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In the Supreme Court of Florida

Case No. SC13-1882
L.T. Case No. 1D12-2116

WALTER E. HEADLEY, JR.,
MIAMI LODGE #20, FRATERNAL
ORDER OF POLICE, INC.

Appellant,

v.

CITY OF MIAMI,FLORIDA,

Appellee.

JOINT BRIEF OF AMICI CURIAE FLORIDA EDUCATION ASSOCIATION, COMMUNICATIONS WORKERS OF AMERICA, AND FLORIDA POLICE BENEVOLENT ASSOCIATION IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

Amicus Curiae Florida Education Association is a statewide organization of professional educators and education support personnel employed by public employers in 65 of 67 Florida counties, in numerous community and state colleges and all state universities. Through its state and local affiliates, FEA represents approximately 270,000 public employees as the certified bargaining agent for purposes of collective bargaining pursuant to Section 447.307, *Florida Statutes* (2014).[1]

Amicus Curiae Communication Workers of America, AFL-CIO, CLC, is an employee organization which represents and is the bargaining agent for public and private sector employees nationwide, including approximately 2,500 members in 19 bargaining units comprised of supervisory, non-supervisory, professional, white and blue collar and rank-and-file public sector employees throughout the State of Florida.

Amicus Curiae Florida Police Benevolent Association, Inc., is an employee organization which is comprised of 18 chapters and charters throughout the State of Florida, with a membership of over 36,000 law enforcement officers and has collective bargaining agreements with the state, county, and municipal governments of Florida.

[1] All references to the Florida Statutes to the 2014 version unless otherwise noted.

Resolution of the instant case will necessarily involve the interpretation and application of Section 447.4095, *Florida Statutes,* relating to modification of collective bargaining agreements based upon claims of financial urgency. In their capacities as certified bargaining agents, the *Amici Curiae* and their local affiliate organizations have encountered, and will continue to encounter, such claims by public employers seeking to invoke Section 447.4095. They therefore have a direct interest in how this provision is interpreted by this Court.

SUMMARY OF THE ARGUMENT

Section 447.4095, *Florida Statutes,* establishes a process by which a public employer may unilaterally reopen a collective bargaining agreement contrary to its express terms and ultimately change its essential terms based upon a claim that a "financial urgency" exists. This provision must be interpreted consistently with the right of public employees to collectively bargain guaranteed by Article I, Sections 6 and 10 of the Florida Constitution lest collective bargaining agreements be rendered “illusory and the collective bargaining process nugatory" *Manatee Educ. Ass'n, FEA/AFT (Local 3821) v. Sch. Bd. of Manatee Cnty.*, 62 So.3d 1176, 1178, 1181 (Fla. 1st DCA 2011). The First District’s interpretation, which affirmed PERC, fails to do so.

Chiles v. United Faculty of Florida, 615 So.2d 671, 673 (Fla.1993), makes it clear that under Article I, Sections 6 and 10, the Florida Legislature lacks the

power to change the terms of a collective bargaining agreement covering state employees to generate funds to address a financial crisis except where there is a compelling state interest *and* no other possible reasonable source of funds with which to do so. PERC asserted that *Chiles* does not apply because Section 447.4095 was enacted after that decision "creating a new and distinctly different procedure by which local governments could unilaterally modify an agreement in the event of a financial urgency." Without stating a reason, the First District agreed. Obviously, the Legislature cannot abrogate this ruling in *Chiles* construing the Constitution by statute, nor can it authorize public employers to do that which it cannot do itself. By refusing to apply *Chiles*, PERC and the First District abdicated responsibility to construe Section 447.4095 to avoid rendering it unconstitutional and ignored this Court's admonition in *Manatee* that "it is important to bear in mind 'the Florida Constitution's protection of the right of collective bargaining against statutory impairment.'" 62 So.3d at 1181.

The First District further erred by concluding that the City could implement its changes in the collective bargaining agreement prior to the completion of impasse resolution proceedings pursuant to Section 447.403, *Florida Statutes.* Section 447.4095 clearly and unambiguously requires that after impasse the parties "shall then proceed pursuant to the provisions of s. 447.403," which itself nowhere

provides for implementation of any changes prior to completion of the steps set forth therein. There are no statutory or other exceptions to this process.

Moreover, contrary to PERC's assertions below, its ruling that management decisions that impact wages, hours or terms and conditions of employment of bargaining unit employees may be implemented unilaterally prior to the completion of impasse resolution proceedings is neither long-standing nor court-approved. This issue was not reached by this Court in *City of Jacksonville v. Jacksonville Supervisor's Ass'n,* 791 So.2d 508 (Fla. 1st DCA 2001), and has not been considered on its merits, much less approved by any court. The PERC law on this issue that has received judicial approval is set forth in *Palm Beach Junior College Faculty Ass'n v. Palm Beach Junior College Bd. of Trustees,* 7 FPER ¶ 12300 (1981) *aff'd in part and rev'd in part,* 475 So.2d 1221 (Fla. 1985) ("The statutory right to negotiate over the impact upon bargaining unit employees of management decisions ***prior to their implementation*** is therefore an essential element in the legislative scheme of meaningful collective bargaining for public employees.") (emphasis supplied).

For these reasons, the First District's interpretation of Section 447.4095 is clearly erroneous and should be reversed.

ARGUMENT

I. SECTION 447.4095 MUST BE STRICTLY CONSTRUED BECAUSE IT PURPORTS TO PLACE COLLECTIVE BARGAINING AGREEMENTS IN A LESSER STATUS THAN OTHER CONTRACTS IN VIOLATION OF THE FLORIDA CONSTITUTION.

Public sector collective bargaining agreements share the same protections from impairment as other contracts under Article I, Sections 6 and 10, of the Florida Constitution. *Chiles v. United Faculty of Florida*, 615 So.2d 671, 673 (Fla. 1993). As this court has held:

> The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by Article 1, Section 10 of the Florida Constitution and equally enforceable in labor contracts by operation of Article 1, Section 6 of the Florida Constitution.

Mutuality of obligation is required; if one party is not bound to an essential term, the contract is illusory and therefore invalid. *See Pan-Am Tobacco Corp. v. Dep't. of Corrections*, 471 So.2d 4 (Fla. 1984). Even the Florida Legislature is bound to its financial obligations under a funded collective bargaining agreement during "bona fide emergencies," including financial emergencies, absent a compelling state interest for which the legislature must demonstrate that there are

> no other reasonable alternative means of preserving its contract with public workers, ***in whole or in part***. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other possible source.

Id. (emphasis supplied).

Execution of a written contract embodying the wages, hours and terms and conditions of employment of employees represented by a union is universally recognized as one of the fundamental goals of collective bargaining. *See, e.g.*, § 447.309(1); 29 USC § 158(d) (2012). It is the primary means of promoting the statutory goals of stability in labor-management relations and avoiding interruption of the "flow of commerce" (29 USC Section 151 (2012), "Findings and declaration of policy") and of the "operations and functions of government" (Section 447.201, *Florida Statutes*, "Statement of policy"). Unilateral abrogation of a collective bargaining agreement without a compelling state interest is inconsistent with "public employees' constitutional right to bargain collectively." *Chiles, supra*; *Manatee Educ. Ass'n, FEA/AFT (Local 3821) v. Sch. Bd. of Manatee Cnty.*, 62 So.3d 1176, 1178 (Fla. 1s^{t} DCA 2011).

Section 447.4095, enacted after this Court's decision in *Chiles*, purports to allow a public employer to unilaterally abrogate its obligations under a collective bargaining agreement in the event of a "financial urgency requiring modification of an agreement." Because it plainly implicates fundamental rights protected by Article I, Sections 6 and 10, this provision must be interpreted so as to render it constitutional if possible. *See Haddock v. Carmody*, 1 So.3d 1133, 1135 (Fla. 1st DCA 2009) (holding that "[w]henever possible, courts should construe a

challenged law to effect a constitutional outcome"). Here, the First District interpreted Section 447.4095 to allow the public employer to simply assert it faced a serious, but not a catastrophic financial problem, and thereafter unilaterally change its collective bargaining agreement, reducing the employees' wages and benefits, after 14 days of negotiations without completing the impasse resolution proceedings under Section 447.403. This interpretation of Section 447.4095 relegates public sector collective bargaining agreements to a lesser status than other contracts, including contracts with individual employees, vendors, and other third parties. It singles out public sector collective bargaining agreements as the single most ready and largest source of funds for public employers to target during a financial urgency. As a result, and for the reasons stated in the Initial Brief, the First District's interpretation violates the fundamental rights to contract and collectively bargain under Article I, Sections 6 and 10.

II. THE FIRST DISTRICT'S INTERPRETATION OF SECTION 447.4095 IS CLEARLY ERRONEOUS BECAUSE IT FAILS TO CORRECTLY APPLY *CHILES*.

Section 447.4095 applies only when there is an actual "financial urgency requiring modification of an agreement." This standard raises two questions: (1) what is a financial urgency, and (2) when does one require modification of an agreement. The framework to answer these questions was provided by this Court in *Chiles v. United Faculty of Florida,* 615 So.2d 671, 673 (Fla.1993), in which this

Court stated the following rule for modifying an existing collective bargaining agreement on the basis of a claimed financial crisis:

> We recognize that in the sensitive area of a continuing appropriation obligation for salaries, and perhaps in other contexts as well, the legislature must be given leeway to deal with bona fide emergencies. Accordingly, we agree with the trial court that the legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, ***but only where it can demonstrate a compelling state interest.*** *Art. I, §§ 6, 10, Fla. Const.; Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Authority*, 522 So.2d 358 (Fla. 1988).
>
> Before that authority can be exercised, however, ***the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part.*** The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, ***the legislature must demonstrate that the funds are available from no other possible reasonable source.*** *Accord United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Association of Surrogates and Supreme Court Reporters v. New York*, 940 F. 2d 766 (2nd Cir. 1991); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P. 2d 1 (1979). That has not happened here.

615 So.2d at 673. (emphasis supplied). This two-part strict scrutiny test for evaluating whether there has been an abridgment of a fundamental right protected by Article I was recently followed and applied by the Fourth District Court to Section 447.4095 in determining whether the employer had engaged in an unfair labor practice when it unilaterally rewrote the collective bargaining agreement under this provision. *Hollywood Fire Fighters, Local 1375, IAFF v. City of*

Hollywood, 133 So.3d 1042 (Fla. 4th DCA 2014). The Fourth District held that PERC had failed to apply the second part of this test.

The First District, however, applied its own, revised *Chiles* standard. First, it adopted PERC's circular definition of "financial urgency" that combines questions (1) and (2) above: "a financial condition requiring immediate attention and demanding prompt and decisive action *which requires the modification of an agreement*, but not necessarily a financial emergency or bankruptcy." 118 So.3d at 892 (emphasis supplied). This definition fails to describe the severity of dire financial circumstances necessary to show a compelling state interest for unilaterally abrogating and rewriting a contract. Significantly, it does not answer the central issue in this case: Did the admittedly serious financial difficulties faced by the City of Miami rise to the level required to allow it to make those particular unilateral changes that it chose to make to the collective bargaining agreement?

Second, the First District summarily dismissed the standard in *Chiles* as applied in *City of Hollywood*, which requires the employer to demonstrate "***no other reasonable alternative means of preserving its contract with public workers, either in whole or in part***" and "***that the funds are available from no other possible reasonable source***." In doing so, the First District stated: "[W]e are not persuaded that this restrictive standard is constitutionally mandated or that it should be extended to section 447.4095." 118 So.3d at 893. Instead, it held that

an employer must simply show that "other potential cost-saving measures and alternative funding sources are unreasonable and inadequate to address the dire financial condition facing the local government." *Id*. Then, according to the First District, the employer apparently can wholly rewrite the contract without regard to preserving any part. The First District's pronounced standard does not require that any compelling state interest be implemented by the least restrictive means possible, as required by strict scrutiny.

Even if the Legislature had intended Section 447.4095 to provide local governments an alternative to the requirements of *Chiles*, as PERC claims, it had no authority to do so. Obviously, the Legislature cannot, by statute or otherwise, overrule an interpretation of the Constitution by this Court, nor can it authorize other public employers/legislative bodies to abrogate contractual provisions that it cannot abrogate itself. Nowhere are these entities exempted from Article I. The very notion that Section 447.4095 could in any way overrule the requirements of Article I, Sections 6 and 10, is absurd on its face.

Accordingly, PERC's interpretation of Section 447.4095 as affirmed by the First District is unconstitutional and must be rejected.

III. PERC'S INTERPRETATION OF SECTION 447.4095 TO PERMIT IMPLEMENTATION OF CHANGES TO AN AGREEMENT PRIOR TO THE COMPLETION OF PROCEEDINGS UNDER SECTION 447.403 IS CLEARLY ERRONEOUS.

Assuming, *arguendo,* there was a qualifying financial urgency, the First District clearly erred by concluding that the City could implement changes in the agreement prior to completing impasse resolution proceedings under Section 447.403. *Amici Curiae* agree with Petitioner that the plain and unambiguous language of Section 447.4095 requires the completion of Section 447.403 proceedings prior to implementation. (Initial Brief at 31). They add, however, that to the extent that it is argued that there is any ambiguity introduced by the reference to bargaining the "impact" of the financial urgency in Section 447.4095, the rules of statutory construction and the applicable precedent require the same result.

Under the principle *expressio unius, est exclusio alterius* (meaning "the mention of one thing implies the exclusion of another"), "a legislative direction as to *how* a thing shall be done is, in effect, a prohibition against its being done in any other way." *See Sun Coast Int'l, Inc., v. Dep't. of Bus. Reg.*, 596 So.2d 1118, 1121 (Fla. 1st DCA 1992) (emphasis in original). Thus, whatever the parties bargained over and reached impasse on, Section 447.4095 specifies the *exclusive* method for resolving that impasse: Section 447.403. That provision permits the unilateral

implementation of changes to the *status quo* under negotiation only after the conclusion of impasse resolution proceedings and failure of ratification:

> If such agreement is not ratified by all parties, pursuant to the provisions of s. 447.309, the legislative body's action taken pursuant to the provisions of paragraph (d) shall take effect as of the date of such legislative body's action for the remainder of the first fiscal year which was the subject of negotiations; . . . .

§ 447.403(4)(e), *Fla. Stat* (2014). Had the Legislature intended for the changes to take effect earlier or under any other circumstances, it could have said so. Its failure to do so requires that this portion of Section 447.4095 be interpreted as argued by Petitioner and *Amici Curiae.*

This analysis brings into question PERC's allegedly "long-standing" and "court approv[ed]" impact bargaining decisions stating that an employer is not required to complete Section 447.403 proceedings before implementing changes in mandatory subjects of bargaining resulting from impact bargaining. First, as Petitioner correctly noted, this aspect of PERC's impact bargaining jurisprudence has never been seriously analyzed by any court, much less approved. It was not an issue litigated in *City of Jacksonville v. Jacksonville Supv. 's Ass'n*, 791 So.2d 508 (Fla. 1st DCA 2001), cited by the First District, which turned on whether there was any obligation to bargain at all, not when changes subject to impact bargaining could be implemented. This is the only appellate case that could be found involving review of a PERC decision that purported to apply this principle.

In fact, the judicial decisions that could be found involving implementation of a management decision subject to impact bargaining hold the *opposite* of PERC's position. In *Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 475* So.2d 1221 (Fla. 1982), this Court affirmed PERC's decision based on the following analysis of impact bargaining in *United Faculty of Palm Beach Junior College v Palm Beach Junior College Bd. of Trustees*, 7 FPER ¶12300 (1981):

> Neither party disputes the general principle that, the absence of such a provision [waiving the right to impact bargaining] or a recognized exception, the College would be required, upon demand, to bargain ***prior to implementation*** over the effect upon the employees' working conditions of the exercise of a management right defined by Section 447.209, *Florida Statutes* (1979). *Palowitch v. School Board of Orange County, 3 FPER at 282; Local 1240, LIUNA v. DeSoto County,* 7 FPER ¶12248 (1981). The provision at issue therefore requires that the United Faculty waive for the term of the agreement its statutory right to bargain over the effects or impact of such decisions ***prior to their implementation.***
>
> *** * ***
>
> [T]he stability encouraged by requiring negotiations on a broad range of subjects *is inconsistent with the notion that employers should be allowed to unilaterally implement management decisions prior to negotiations regardless of the effect of such decisions on the working conditions of the employees.* As noted by the Hearing Officer in this case, conceptually all wages, hours, and terms and conditions of employment can be viewed as an implementation of some management decision. For instance, paying a wage is a means of implementing the management decision to hire employees to do work which is a means of implementing the management decision to produce a product or provide a service. Therefore, *to summarily reject*

> *the concept of mandatory negotiations over the effects on employee working conditions of management decisions* ***prior to their implementation*** *is to reject the concept of collective bargaining itself*
>
> *** * ***
>
> The statutory right to negotiate over the impact upon bargaining unit employees of management decisions ***prior to their implementation*** is therefore an *essential element in the legislative scheme of meaningful collective bargaining for public employees.*

(emphasis supplied). This is still the law as far as court decisions are concerned. *See Sch. Dist. of Indian River Cnty. v. Fla. Pub. Emps. Rel. Comm 'n,* 64 So.3d 723 (Fla 4th DCA 2011) ("The appropriate time to impact bargain is prior to implementation of a change. *See Leon Cnty. Police Benevolent Ass'n v. City of Tallahassee,* 8 FPER ¶ 13400, 726 (1982)"). Thus, the courts have approved not PERC's current stance, as it claims, but the opposite policy requiring completion of negotiations prior to implementation.

Amici Curiae submit that PERC's new theory regarding implementation of impact-bargained management decisions is clearly erroneous for the same reason its interpretation of Section 447.4095 is: had the Legislature intended impasse disputes resulting from required impact bargaining be resolved differently than those resulting from normal bargaining it would have clearly said so. Section 447.403 makes no distinction between disputes that reach impasse from regular bargaining and those resulting from impact bargaining:

> (1) If, after a reasonable period of negotiations *concerning the terms and conditions of employment to be incorporated into a collective bargaining agreement,* a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the commission.

(emphasis supplied). Section 447.309(5), *Florida Statutes,* requires that a collective bargaining agreement contain *"all of the terms and conditions of employment of the employees in the bargaining unit"* except for those covered in applicable merit or civil service systems. (emphasis supplied). As established in the quoted passages from PERC's *Palm Beach Junior College* case above, impact bargaining does not involve negotiations over the management decision itself, only the impacted wages, hours and terms and conditions of employment. Because regular negotiations and impact bargaining therefore involve precisely the same things: terms and conditions of employment of bargaining unit employees to be included in an agreement, there is no policy or legal basis for treating them differently for purposes of impasse resolution or implementation. To conclude otherwise, *Amici Curiae* submit, "is to reject the concept of collective bargaining itself." 7 FPER ¶12300 at 595.

The plain language of Section 447.4095, as well as the policy underlying impact bargaining, establishes that impasse resolution proceedings under Section 447.403 must be completed before unilateral implementation of any modifications

of an agreement based on a financial urgency. PERC's contrary conclusion was error and should be reversed.

CONCLUSION

The Florida Supreme Court has definitively established that Article I, Section 6 affords collective bargaining agreements the same protection from legislative impairment in a financial crisis other contracts. Section 447.4095, on its face and as interpreted by the First District Court of Appeal and PERC, purports to weaken or circumvent that protection. The only way, if at all, this statute can be rendered constitutional is to interpret the phrase "financial urgency requiring modification of an agreement" as requiring the same limited circumstances necessary for impairment of a contract set forth in *Chiles*, as followed by the Fourth District Court of Appeal in *City of Hollywood*. Because the First District did not do so, the decision below must be reversed.

Respectfully Submitted,

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