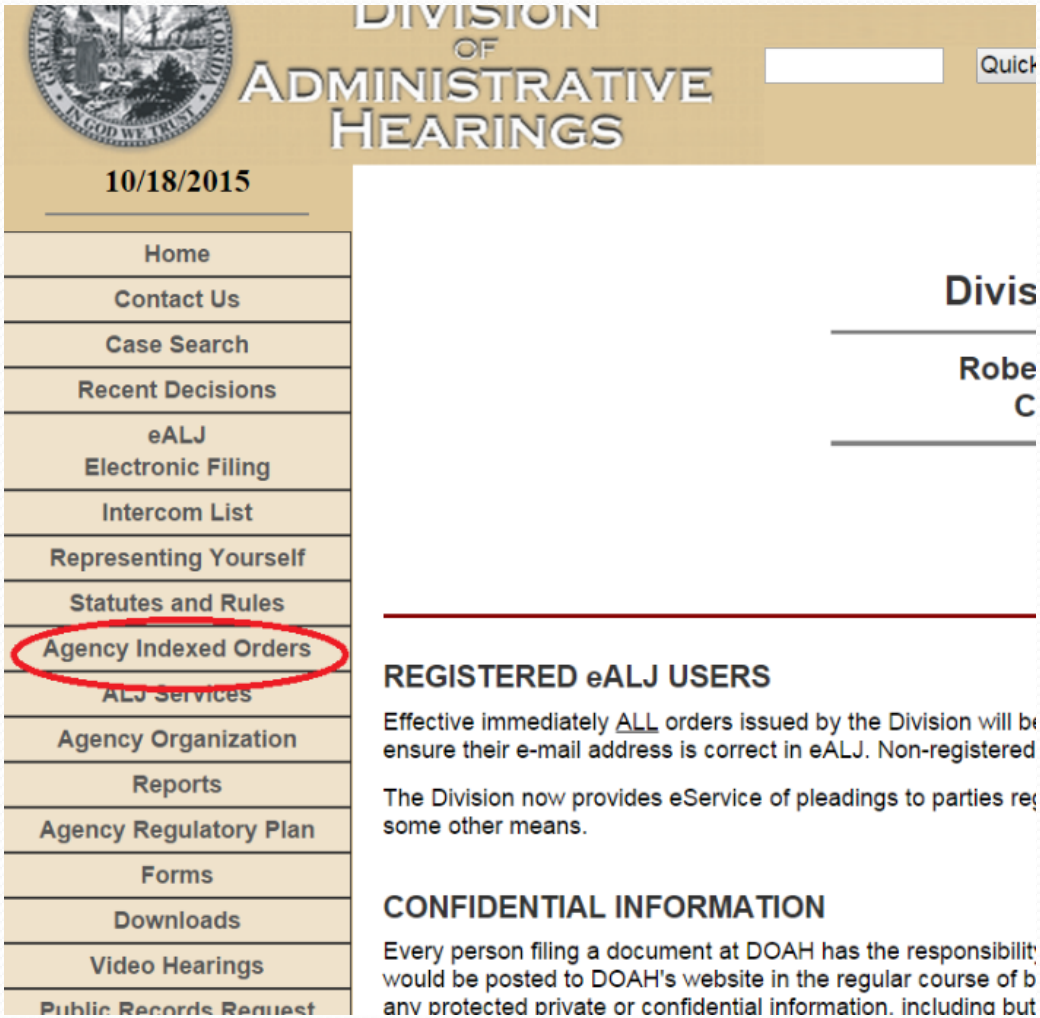


DOAH's Website https://www.doah.state.fl.us



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Thank you!

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