FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1810

STATE OF FLORIDA, DEPARTMENT OF MANAGEMENT SERVICES,

Appellant,

v.

AFSCME FLORIDA COUNCIL 79 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

On appeal from the Public Employees Relations Commission. Donna Poole, Chairperson.

December 22, 2022

B.L. THOMAS, J.

The Department of Management Services appeals a final order issued by the Public Employee Relations Commission. The order dismissed the Department's amended unfair labor practices charge against AFSCME Florida Council 79 of the American Federation of State, County, and Municipal Employees, AFL-CIO. We reverse because the Department had standing and made a prima facie case.

The Department and AFSCME engaged in collective bargaining negotiations during the 2019-2020 fiscal year for a 2020-2023 collective bargaining agreement. During these negotiations, AFSCME proposed a pay raise for its employees in the four bargaining units it represents, but the Department did not agree to the proposal.

The Legislature approved a 3% pay increase for all eligible state employees during the 2020 legislative session. Ch. 2020-111, § 8, at 419, Laws of Fla. The negotiations between AFSCME and the State on the issue of wages for the 2020-2021 contract year were submitted to the 2020 Florida Legislature for resolution through the statutory impasse process. The Legislature resolved the impasse through the 2020 General Appropriations Act, and the Governor signed this act into law. Ch. 2020-111, § 8, at 419, Laws of Fla. The resolution of the impasse went into effect on October 1, 2020, regardless of whether the collective bargaining agreement was ratified.

In early October 2020, AFSCME mailed a postcard to state employees at eleven agencies, including to employees not represented by AFSCME. The postcard advised the employees to ratify the collective bargaining agreement with AFSCME to "complete" the 3% pay raise. The postcard stated, "For this raise to take effect YOU as a state employee **MUST APPROVE THIS RAISE**." (emphasis in original). The postcard directed state employees to access AFSCME's website to find dates, times, and locations for the employees to cast votes "on our union contract and pay increase."

Starting October 12, 2020, the human resource offices of eleven state agencies began contacting the Department's Division of State Human Resource Management about the postcard. Some agencies sought assistance in responding to their employees concerned that their pay raise would be in jeopardy if the agreement was not ratified.

The Department emailed all state employees in a final effort to correct AFSCME's misrepresentations and to assuage fears that the 3% raise was at risk.

AFSCME later added this language to its website about this issue:

> State employees may have received correspondence from management regarding this. When AFSCME started contract negotiations in the Fall of 2019, the state was unwilling to agree to a raise for state employees. AFSCME did not accept this and the negotiations went to an impasse. AFSCME members across Florida spent months fighting for this wage increase by holding rallies and lobbying the state legislature. That hard work paid off when a 3% raise was included in the proposed state budget that was signed by the Governor. Impasse rules as set by law (L 447.01 – 447.609) require that the next step is for employees to vote on it. Should they approve – all changes go into the contract and thus if the State does not follow through, employees have recourse. Should the employees not approve the contract, all improvements are erased and the contract reverts to the old language. The 3% was signed into law due to the hard work of our Union members. The accompanying contract language must be approved by members to cement the contract and the Union's ability to file a grievance should the state short change someone.
>
> We apologize for any misunderstanding. Thank you for all you do to make Florida happen.

On October 14 through 17, 2020, AFSCME conducted the vote to ratify the collective bargaining agreement pursuant to section 447.403(4)(e), Florida Statutes (2020). When the vote occurred, the 3% raise had been in effect for two weeks. The 2020-2023 Master Agreement contained a provision that "[p]ay shall be in accordance with the authority provided in the Fiscal Year 2020-2021 General Appropriations Act."

The Department then filed with the Commission an amended unfair labor practices charge against AFSCME, alleging that AFSCME (i) interfered with or coerced public employees in the exercise of their right under section 447.301(1), Florida Statutes, to refrain from joining an employee organization, and thus violated section 447.501(2)(a); and (ii) failed to bargain collectively in good

faith when it provided false and misleading information to state employees ahead of the ratification vote, in violation of section 447.501(2)(c). The Commission's General Counsel summarily dismissed the amended charge, and the Department appealed the dismissal to the full Commission.

The Commission entered a final order dismissing the Department's amended charge. The Commission determined that the Department failed to allege an injury to its own interest. As a public employer, the Department lacked standing to bring an unfair labor practice charge against a union, based on injuries to employees' interests, according to the Commission. The Commission also concluded that the Department failed to state a prima facie case that AFSCME had engaged in unfair labor practices.

Standard of review

Article V, section 21, of the Florida Constitution provides that, "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

Standing

Section 447.503(1), Florida Statutes (2020), provides:

> A proceeding to remedy a violation of the provisions of s. 447.501 shall be initiated by the filing of a charge with the commission by *an employer*, employee, or employee organization, or any combination thereof.

(emphasis added). Section 447.503 also provides that

> violations of the provisions of s. 447.501 shall be remedied by the commission in accordance with the following procedures and in accordance with chapter 120; however, to the extent that chapter 120 is inconsistent

> with the provisions of this section, the procedures contained in this section shall govern[.]

The Commission and AFSCME argue that the substantial-interest requirement of chapter 120 applies here because section 447.503 states that violations must be remedied in accordance with chapter 120. But Chapter 120 does not use the word "standing." A hearing is provided under section 120.569 "in all proceedings in which the substantial interests of a party are determined by an agency . . . ." § 120.569(1), Fla. Stat. (2020).

Section 120.52(13), Florida Statutes (2020), defines a party as:

> (a) Specifically named persons whose substantial interests are being determined in the proceeding.
>
> (b) *Any other person* who, as a matter of constitutional right, *provision of statute*, or provision of agency regulation, *is entitled to participate in whole or in part in the proceeding*, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(emphasis added).

The Department is a "person" under section 120.52(14), because it is a "governmental entity in the state having statewide jurisdiction . . . ." *See* § 120.52(1)(b), Fla. Stat. The Department has legal standing under section 120.52(13)(b), because section 447.503 entitled it, as an employer, to participate in whole or in part in the proceedings. Section 120.52(13)(b) does not require the Department to allege its substantial interest has been adversely affected, when a provision of a statute entitles it to participate in the proceeding. Thus, sections 120.52(13)(b), 120.569, and 447.503 are consistent.

We also hold that, even were we to agree with the Commission's arguments regarding standing—which we do not—the Department showed that its interests would be substantially affected by the unfair labor practices proceeding. A party asserting that its substantial interests are affected "must demonstrate that (1) it 'will suffer injury in fact which is of sufficient immediacy to

entitle [it] to a section [120.569] hearing,' and that (2) its 'substantial injury is of a type or nature which the proceeding is designed to protect.'" *Washington Cnty. v. Northwest Fla. Water Mgmt. Dist.*, 85 So. 3d 1127, 1131 (Fla. 1st DCA 2012) (quoting *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)). The Department was a party to the negotiations for the 2020-2023 collective bargaining agreement. AFSCME's postcard provided incorrect and misleading information concerning the effect of the agreement on the 3% raise and encouraged state employees to ratify the agreement in order to protect the raise, when the raise had already been approved by the Legislature. This misleading information affected the negotiation and ratification process, and the Department had to expend its resources to try to refute the misinformation. The Department, therefore, suffered an injury in fact that was substantial and sufficient to confer standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that an organization suffered an injury in fact when its ability to accomplish its mission was impaired by its having to expend significant resources to counteract the opposing party's discriminatory practices).

The Department's prima facie case under section 447.501(2)(a) and (2)(c)

The Department argued that AFSCME's postcard constituted a violation of section 447.501(2)(a), Florida Statutes (2020), because it was an improper attempt to encourage membership in its organization through the dissemination of false information. Section 447.501(2)(a) prohibits a public employee organization from "[i]nterfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part . . . ." "Public employees shall have the right to form, join, and participate in, or *to refrain from* forming, joining, or participating in, any employee organization of their own choosing." § 447.301(1), Fla. Stat. (2020) (emphasis added). In dismissing the Department's amended charge, the Commission's final order found that the postcard did not "contain a promise of benefits or a threat of reprisal or force," but was merely expressing what AFSCME believed needed to occur for the pay raise to "become official" as

part of the collective bargaining agreement. The Commission also found that the statements in the postcard "are free speech."

A prima facie claim "is an assertion that, at first glance, is sufficient to establish a fact or right but is yet to be disproved or rebutted by someone." *Jefferson v. State*, 264 So. 3d 1019, 1027 (Fla. 2d DCA 2018) (emphasis omitted). The Department's amended charge alleged that the postcard "contained a promise of benefit (i.e. a 3% raise) if the Agreement was ratified and a threat (i.e. that employees would not receive a 3% raise) if the Agreement was not ratified." The Department therefore asserted a prima facie case of an unfair labor practice, in that the postcard "coerc[ed] public employees" in exercising their right to join or refrain from joining or participating in an employee organization. *See* § 447.501(2)(a), Fla. Stat. Nothing in section 447.501(2)(a) requires that the employee organization's actions be illegal or prohibited.

The Department also argued that AFSCME's actions violated section 447.501(2)(c), Florida Statutes (2020), by "failing to bargain collectively in good faith" when it misrepresented the extent of AFSCME's involvement with the pay raise and misled members that if the collective bargaining agreement was not ratified, members would not receive the pay raise. The Commission dismissed this charge by imposing an "isolated incident" exception. Section 447.501(2)(c) prohibits a public employee organization from "[r]efusing to bargain collectively or failing to bargain collectively in good faith with a public employer." Nothing in section 447.501(2)(c) suggests that isolated acts of bad faith are not actionable or that a charging party must allege repeated misconduct to pursue a claim of bad-faith bargaining.

Section 447.203(17), Florida Statutes (2020), provides:

> "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 [enumerated] occurrences . . . .

(emphasis added). Section 447.203(17) explicitly states that good-faith bargaining is not limited to the definition in that subsection and provides that the Commission shall consider "specific incidents of alleged bad faith."

Similarly, AFSCME argues that in order to violate section 447.501(2)(c), an action must constitute a failure or refusal to bargain in that it must thwart the bargaining process. However, "failing to bargain collectively in good faith" does not, by its plain language, require a complete failure to bargain. "It is a well-established tenet of statutory construction that courts 'are not at liberty to add words to the statute that were not placed there by the Legislature.'" *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008) (quoting *State v. J.M.*, 824 So. 2d 105, 111 (Fla. 2002)). Here, the Department asserted a prima facie case that AFSCME failed to bargain in good faith by sending the postcard containing the misrepresentation that the pay raise would be in jeopardy unless employees ratified the collective bargaining agreement.

Accordingly, we reverse the Commission's final order and remand for further proceedings consistent with this opinion.

M.K. THOMAS, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

The crux of this case is whether the Department of Management Services can pursue—as an unfair labor practice—the mailing of a postcard containing incorrect but quickly corrected information from the American Federation of State, County and Municipal Employees, Council 79 (AFSCME or union) that resulted in the Department's expenditure of time and resources to quell concerns about the postcard amongst state employees, i.e., the constituency that AFSCME represents in bargaining. The Public Employees Relations Commission (PERC), whose mission is to remedy statutorily defined unfair labor practices, held that the Department lacked standing and a substantial interest in AFSCME's communication with its members via the postcard, which did not amount to a failure or refusal to bargain in good faith. The Department appeals that determination.

First of all, the Legislature has made clear that PERC's adjudication of claimed unfair labor practices is done pursuant to the standards set forth in administrative litigation under chapter 120.

> It is the intent of the Legislature that [PERC] act as expeditiously as possible to settle disputes regarding alleged unfair labor practices. To this end, *violations of the provisions of s. 447.501 shall be remedied by [PERC] in accordance with the following procedures and in accordance with chapter 120*; however, to the extent that chapter 120 is inconsistent with the provisions of this section, the procedures contained in this section shall govern[.]

§ 447.503, Fla. Stat. (2022) (emphasis added). The italicized language makes clear that chapter 120 applies as the default standard; nothing in chapter 447's procedures suggests that the ordinary standards of administrative litigation, including standing principles, create an inconsistency with chapter 120. The argument that any employer, employee, or employee organization has an unfettered right to level a claim of a purportedly unfair labor practice—no matter how insubstantial or peripheral—is problematic because it runs counter to the statutory provision stating that chapter 120 proceedings involve making

determinations as to the "substantial interests of a party." § 120.569(1), Fla. Stat. (2022). It also runs counter to chapter 447's intent of expeditiously resolving labor practices that actually fall within statutory parameters. *See* § 447.501, Fla. Stat. (2022) (defining scope of unfair labor practices). As AFSCME states, the Department's argument that "any employer, employee, or employee organization, or any combination thereof, can initiate an unfair labor practice proceeding against any public employer or public employee organization, even if they have absolutely no interest or stake in the controversy whatsoever" is unconvincing.

To the extent the Department has standing, the nature of this dispute does not appear to be a substantial one that amounts to an unfair labor practice under the facts alleged; a prima facie case has not been shown. The incorrect portion of the postcard, which was minimal, was corrected quickly such that it had no meaningful impact on the pay raise that had already been approved and had become effective a couple of weeks earlier. Although state agencies spent some time and resources communicating with employees that their 3% pay raise had been enacted without need for employee ratification, that type of administrative message to employees falls short of the type of significant unfair labor practices that PERC was designed to rectify. *See* § 447.501(2)(a), Fla. Stat. (public employee organizations "are prohibited from: . . . [i]nterfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part or interfering with, restraining, or coercing managerial employees by reason of their performance of job duties or other activities undertaken in the interests of the public employer.").

The oddity is that bargaining for the pay raise was over and done and the pay raise had already been implemented, such that the postcard was simply like a postscript to a letter already written and delivered; it could have no substantial effect on a legislative process that was already completed and in effect. For that reason, any claim of a "[r]efus[al] to bargain collectively or failing to bargain collectively in good faith with a public employer" must fail. *Id*. § 447.501(2)(c). Public employees who felt they were misled had an individual remedy: an unfair labor practice on their own behalf, which did not materialize. Employees, not the employer, are in the

best position to assert whether they were coerced, restrained, or adversely affected by what the union did in this case.

Plus, as PERC says: "If merely discussing another party's claims could constitute a substantial interest because time and resources were expended, it is hard to fathom any party being unable to manufacture a substantial interest in an unfair labor practice case." Allowing the claim in this case to proceed seemingly opens the barn door to strategic claims attempting to cast routine communications (even those temporarily erroneous) as unfair practices, thereby creating a potential chilling effect on the bargaining process itself. As the Florida Legislature has made clear, the "*parties' rights of free speech shall not be infringed, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair employment practice or of any other violation of this part*, if such expression contains no promise of benefits or threat of reprisal or force." *Id.* § 447.501(3) (emphasis added). In other words, communications are protected free speech and cannot form the basis for sanction as an unfair labor practice with very limited exceptions.

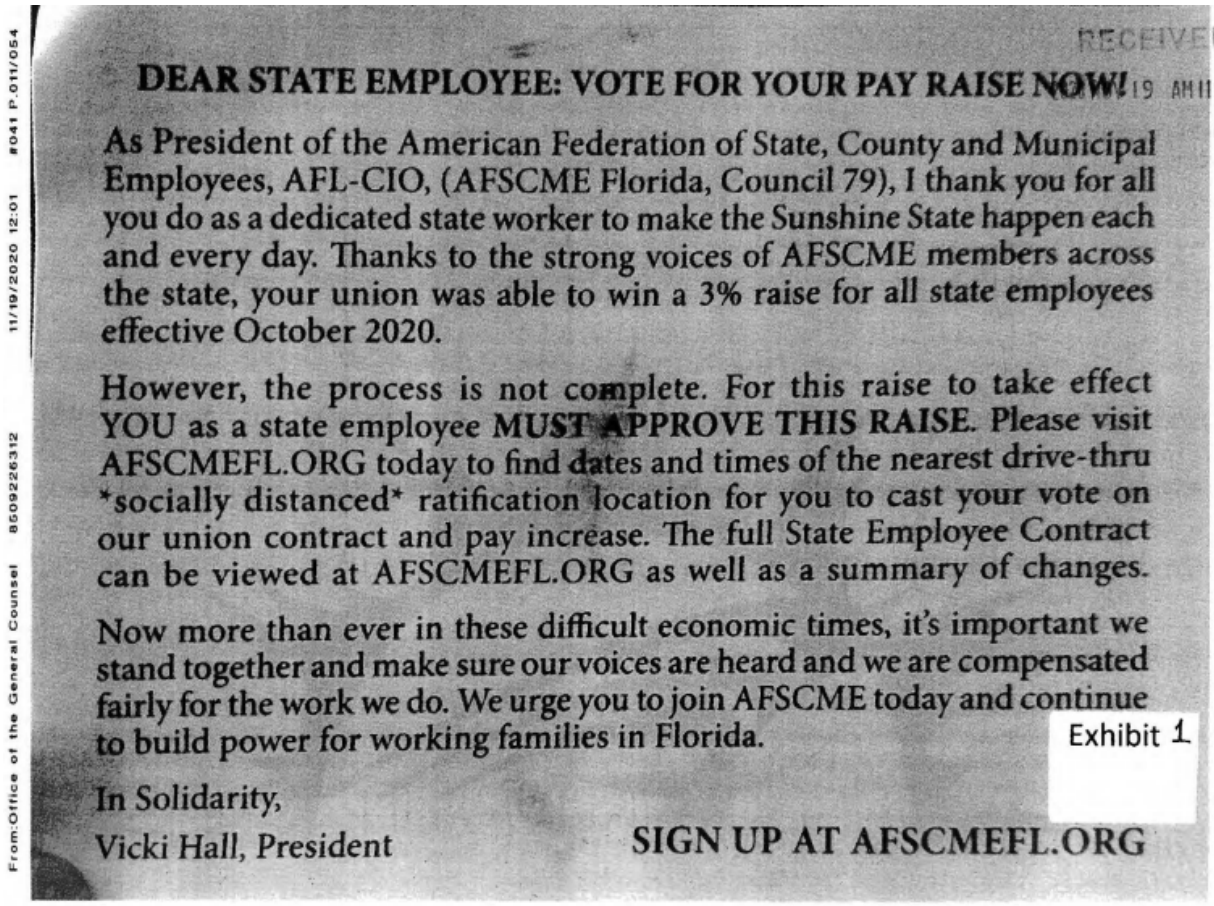
Here, the postcard at issue, soon corrected, is within protections of constitutional free speech rights (First Amendment)* and statutory rights (section 447.501(3), Florida Statutes) of the union, which the latter makes nonactionable unless it contains a "promise of benefits or threat of reprisal or force." No threats of "reprisal or force" are at issue. *See Da Costa v. Pub. Emps. Rel. Comm'n*, 443 So. 2d 1036, 1037–38 (Fla. 1st DCA 1983) (employee "ha[d] been the object of threats, intimidation and harassment due to his desire to withdraw" from the union and was on the top of a "'hit list' of non-members . . . so as to 'make an example' of him"); *see also United Fac. of Fla v. Fla Bd. of Regents*, 585 So. 2d 991,

* *See Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

999 (Fla. 1st DCA 1991) (statute that made it an unfair labor practice for organization to send letter seeking support from students is facially unconstitutional; letter from faculty union sent to students is protected). No "promise" of anything from the union was made in the postcard, let alone some type of union-sponsored benefit. At most, the postcard urged action for the *Legislature* to provide a pay raise, which is not a benefit the union could control or provide. *Jess Parrish Mem'l Hosp. v. Pub. Emps. Rel. Comm'n*, 364 So. 2d 777, 782 (Fla. 1st DCA 1978) ("There was certainly no threat of reprisal or force or promise of benefit if the employees refused to comply with the administrator's assistance in withdrawing their authorization cards.").

In conclusion, because PERC was correct in dismissing the Department's claims as nonactionable under chapter 447, affirmance is in order.

Appendix



From:Office of the General Counsel 8509226312 11/19/2020 12:01 #041 P.011/054

RECEIVED
19 AM 11:

DEAR STATE EMPLOYEE: VOTE FOR YOUR PAY RAISE NOW!

As President of the American Federation of State, County and Municipal Employees, AFL-CIO, (AFSCME Florida, Council 79), I thank you for all you do as a dedicated state worker to make the Sunshine State happen each and every day. Thanks to the strong voices of AFSCME members across the state, your union was able to win a 3% raise for all state employees effective October 2020.

However, the process is not complete. For this raise to take effect YOU as a state employee **MUST APPROVE THIS RAISE.** Please visit AFSCMEFL.ORG today to find dates and times of the nearest drive-thru *socially distanced* ratification location for you to cast your vote on our union contract and pay increase. The full State Employee Contract can be viewed at AFSCMEFL.ORG as well as a summary of changes.

Now more than ever in these difficult economic times, it's important we stand together and make sure our voices are heard and we are compensated fairly for the work we do. We urge you to join AFSCME today and continue to build power for working families in Florida.

Exhibit 1

In Solidarity,

Vicki Hall, President

SIGN UP AT AFSCMEFL.ORG

Andy V. Bardos and Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee; Rebekah A. Davis, Deputy General Counsel, Office of the General Counsel, Tallahassee; Kristen Larson, General Counsel, and Mary Ellen McDonald, Department of Management Services, Tallahassee, for Appellant.

Osnat K. Rind, Phillips Richard & Rind, Miami, for Appellee AFSCME Florida Council 79 of the American Federation of State, County and Municipal Employees, AFL-CIO.

Gregg Riley Morton, General Counsel, and Lyyli Van Whittle, Staff Attorney, Public Employees Relations Commission, Tallahassee, for Appellee Public Employees Relations Commission.