047

IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF MIAMI,

Petitioner,

v.

GEORGE A. MEYER,

Respondent.

CASE NO. 80,652

INITIAL BRIEF OF THE CITY OF MIAMI

On Review of a Certified Question from
the First District Court of Appeal

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Table of Contents

Table of Authorities

Page

Cases

Other

Introduction

This case involves a former firefighter who was employed by the City of Miami and suffered a compensable disability. The City reduced his disability pension benefit by the amount of workers' compensation benefits payable with respect to the disability. The two issues in this case, retroactivity of the Court's decision in *City of Miami v. Barragan*, 545 So.2d 252 (Fla. 1989), and the imposition of a 10% penalty on the City in addition to any retroactive benefits that are awardable, are presented in this brief in the identical manner that they are presented in the City's brief in *City of Miami v. Bell*, Case No. 80, 524. A brief in the *Bell* case has been filed by the City simultaneously with the filing of this brief.

Statement of the Facts and the Case

George A. Meyer, a firefighter employed by the City of Miami, suffered a compensable accident on March 13, 1976. (R. 5). The City accepted Meyer as permanently and totally disabled on July 26, 1976, with a weekly compensation rate of $112.00. (R. 5-6). His gross disability pension was offset by $485.33 monthly until August 1, 1989. (R. 8). He received separate checks for compensation and pension payment. (R. 25). The offset amount, together with interest, penalties, costs and attorney's fees, constitutes the amount in dispute in this appeal.

After the Court's decision in *Barragan v. City of Miami*, 545 So.2d 252 (Fla. 1989), Meyer filed a claim for reimbursement of his pension offset, together with interest, penalties, costs and attorney's fees on May 7, 1990. (R. 58). The City defended on the basis that the *Barragan* decision should not be applied retroactively to entitle Meyer to reimbursement. (R. 58).

A Judge of Compensation Claims rejected the City's defenses, awarded Meyer permanent total disability benefits of $112.00 per week for the offset period, and further awarded a 10% penalty, statutory interest on the benefits awarded, costs and attorney's fees. (R. 239-47). The First District Court of Appeal affirmed the award, but certified to the Court the same penalty question that had been certified in *City of Miami v. Bell*, 17 F.L.W. D2182 (Fla. 1st DCA Sept. 16, 1992), *pending review*, Case No. 80,524.

Summary of Argument

When the Court decided *Barragan* in 1989, it unsettled a common practice of the City of deducting from pension payments the amount paid to former employees under the workers' compensation provisions of Chapter 440. Once this long-approved practice was deemed contrary to law, the City faced a budgetary restructuring to remove this offset. Since then, the First District's determination that *Barragan* is to apply retroactively has caused further financial turmoil and, of course, spun off a legal debate now to be determined for the first time by this Court. The City is convinced that *Barragan* should not be applied retrospectively to award payments of windfall proportions to claimants.

This Court's and the other courts' prior affirmations of the City's right of offset should put any such use of *Barragan* completely to rest. *Barragan* constituted a fundamental change in law which expressly overturned several previous district court decisions regarding the same City ordinance. There can be no question that, in taking the offset, the City conducted itself with justifiable reliance on these past decisions. This good faith behavior of the City, coupled with intent of the workers' compensation law and the obvious inequities

befalling the City from a retrospective application of *Barragan* demonstrate the appropriateness of prospective limitation.

In a second drain on the City's taxpayers, the First District has imposed a 10% statutory penalty for untimely payment of the retrospective award. This punitive penalty on the City has no logical support in the language of the compensation law, or in the judicial gloss on the statute. Clearly, this is a circumstance where the City had no control over the conditions of non-payment, and where it possesses a totally valid excuse for not immediately agreeing to a retroactive award. The City's conduct reveals no incidents of contemptuous behavior, but simply an inability to prognosticate the decision in *Barragan* and its later retroactive application by the First District. Regardless of whether the determination of retroactivity is upheld (and the City vehemently disagrees that it should be), the tack-on penalty cannot be condoned.

Argument

Two issues are involved in this appeal. The first and most fundamental is the retroactivity of the *Barragan* decision. This issue not only affects Meyer, but numerous other claimants seeking retroactive reimbursement for pre-*Barragan* disability pension offsets.[1/] A second issue is the applicability of the 10% penalty which the workers' compensation law

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1/ Some claimants have petitions for review pending in this court, some have cases pending in the First District Court of Appeal, and some have claims pending before Judges of Compensation Claims. The City has filed a petition with the Court, invoking the all writs power of article V, section 3(b)(7), Fla. Const., to stay these various proceedings pending the outcome of this appeal.

provides for employers who inexcusably delay in either paying compensation claims or denying that payment is due.[2/]

1. The *Barragan* Decision Should Not be Given Retroactive Effect.

In its *Barragan* decision, the Court did not make a determination one way or the other as to whether the decision would have retroactive effect.[3/] Not all precedent-setting cases are given retroactive effect, of course. *See National Distributing Co., Inc. v. Office of Comptroller*, 523 So.2d 156 (Fla. 1988). While an overruling decision may, as a general rule, be applied retroactively, this Court has scrutinized the reliance of parties on previous precedent to determine if propectivity alone is the most equitable result. *See Brackenridge v. Ametek*, 517 So.2d 667 (Fla. 1987); *cert. denied*, 488 U.S. 801 (1988); *Florida Forest & Park Service v. Strickland*, 18 So.2d 251 (Fla. 1944).

(a) The City's justifiable reliance.

The district court held that *Barragan* should be applied retroactively to Bell's claim for offset reimbursement. The panel actually expressed no analysis of that issue, but merely adopted by reference a previous decision of other First District panels in *City of Miami v. Burnett*, 596 So.2d 478 (Fla. 1st DCA) *rev. denied*, ____ So.2d _____ (Fla. Oct. 14, 1992), and in *City of Daytona Beach v. Amsel*, 585 So.2d 1044 (Fla. 1st DCA 1991), both of which had construed *Barragan* to be retroactive. The court did, in passing, express sympathy for the

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2/ The penalty issue is before the Court on a certified question from the First District Court of Appeal. The other issue is before the Court under the doctrine announced in *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977); *Hillsborough Ass'n for Retarded Citizens v. City of Temple Terrace*, 332 So.2d 610 (Fla. 1976).

3/ The issue of retroactivity was never briefed to the Court. The only mention of retroactivity appeared as a question by the City in its motion for rehearing.

"financial crisis" imposed on the City by the district court's determination. *City of Miami v. Bell*, 17 F.L.W. at D2182. The district court was wrong. It is impossible to imagine a clearer instance of a decision which states a new principle of law than the overruling of past precedents on which a litigant relied as a party.

It is relevant to note at this juncture, that the multiple district court decisions which were rejected by the Court in *Barragan* are considered (and properly so) as the final judicial word on the principles of law for which they stood. It is not as if these were interim, or intermediate court decisions. They were tantamount to Supreme Court decisions in every jurisprudential way. District court review is "in most instances . . . final and absolute." *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958). Their decisions "represent the law of Florida unless and until they are overruled by this Court . . . ." *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980).

The *Barragan* decision recognized those effects. It announced it was overruling past precedents that were uniformly contrary and clear. Six separate appellate decisions had reached and articulated the conclusion which *Barragan* overturned, and the Court had even declined "conflict" review in 3 of these cases. Most compelling is the fact that the litigant in all of those cases was the City of Miami itself, and the issue in each was exactly the issue in *Barragan*. There could not be a more lavish demonstration of justifiable reliance on past decisions than that recorded by the City.[4/]

4/ The district court obviously understood that effect of *Barragan* when it wrote that "the supreme court 'dropped' the *Barragan* bomb." 17 F.L.W. at D2182.

Prior to the *Barragan* decision in 1989, an unbroken line of district court decisions over a period of 27 years had conclusively provided judicial imprimatur for the City to offset amounts due in disability pension benefits by amounts awarded as workers' compensation payments. The *Barragan* decision held that the Florida Legislature's 1973 repeal of a long-standing, statutory offset authorization -- section 440.09(4), Florida Statutes -- had the effect of invalidating the City's comparable 1940 offset ordinance. The district court decisions in *Giordano, Barragan, Knight, Thorpe, West* and *Hoffkins*, however, had all acknowledged and explained the City's right to exercise the offset despite the legislature's repeal of section 440.09(4). A brief excursion into their rationale is instructive as to the City's clear basis for comfortable reliance on this impressive array of cases.

One of the pre-*Barragan* precedents -- *Hoffkins* in 1976 -- expressly addressed the repeal of section 440.09(4) and confirmed the manner in which the City had construed its effect vis-a-vis the City of Miami's pre-existing ordinance. The Third District in *Hoffkins* saw no reason why the City's ordinance, in existence since 1940, could not maintain its own viability to require disability pension offsets in the exact manner authorized by section 440.09(4) prior to its 1973 repeal. *Hoffkins*, 339 So.2d at 1146. That was 1976, some thirteen years prior to *Barragan*.

Eleven years later in *Knight*, the First District issued a decision which elaborated on the theme struck in *Hoffkins*, and lent it further credence. In *Knight*, the court reconciled assertions of disharmony between the City's long-standing ordinance and the equally long-standing section 440.21 of the workers' compensation law -- a statute which appeared to disallow and criminalize any form of benefits reduction. The *Knight* court analyzed a line of

cases from this Court which had strictly construed section 440.21,[5/] and concluded they meant only

> that workers' compensation benefits cannot be reduced by any benefit to which the claimant is contractually entitled independently of workers' compensation.

Knight, 510 So.2d at 1073.

The 11-year string of decisions, which had assured the City that its ordinance-authorized offsets were proper, were the very ones that the Court utilized to reach the diametrically opposite result in *Barragan*! Thus, the 11-year string of decisions from *Hoffkins* through *Knight*, up to this Court's *Barragan* decision, had specifically and uniformly upheld the City's right to reduce collectively bargained-for pension payments by amounts received by claimants under the workers' compensation law based on analyses of both section 440.21 and repealed section 440.09(4).

None of this discussion is intended to reargue the merits of *Barragan*. It does verify, however, that the reliance factor in determining whether *Barragan* should apply retroactively overwhelmingly favors the City. The result reached in *Barragan*, and the reasoning, constituted 180% departures from clear, past precedent in "City" cases, on which the City obviously and fairly had relied.

The Court's decision in *National Distributing* provides both the rationale and result to compel non-retroactivity for *Barragan*. The legislature had enacted laws consistent with its plenary power to regulate alcoholic beverages under the Twenty First Amendment to the United States Constitution. It had acted "in good faith," according to the Court, but had

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5/ *Jewel Tea Co., Inc. v. Florida Industrial Commission*, 235 So.2d 289 (Fla. 1970); *Brown v. S.S. Kresge Co. Inc.*, 305 So.2d 191 (Fla. 1975); *Domutz v. Southern Bell Telephone & Telegraph Co.*, 339 So.2d 636 (Fla. 1976).

been stung by a "marked departure from prior precedent" of the United States Supreme Court when that court subsequently determined that Florida's laws were in violation of the Commerce Clause -- article I, section 8 of the United States Constitution. *National Distributing Co.*, 523 So.2d at 157-58. Yet the Court refused to apply the policy change retroactively in *National Distributing*. The result there cannot be different than the result here. The City has acted in no less "good faith" than the legislature did.[6/] If the state's lawmakers were stung by a reversal of judicial precedent at the highest judicial level, no less were the City's lawmakers afflicted by the reversal of six precedents! The parallels are inseparable.

The First District has reasoned that *Barragan* should be given retroactive application, however, because section 440.21 was the law at the time the claimant entered into his particular contract with the City, and consequently no offset rule could constitute a provision of that agreement. *Amsel*, 585 So.2d at 1046 (concerning the Daytona Beach ordinance); *Burnett*, 596 So.2d at 478 (concerning the Miami ordinance).[7/] For a retroactivity analysis, this rationale is utterly unpersuasive.

The pre-*Barragan* cases on which the City justifiably relied had effectively held that the City's ordinance was neither inconsistent with nor voided by section 440.21. *Burnett* and *Amsel* adopted a legal fiction -- that the statute canceled contract provisions. That fiction

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6/ The City's "good faith" in effect has been adjudicated already. The district court has framed its certified question on the 10% penalty in terms of the City's "good faith reliance" on the validity of its offset ordinance. 17 F.L.W. at D2184.

7/ *Burnett* states the same conclusion in the negative, by finding that section 440.21 voided the long-standing Miami ordinance as of July 1, 1973. *See also, City of Miami v. Jones*, 593 So.2d 544 (Fla. 1st DCA), *rev. denied*, 599 So.2d 1279 (Fla. 1992).

simply made it possible to rule for the claimants, without saying that the harmonization of statute and ordinance as previously adjudicated in *Knight* was wrong. It is hardly surprising that the City should now cry "foul" at this legal revisionism. The First District's decisions should be rejected, and *Barragan* should be applied only prospectively.

(b) History and purpose of the rule.

Retroactivity is anathema to workers' compensation. Any retrospective result of substantial effect in workers' compensation cases has been studiously avoided, if at all possible. This thesis emerges both from the case law and from the underlying policy of the statutory scheme.

The workers' compensation statute rests on a policy fashioned to balance stability and predictability. On-the-job injuries and disabilities covered by the Act are compensated on a prompt and stable schedule of payments, in exchange for abrogation of the employee's right to sue in tort. *Fisher v. Shenandoah General Construction Co.*, 498 So.2d 882 (Fla. 1986). Lump sum awards representing duplicative and overlapping benefits which had been bargained away -- an aggregation providing a windfall "double dip" -- is completely incompatible with either the prompt-payment assurances of the Act for workers or the you-won't-get-slammed-later assurances of the Act for employees. *See* section 440.20, Florida Statutes (1987); *Sullivan v. Mayo*, 121 So.2d 430 (Fla. 1960). The lump sum awards being sought here have all the suddenness, unpredictability and devastation of an adverse tort award.

For almost 50 years, Miami's ordinance effectuated a reduction in pension benefits under a contractual arrangement which reduced those payments if a disability was also

compensated by workers' compensation payments. Nothing unnatural or unfair inheres in a contractual bargain of that nature.[8/] There is no need to elaborate here on the notion that the City had every legitimate right to tailor its financial responsibilities in accordance with the offset ordinance. The policy of the workers' compensation law favoring prompt and settled periodic payment of benefits would be destabilized by a retroactive application of *Barragan*, causing the dual consequences of providing a non-periodic windfall to former employees and a treasury-busting drain on the employer.

In the past, the Court and the First District have declined to apply statutory amendments to the workers' compensation laws retroactively when the effect is to reduce the measure of damages due a claimant. *See L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.*, 481 So.2d 484 (Fla. 1986); *Sir Electric, Inc. v. Borlovan*, 582 So.2d 22 (Fla. 1st DCA 1991). *See also, Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991), refusing to apply retroactively a judicial declaration of invalidity for a statute amending the workers' compensation law to reduce benefits. The same principle logically holds for a retroactive increase in the damages to be paid out by public employers.

(c) Inequities imposed by retroactive application.

Three times recently, the Court has stepped in to reject retrospective application of decisions which could either have unsettled scheduled benefit payments or grievously impacted state and municipal finances. *Martinez v. Scanlan,* 582 So.2d 1167 (Fla. 1991); *State v. City of Orlando,* 576 So.2d 1315 (Fla. 1991); *National Distributing Co., Inc. v. Office of*

8/ Pension plans under ERISA are allowed by law to be "integrated" with Social Security in exactly in the same fashion. By this means, employers can provide more affordable retirement benefits without duplicating or diminishing those benefits.

Comptroller, 523 So.2d 156 (Fla. 1988). In each instance, the Court warily averted the potential for disrupting fiscal management and government budgets by exercising its prerogative of prospective application.

In *Martinez,* the Court applied prospectively a decision which held unconstitutional amendments to the workers' compensation law that had reduced benefits to eligible workers. 582 So.2d at 1171-1176. In *City of Orlando,* the Court applied prospectively its invalidation of certain municipal revenue bonds issued for investment purposes, in order to avoid any effect on bonds that may have been previously issued or approved. 576 So.2d at 1318. In *National Distributing Co.,* the Court refused to apply retrospectively the invalidation of a tax statute, where the effect would have been to provide alcoholic beverage distributors a windfall from repayment (the excess taxes having already been passed on to customers in the pricing of goods). 523 So.2d at 158.

The principle that emerges from these three contemporary decisions is not new. The Court has long been concerned that when "property or contract rights have been acquired under and in accordance with [a previous] construction, such rights should not be destroyed" by retrospective operation of a subsequent overruling decision. *Florida Forest & Park Service v. Strickland,* 18 So.2d 251 (Fla. 1944).

The only cumulative conclusion that can be reached by applying *National Distributing* and additional Florida precedents is that the policy considerations for retrospective

limitation are present in this case. There is no legal, equitable, or just basis to impose a retroactive application on *Barragan*.[9/]

2. The City Should Not be Subjected to the 10% Statutory Penalty for Untimely and Unjustified Refusal Either to Pay or Controvert a Compensation Claim.

The 10% penalty issue is the subject of the district court's certified question. In *Bell*, this issue engendered the most controversy before the First District, prompting a 10-page discussion of the issue in the majority decision, a 6-page dissent from Judge Booth, and an even 6 to 6 division among the judges on the district court as to whether the issue should be considered *en banc*.[10/] The City respectfully suggests that, under the circumstances, a 10% penalty on the City is totally unwarranted.

The nub of the district court's decision in *Bell* has to be that, with respect to the penalty-imposing provisions of the workers' compensation statute, the Court's reversal of 27 years of precedents on which the City relied was not a condition "over which [the City] had no control." 17 F.L.W. at D2184 (construing section 440.20(7), Florida Statutes (1985)). This ruthless application of the statute is exposed for inconsistency and unfairness by Judge Booth in dissent:

> The majority forgives [the employee's] failure to claim the offset in this 1988 claim because, under the existing law, there was no basis for such a claim. A different rule is applied to [the City], however, who must now pay the offset amounts based on the retroactive application of a change in the law and pay a penalty to boot. Where was [the City's] opportunity to avoid the penalty? What was the effect of the ordinance remaining on the books that authorized

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9/ *See also, City of Miami v. Gates*, 592 So.2d 749 (Fla. 3d DCA 1992), in which the Third District recently concluded that pension plan claimants should not be barred by a class action settlement which did not anticipate *Barragan*'s conclusion that the City's offset ordinance was invalid.

10/ The tie vote was prompted by the voluntary recusal of one judge of the First District.

> the offset? . . . Only a soothsayer with a crystal ball could have predicted in 1985, when the original claim arose, or in 1987, when the offsetting began, that *Barragan* would be decided (July 1989) and, eventually (October 1991), be held to apply retroactively.

17 F.L.W. at D2185. The City would suggest that the dissent has the better reasoned analysis.

The 10% penalty is a statutory mechanism to compel the prompt payment of workers' compensation claims, or in the alternative the prompt invocation of administrative processes. *Compare Sigg v. Sears Roebuck & Co.*, 594 So.2d 329, 330 (Fla. 1st DCA 1992). Nowhere in the history or lore of the workers' compensation laws has there been a judicial determination that this penalty should be levied on an employer who has followed the law for 13 years, under six separate and judicially-final appellate court decisions, when those decisions are unexpectedly overturned and then, 2 years later, this reversal is ruled to apply retroactively. None of the statutory subsections invoked by the First District's majority can be manipulated to condone this penalty under these circumstances. They are square pegs in ill-fitting round holes.

Section 440.20(7) imposes a 10% penalty after 14 days of non-payment of a non-controverted installment of compensation, "unless such non-payment results from conditions over which the employer or carrier had no control." A veritable hornet's nest of questions arise in attempting to apply this penalty provision to these facts. Indeed, panels of the First District have twice certified to the Court whether a retroactive award even constitutes compensation under the statute: *City of Miami v. Arostegui,* 17 F.L.W. D2245 (Fla. 1st DCA

September 23, 1992), *review pending*, Case No. 80,560; *City of Miami v. McLean*, 605 So.2d 953 (Fla. 1st DCA 1992), *review pending*, Case No. 80,575.[11/]

The first problem, mentioned expressly by Judge Booth in dissent, is whether a pension offset amount restored following *Barragan* even constitutes an "installment of compensation." The City has paid its former employee in excess of the amount owed for workers' compensation; it has simply reduced their contractual separate pension benefits. *See also City of Miami v. McLean, supra*; *City of Miami v. Arostegui, supra*; *State, Department of Transportation v. Davis*, 416 So.2d 1132, 1133 (Fla. 1st DCA 1982) (statutory offset in Chapter 440 for social security does not equate latter with "compensation"); *Brantley v. ADH Building Contractors, Inc.*, 215 So.2d 297, 299 (Fla. 1968) (narrowly construing "compensation" to exclude medical and hospitalization benefits obtained pursuant to subsection of the Act).

Second, the penalty in section 440.20(7) is only triggered in one of three circumstances: the employer's knowledge of the employee's injury,[12/] when "impairment benefits" are owed,[13/] or by knowledge of a post-termination "wage-loss benefit."[14/] None of these triggering events are well-suited to the imposition of a 10% penalty here. The City's knowledge of Meyer's injury dates from 1975, when the City in fact began timely

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11/ The very thought of applying a punitive financial burden on top of retroactivity apparently is a second bombshell which obviously does not rest comfortably with the district court judges.

12/ Section 440.20(2), Florida Statutes (1985).

13/ Section 440.20(3), Florida Statutes (1985).

14/ Section 440.20(4), Florida Statutes (1985).

and penalty-free compensation payments. "Impairment benefits" and post-termination wage-loss provisions have no relevance here at all.[15/]

No contortions can fit the blindside of *Barragan* into this precisely crafted statutory scheme. Nor can the punitive nature of 10% penalty, based on the purposes for which it is levied, rest comfortably alongside the City's innocence. As Judge Booth quite logically found in dissent, the only statutory provision that fits this circumstance is that which makes "the penalty . . . inapplicable where non-payment results from conditions over which the employer or carrier had no control." 17 F.L.W. at ___. That exoneration from the imposition of the penalty obviously comes in play here. Other less compelling decisions affecting a compensation loss have rejected the imposition of penalties when the employer has a valid excuse for non-compliance. *See Florida Community Health Center v. Ross,* 590 So.2d 1037 (Fla. 1st DCA 1991); *Four Quarters Habitat, Inc. v. Miller*, 405 So.2d 475 (Fla. 1st DCA 1981).

On a policy level, the retroactive imposition of a penalty on a retroactive award is unconscionable. It would not punish behavior which is contumacious or in disregard of the claimant's rights. It merely enriches Meyer for the City's lack of prescience -- failing to anticipate that an unbroken line of appellate decisions would be reversed, and then to further anticipate that some two years later the reversing decision would be applied retroactively. Surely the City's skill at prognosticating should not be held to a higher

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15/ Section 440.20(7) references to sub-sections 440.20(3) and (4), which in turn, respectively, require conformity with either section 440.15(3)(a)2 or keys off sections 440.15(3)(b) or (4). The former requires payments to commence on "impairment" benefits within 20 days of a carrier's knowledge of the impairment, once maximum medical improvement has been reached. The latter involves scheduled wage-loss provisions or temporary partial disability situations.

standard than the First and Third District Courts of Appeal, both of which were equally off the mark (according to *Barragan*)[16/] in the *Knight* and *Hoffkins* decisions. If there is just a scintilla of validity in the City's analysis of *National Distributing* (and the City believes it is compelling), no penalty is warranted for the City's decision not to voluntarily disburse vast sums from the City's coffers in the 10th month of its 1988-89 fiscal year.[17/]

Finally on this point, there is language in the applicable statute which itself suggests the inappropriateness of a 10% penalty. Section 440.20(7) doesn't just declare a "penalty." It expressly declares this 10% levy to be a "punitive penalty." Of course, all words in a statute have meaning,[18/] and all penal statutes are to be strictly construed.[19/] For what, one must ask, is the City being "punitively" penalized? The City's only volitional behavior in this whole brouhaha was not sending a check to Meyer for full retroactive reimbursement of prior offset benefits, within 14 days of the finality of the *Barragan* decision.

16/ *City of Miami v. Barragan*, 545 So.2d at 254-255 (Fla. 1989).

17/ The City's fiscal year runs from October 1, to September 30. The *Barragan* decision became final on July 14, 1989.

18/ *Gretz v. Florida Unemployment Appeals Commission*, 572 So.2d 1384, 1386 (Fla. 1991).

19/ *E.g., Philip C. Owen, Chartered v. Department of Revenue*, 597 So.2d 380 (Fla. 1st DCA 1992); *Gardinier, Inc. v. Department of Pollution Control*, 300 So.2d 75, 78 (Fla. 1st DCA 1974); *Turner v. Department of Professional Regulation*, 591 So.2d 1136, 1137 (Fla. 4th DCA 1992).

Conclusion

The *Barragan* decision should not be given retroactive effect by this Court. If the Court does extend retroactivity, the district court's imposition of a 10% penalty should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of this brief was mailed on December 1, 1992, to Richard A. Sicking, P.A., 2700 S.W. Third Avenue, Suite 1E, Miami, Florida 33129.

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