

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

IN RE

Case Nos. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PETITION FOR WAIVER OF [REDACTED]
[REDACTED]
[REDACTED]

Order No.: 23MS-168
Date Issued: August 31, 2023

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FINAL ORDER

On July 5, 2023, the Commission issued an order granting the [REDACTED]
[REDACTED] (County) petition for waiver from the following provisions, pursuant to section 447.207(12), Florida Statutes (2023)¹:

1. the prohibition on dues and assessment deductions provided in section 447.303(1), Florida Statutes;
2. the requirement to petition the Commission for recertification provided in section 447.305(6), Florida Statutes; and
3. the revocation of certification provided in sections 447.305(6) and (7), Florida Statutes.

The Commission granted the waiver with respect to each bargaining unit of mass transit County employees and limited the duration to the time period covered by the current collective bargaining agreement (CBA) between the County and the employee organization representing each bargaining unit.² The waiver was designed to address

¹ All references to Florida Statutes herein are to the 2023 edition, unless otherwise stated.

² The referenced employee organizations (collectively referred to as “the Unions”), including the bargaining units they represent and the expiration date for their respective CBAs, are as follows:

- [REDACTED] representing the bargaining unit defined in Certification 361. The current CBA expires September 30, 2023.

[REDACTED]

the Department of Labor’s (DOL) representation that the above-stated provisions jeopardize the ability of the County to comply with its previously certified protective arrangements required by 49 U.S.C. § 5333(b) and its continued eligibility for federal assistance from the Federal Transit Administration (FTA).

Background

The County notified DOL of the waiver and requested that it issue final certifications for the County’s pending grants. By letter dated July 14, DOL responded that “[t]he waiver issued by PERC does not fully resolve the dispute over [the County]’s compliance with 49 U.S.C. § 5333” as it “is less than the duration of the protective arrangements required by 49 U.S.C. § 5333(b), which extend for the life of the federally funded project.”

On July 19, the County filed a second emergency petition for waiver, asserting that absent a permanent waiver, or at least a waiver that extends for the duration of the federally funded project, its ability to receive funding under its current grants, pending

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- [REDACTED], representing the bargaining unit defined in Certification 531. The current CBA expires September 30, 2025.
 - [REDACTED], representing the bargaining unit defined in Certification 460. The current CBA expires September 30, 2025.
 - [REDACTED], representing the bargaining unit defined in Certification 1289. The current CBA expires September 30, 2025.
 - [REDACTED], representing the bargaining unit defined in Certification 1103. The current CBA expires September 30, 2025.



grants, and any future grants will be jeopardized. On July 21, the Commission directed the County to file a response to four stated inquiries to clarify how the current waiver fails to satisfy the requirements of 49 U.S.C. § 5333(b) with respect to the protective arrangements and agreements in place.

The County filed its response on August 10, along with several supporting documents, asserting that it has various federal grants that are current, pending, or are anticipated in the future.³ The County has at least one federally funded project that is expected to last until 2067. The County applies for federal grants for projects encompassing a wide range of useful life expectancies and expected durations every year, and the duration of certain grants can be extended. Certain grants must be certified by DOL and received by the FTA by August 30, or the County stands to lose millions of dollars in grant funds. According to the County, all grant applications must have all final FTA signatures by September 25.

The County further asserts that it previously met with one of the Unions to discuss the dispute and could not identify any alternative methods that would comply with both 49 U.S.C. § 5333(b) and chapter 2023-35, Laws of Florida, other than obtaining a waiver

³ For example, the Capital Investment Program Grant (FL 2023-047) totals \$17,275,000 and applies to the “[REDACTED].” The expected duration of this project has end dates ranging from December 31, 2027, to December 31, 2067, depending on the specific project component. The County also referenced three other grants that are pending either FTA review or DOL certification. Those grant amounts range from \$172,055 (FL-2023-029) to \$36,561,780 (FL-2023-027), with life expectancies ranging from September 30, 2024, to December 31, 2044.



from the Commission. Additionally, the County requested DOL to clarify how the provisions at issue here conflict with any protective arrangements or agreements required to be in place with respect to the County's current or pending grants.

DOL's Determination

By letter dated August 4, DOL reiterated its position to the County that time-limited waivers issued by the Commission "do not resolve the dispute over ... [the] County's capacity to comply with 49 U.S.C. § 5333(b)." DOL's administrative decision articulates three bases as to why the requirements of chapter 2023-35, Laws of Florida (which it refers to as "CS 256"), are inconsistent with collective bargaining rights. Specifically, DOL states:

CS 256 makes changes that interfere with transit employees' collective bargaining rights absent a waiver from the PERC. CS 256, Section 3 prohibits a public employer from deducting union dues and uniform assessments from the salaries of transit employees. In doing so, CS 256 removes a critical mandatory subject of collective bargaining: dues check-off.

CS 256, Section 4 augments the requirements in Florida law for employee organizations to register with the PERC and renew their registration annually. As part of the annual application for renewal of registration, the union must provide details regarding the number of represented employees with valid signed membership authorization forms and who are paying dues. If fewer than 60 percent of the employees eligible for representation in the bargaining unit pay dues during the union's last registration period, then the union must petition for recertification as the exclusive representative of all employees in the bargaining unit. Additionally, the legislation provides that an employer may challenge the accuracy of the union's application for reviewal (sic) of registration. If the PERC finds the application is inaccurate or does not comply



with the law, then it shall revoke the union's registration and certification.

CS 256, Section 4 impermissibly undermines the presumption of the continuing majority status of a certified or recognized union. It expands the means and methods of [sic] by which a union loses its right to act as the exclusive bargaining agent for a transit authority's employees without regard to the existence of any evidence that the union has lost its majority status.

DOL concludes that "the changes required by CS 256 impermissibly interfere with the collective bargaining rights of transit workers protected by Section 13(c) and a waiver of these requirements is required in order to ensure [the County] can comply with its Section 13(c) obligations."

Consequently, the County requests that the Commission grant a waiver from all applicable statutory provisions with respect to pending and future funding requests or, alternatively, for the duration of the federally funded project.

PERC's Position

The Commission finds itself in a dilemma not unfamiliar to many of the local governments we serve. Federal spending power can impose restrictions on the acceptance or use of federal funds having the indirect effect of altering local public policy. Having researched 49 U.S.C. § 5333(b), and its sparse case law, as diligently as time has allowed during the initial implementation of SB256, the Commission acknowledges that reality of our federal system. But the Commission is constrained to act on this petition, not in a manner dictated by equity, but only within its own statutory authority to waive certain provisions of the new law "to the extent necessary to comply with the



requirements of 49 U.S.C. s. 5333(b).” The Commission’s job in this administrative matter is to execute state law as written.

The Commission is not convinced that payroll dues deduction, as regulated by section 447.303, Florida Statutes, and protection from the referenced licensure obligations and possible representation elections under sections 447.305(6) and (7), Florida Statutes, undercut the continuation of collective bargaining rights protected by the applicable federal law. First, no evidence has been presented that employers and bargaining agents cannot negotiate, even to impasse, an equitable alternative to payroll dues deduction, and the Commission is not convinced that none exist. For example, the public employer could offer to pay the employee organization’s cost for utilizing an alternative dues collection method and/or permit additional dues solicitation through the employer’s email system or other workplace communications. Under both state law and 49 U.S.C. § 5333(b), such alternatives are negotiable.

Second, there does not appear to be any articulable standard under 49 U.S.C. § 5333(b) governing the kinds of impacts contained in the new registration renewal procedures. Florida law currently allows any employee or group of employees, who no longer desires to be represented by the certified bargaining agent, to file with the Commission a petition to revoke certification. See § 447.308, Fla. Stat. Additionally, section 447.307(2), Florida Statutes, permits an employee organization that is not already the certified bargaining agent of a particular bargaining unit of employees, to file a petition with the Commission for certification within certain allowable window periods. See §



447.307(3)(d), Fla. Stat. (describing what is referred to as an “election bar” and a “contract bar”). Also, prior to the new law, employee organizations could be decertified for violating certain other state laws. See § 447.507(5)(a).2-3., Fla. Stat. DOL’s written determination fails to clarify how the new law’s recertification requirement differs in kind from the certification risks previously existing under state law.

While understandably burdensome to a certified bargaining agent, increasing the frequency of representation elections – only when the agent does not meet an objective standard of favorability with the unit membership – does not limit the rights of employees any more than a recall election limits the rights of registered voters in a municipality. Section 447.305(6), Florida Statutes, requires an election to ratify the bargaining unit’s choice of agency when triggered by deficient membership numbers reported through the annual registration process. A “presumption of majority status”, which does not appear in 49 U.S.C. § 5333(b), should not be deemed a per se limitation on an orderly regular expression of the majority will. We note that under section 9(a) of the National Labor Relations Act (NLRA), unions enjoy a “presumption of majority status” for only one year following certification by the National Labor Relations Board (NLRB), and should a contract be reached, the presumption prevails during the term thereof but only up to three years. There is no basis for interpreting 49 U.S.C. § 5333(b) to incorporate the NLRA’s specified three-year presumption when Congress clearly has not imposed NLRA specifics on public transit agencies. And DOL has not articulated a clear standard for its



conclusion that the impacted employees' collective bargaining rights are diminished under the new law.

It appears that DOL may be arbitrarily and capriciously rejecting a caricature of those provisions based on a cursory reading. Without any experience under Florida's new law, it is not clear that parties cannot bargain to protect the bargaining agent's implementation role under a CBA in the unfortunate event of a decertification sooner than might have occurred under previous law. For instance, if the presumption of majority status during a CBA is to secure the employees' rights to the full administration of the bargained-for agreement, the parties could negotiate protection of that interest other than through an unchallengeable certification. We note further that for approximately five years, a precursor recertification requirement was applicable to numerous instructional units in Florida that demonstrated fewer than fifty-percent dues-paying members, and no bargaining agent subject to a representation election lost its certification as a result thereof.

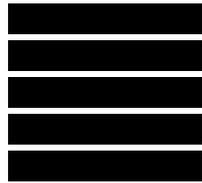
DOL also misrepresents the new law's provisions and overstates its impact. Florida is a right to work state. Prior to July 1, 2023, dues deduction in Florida was a statutory entitlement granted to an employee organization that was certified as a bargaining agent, while also requiring the authorization of each public employee to have his or her dues and uniform assessments deducted and collected by the employer. § 447.303, Fla. Stat. (2022). Contrary to DOL's assertion that dues deduction is a mandatory subject of collective bargaining in Florida, the state legislature made clear that



only the reasonable costs to the employer of said deductions was subject to bargaining. *Id.*; see also *Edison Community College v. Edison Community College Faculty Federation, Local 3513, FEA/UNITED (AFL-CIO)*, 4 FPER ¶ 4269 (1978). The new law repealed that right⁴ and replaced it with a prohibition that affects all public employees except certain classifications of public employees. § 447.303(2)(a), Fla. Stat.

Additionally, for more than forty years, employee organizations in Florida have been legally obligated to register annually with the Commission. See § 447.305, Fla. Stat. As a result of the recent amendments, that registration process now requires employee organizations to report additional information about their membership. For example, the reporting of membership authorization forms retained by an employee organization is a minor administrative burden having no particular relation to the possible sanctions in chapter 2023-35, section 4, Laws of Florida. Also, a Commission finding of inaccuracy or non-compliance regarding a registration renewal is only authorized upon a valid petition challenging the organization's filing. This process is also regulated under section 120.60, Florida Statutes, which is part of Florida's Administrative Procedures Act, to ensure full due process in case of a registration revocation. And the mandatory audit and verification requirements operate as built-in self-corrections preventing unintentional inaccuracies that might result in revocation. Notwithstanding these changes, the obligation to register remains the same.

⁴ Such repeal is unaffected by the waiver permitted under section 447.207(12), Florida Statutes.



The case law supports that Congress did not intend to supersede state law or impose NLRA standards on public employers through 49 U.S.C. § 5333(b). See *Amalgamated Transit Union, Int'l v. United States Dep't of Labor*, 2:20-cv-00953-KJM-DB (E.D. Cal. Dec. 28, 2022). Rather, “collective bargaining” is to be preserved in the utilization of federal transit funds, and the Florida law does not limit bargaining, even on some actions which the parties may take under the new provisions. DOL has no rulemaking authority to add to 49 U.S.C. § 5333(b). Its interpretation of “collective bargaining,” therefore, is subject to judicial review de novo.⁵

In its January 3, 2011, “Unified Protective Arrangement”, DOL places dues deduction in the same category with union security and binding arbitration as important collective bargaining rights. And yet, the abolition of two of those three “rights” in some jurisdictions has been tolerated under 49 U.S.C. § 5333(b). DOL provides no clear reason why dues deduction is a “mandatory critical subject of bargaining,” abolition of which is intolerable under a 1960s ambiguous use by Congress of the term “collective bargaining” (notwithstanding the multiplicity of ways unions and a multitude of other membership and subscription services may collect regular payments in the 21st century). Because of the dearth of case law and limited access to the thousands of certification

⁵ One state judge in Florida recently determined preliminarily that the new prohibition on dues deduction does not violate collective bargaining rights guaranteed by Florida’s constitution. The Commission is awaiting a final judgement on that important question. State and federal cases also are pending with respect to the constitutionality of chapter 2023-35, section 4, Laws of Florida. Without resolution of those legal questions, the necessity of this waiver must necessarily be contingent.

orders applying 49 U.S.C. § 5333(b), which some federal courts have determined to be ambiguous, DOL's standards can be viewed as opaque at best.

Conclusion

While the Commission questions DOL's interpretation of the 49 U.S.C. § 5333(b) requirements vis-à-vis the provisions of chapter 2023-35, Laws of Florida, the Commission nonetheless recognizes the financial hardship facing the County and its public employees given DOL's refusal to certify various pending federal grants absent an extended waiver. Further, because time is of the essence, the County is essentially foreclosed from challenging DOL's determination without suffering great harm.

Therefore, upon careful consideration, we GRANT the County's petition. Pursuant to section 447.207(12), Florida Statutes, we exercise our statutory discretion in granting the County and the Unions, which have been certified as bargaining agents to represent mass transit County employees, a waiver from the following:

1. the prohibition on dues and assessment deductions provided in section 447.303(1), Florida Statutes;
2. the requirement to petition the Commission for recertification provided in section 447.305(6), Florida Statutes; and
3. the revocation of certification provided in section 447.305(6) and (7), Florida Statutes.

The waiver shall be in effect so long as any protective arrangement is required by 49 U.S.C. § 5333(b). According to DOL, it will issue final certifications that include this waiver as part of its protective arrangements for any pending and future grant



Florida’s 2023 public sector collective bargaining reforms. After extensively studying the limited case law from the time this authority was assigned to the Commission, it is clear to me that Congress had no legislative intent in its enactment of 49 U.S.C. § 5333(b) to overrule state law or to make transit grants a mechanism to control public payroll systems. Payroll dues deduction does not enhance the terms and conditions of employment, the legitimate objects of collective bargaining. Regular representation elections of bargaining units by the members of the unit does not in and of itself negatively affect the terms and conditions of employment. What Florida’s reforms affect is the strength of employee organizations, not the rights of workers. They should make fruitful organizations stronger as they appeal more vigorously for dues-paying members. They will be more accountable to the public employees they represent and will not be able to rest on marginal support in a distant past.

49 U.S.C. § 5333(b) is intended to protect workers, not unions. The protection of “collective bargaining rights”⁷ under 49 U.S.C. § 5333(b) has tolerated jurisdictions

⁷ At least one case is pending in Florida courts asking whether chapter 2023-35, Laws of Florida, specifically including provisions waived in this Order, violates Florida’s constitutional right of public employees to engage in “collective bargaining.” Bound by my oath to adhere to the state and federal constitutions, I have no desire to enforce any law in violation thereof. But if the same words mean different things to DOL and Florida, I would like to have more than DOL’s mere conclusions to comprehend and apply the difference to fulfill the statutory responsibilities undertaken by the Commission in this matter. It would have been helpful to invite broad expert participation and hold oral arguments on such a question. But the administration of federal transit grants and DOL’s role therein permitted no time for adequate deliberation. (Similar limitation on review of DOL’s determinations, inherent in 49 U.S.C. § 5333(b), have long been known.) Such is the corrosive power over the rule of law effected by the federal spending power when not



without public sector collective bargaining, tolerated right-to-work, and tolerated limits on binding arbitration. Public sector payroll dues deduction, as does binding arbitration, strikes at the heart of state sovereignty. The state legislature has exclusive jurisdiction over state and local finance, limited only by the federal constitutional authority to tax incomes. Congress did not intend 49 U.S.C. § 5333(b) to impose an income tax on union members. Due to the urgency of the matter, no one knows what might be bargained with respect to state policy changes. The Commission has an interest in allowing the parties to explore the possibilities through collective bargaining. In fact, the waiver granted today does not nullify the repeal of mandatory dues deduction but puts it back into the mix when the next bargaining agreement is negotiated. Employees may have to give up something else to keep dues deduction, and the bargaining agent has a real conflict of interest in such negotiation. Given the alternative means of collecting regular payments in the 21st century, the diminished value of such collection service ought to be part of that calculus.

DOL has indicated that it only has authority to require protections for the life of the project funded in the pending grant applications. Advocates displaying no understanding of the cost accounting and federal maintenance and audit requirements of the relevant grants fear what they may not understand or promote fear among those who do not. The FTA's directives in these matters, however, are clear. "Life of the project funded" is not

better supervised by Congress.



an open-ended “gotcha” trap for local transit grantees. It is an accounting concept, and the grantee has broad authority to define the life of a project, subject to mandatory minimums established by regulation. In my opinion, a waiver longer than the clearly determinable specific lifespan of the federal projects being funded is not necessary and not contemplated by section 2 of chapter 2023-35, Laws of Florida.

It is not necessary because there is no reason DOL would not accept a waiver ending on December 31, 2067, which is the applicable longest life span of the County’s pending grant projects. If it would act so arbitrarily and capriciously, the Commission could have acted swiftly to remedy such circumstance unless state officials took the opportunity to seek an injunction against DOL, with equity balancing heavily in Florida’s favor, preserving such a waiver, pending judicial review of DOL’s determinations. Today’s Order, however, allows DOL to evade its own acknowledged limitations. It relieves the County from returning for extensions when future grant applications might require. It puts the Commission in the unusual position of needing to reinstitute a limitation, *sua sponte*, should greater clarity arise, or other unforeseen circumstances come to pass that make the waiver inconsistent with state law. Had the Florida Legislature intended permanence, transit employees would have been exempted from waivable provisions of the law as were certain public safety units. For these reasons, I concur in the issuance of a waiver only.

[REDACTED]

I HEREBY CERTIFY that this document was filed and a copy served on each party on August 31, 2023.

BY: Barry Adams
Clerk



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