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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent. /

CASE NO.: SC13-1882

Lwr. Tribunal: 1D12-2116

BRIEF OF AMICUS CURIAE, FLORIDA PROFESSIONAL FIREFIGHTERS, INC., INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, IN SUPPORT OF PETITIONER'S POSITION

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STATEMENT OF INTEREST

The amicus curiae, Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO, is the labor organization (union) of firefighters and paramedics employed by the State of Florida, and Florida counties, cities and special districts. It lobbies the Legislature on matters of public employee collective bargaining and assists its locals in collective bargaining. Therefore, it has an interest in public employee collective bargaining, particularly as affected by the "financial urgency" statute. It is filing this brief in support of the petitioner's position.

SUMMARY OF ARGUMENT

The right of public employees to bargain collectively is a fundamental right contained in the Florida Constitution, Article I, Section 6. Statutes which abridge fundamental rights are subject to the strict scrutiny test of validity: (1) the Legislature must demonstrate a compelling state interest; and (2) the law involved is the least intrusive way of addressing that interest.

In *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), the Supreme Court of Florida held that a unilateral denial of a budget item by the Legislature to pay a raise to teachers provided for in a collective bargaining agreement was invalid under the strict scrutiny test, as it violated Article I, Section 6, even though the Legislature had a budget shortfall.

After *Chiles*, the Legislature passed the "financial urgency" statute, Section 447.4095, Fla. Stat., which authorizes public employers to declare "financial urgency" (undefined in the statute) in order to set aside collective bargaining agreements. Then, after reaching the last of the impasse/resolution steps in collective bargaining, the employer may unilaterally impose on the employees the employer's own provisions of wages, hours, terms and conditions of employment for the rest of the fiscal year.

This unilateral action is not a contract. There is no mutual agreement. It is not collective bargaining at all. It is worse than "take it or leave it". It is "take it and keep on taking it". The "financial urgency" statute is constitutionally invalid because it abridges the fundamental right of public employees to bargain collectively.

However, the City of Miami also acted too hastily. The City Commission imposed its own provisions of wages, hours, terms and conditions of employment on the police officers prior to completion of the resolution of impasse process required by Section 447.403, Fla. Stat., as contained in Section 447.4095, Fla. Stat. Plainly, the City did not follow these statutory requirements.

Under either theory, the First District Court of Appeal was incorrect in affirming PERC's rejection of the union's unfair labor practice (ULP) charge against the City: either (1) the City did not follow the "Resolution of impasses" statute or (2) the "Financial urgency" statute is unconstitutional.

ARGUMENT

POINT ONE

I. THE COURT'S DECISION IN *CHILES V. UNITED FACULTY OF FLORIDA*, 615 So.2d 671 (Fla. 1993) SETS FORTH THE STANDARD THAT MUST BE MET BEFORE GOVERNMENT CAN UNILATERALLY MODIFY THE TERMS OF A CBA AND IT WAS ERROR NOT TO FOLLOW IT

(Petitioner's Point I)

The standard of review is de novo. *City of Miami v. McGrath*, 824 So. 2d 143, at 146 (Fla. 2002); *Caribbean Conservation Corps., Inc.*, v. *Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, at 500 (Fla. 2003).

In 1968, the people of Florida adopted a new Constitution. (It was the centennial of the 1868 Constitution.) Article I of this Constitution is entitled "Declaration of Rights". The rights described in Article I are fundamental rights retained by the people to themselves. One of the fundamental rights described in Article I is the right of persons to be rewarded for industry. Art. I, §2, Fla. Const. Another one of the fundamental rights described in Art. I

is the right of public employees to bargain collectively, but not the right to strike.

Article I, Section 6, of the Florida Constitution provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

The Supreme Court of Florida decided in *Ryan I*[1] that under Article I, §6, Fla. Const., public employees had the same constitutional right to bargain collectively as did private employees, except the right to strike, and that this constitutional right required legislative implementation. Thereafter, the Florida Legislature stumbled for three sessions over this requirement, such that the Supreme Court of Florida decided in *Ryan II*[2] that the Legislature must implement this constitutional right or the Supreme Court would do it for them. *Ryan II*, at 688. The opinion in *Ryan II* was written by Chief Justice B. K. Roberts. He stated that he had been a member of the Florida Constitutional Revision Commission and he had been opposed to what became Article I, Section 6. However, he put his personal belief aside

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[1] *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2nd 903 (Fla. 1969).

[2] *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972).

to make clear the importance of the implementation of the right of public employees to bargain collectively. He wrote:

> But the people of this State have now spoken on this question in adopting Section 6 of Article I, supra. The question of the right of public employees to bargain collectively is no longer open to debate. It is a constitutionally protected right which may be enforced by the courts, if not protected by other agencies of government.

Ryan II, at 687.

In 1974, the Florida Legislature adopted the Florida Public Employees Relations Act [PERA] (Part II of Ch. 447, Fla. Stat.; §447.201, et seq., Fla. Stat.).

In 1977, the Florida Legislature amended the Act to prohibit public employees from bargaining collectively over pensions. Ch. 77-343, §9, at 1486, Laws of Fla.; and Ch. 77-343, §13, at 1490, Laws of Fla., creating §447.301(2) Fla. Stat. (1977), and §447.309(5), Fla. Stat. (1977). These statutes were declared unconstitutional for violating Article I, Section 6, of the Florida Constitution which allowed for no such exception. *City of Tallahassee v. P.E.R.C.*, 410 So. 2d 487 (Fla. 1981).

While *City of Tallahassee v. P.E.R.C.*, supra, may have used a rational basis test, later cases have treated the right of public employees to bargain collectively to be a fundamental right,[3] subject to strict scrutiny.[4]

In the case of *The City of Miami Beach v. The Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Miami Beach*, 91 So. 3d 237 (Fla. 3rd DCA 2012), the Third District Court of Appeal decided that the referendum requirement of Section 166.021(4), Florida Statutes, was unconstitutional when applied to collectively bargained pension rights in violation of Art. I, §6, Fla. Const. The Third District Court of Appeal held that Art. I, §6, Fla. Const., guarantees public employees the right of *effective* collective bargaining. This is the Third District Court of Appeal's original emphasis, as follows:

> The Florida Constitution guarantees public employees the right of *effective* collective bargaining. Collective bargaining is embedded in our state constitution's Declaration of Rights, and is deemed by our Supreme Court to be a fundamental right. [citing authorities].

Id., at 239-240.

The right of public employees to bargain collectively in Article I, Section 6, Fla. Const., is included alongside the basic rights: freedom of

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[3] *Dade County School Administrators Ass'n, Local 77 AFSA, AFL-CIO v. School Board of Miami-Dade County*, 840 So. 2d 1103 (Fla. 1st DCA 2003).
[4] *Chiles v. S.E.A.G.*, 734 So. 2d 1030 (Fla. 1999); *Coastal Florida Police Benevolent Ass'n Inc. v. Williams*, 838 So. 2d 543 (Fla. 2003).

religion (Section 3), freedom of speech (Section 4), freedom of the press (Section 4), trial by jury (Section 22), equal protection of the laws (Section 2), due process of law (Section 9) and others. Indeed, the right of public employees to bargain collectively has been specifically determined to be a fundamental right. *SEAG, FPD, NUHHCE, AFSCME v. State*, 653 So. 2d 487, at 488 (Fla. 1st DCA 1995); affirmed, *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999); also *Chiles v. United Faculty of Florida*, 615 So. 2d 671, at 673 (Fla. 1993). *The City of Miami Beach v. The Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Miami Beach*, 91 So. 3d 237 (Fla. 3rd DCA 2012).

A statute which affects fundamental rights is subject to the strict scrutiny test of constitutional validity. *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority*, 522 So. 2d 358 (Fla. 1988). *Chiles v. State Employees Attorneys Guild*, supra.

The courts created the strict scrutiny test to judge the constitutional validity of statutes, ordinances, resolutions, laws, etc., which abridge fundamental rights. This is in contrast to the rational basis test used to judge the constitutional validity of laws which do not abridge fundamental rights. It could be said that any law could pass a rational basis test. Could it not be said that a particular law was designed to save money or make things work,

etc.? On the other hand, it could be said that no law can pass a strict scrutiny test. Could it not be said that there is some other way to do it? If the rational basis test were used to judge laws effecting fundamental rights, there would be no fundamental rights.

Fundamental rights are those set forth in the Declaration of Rights of the Florida Constitution (Article I) and such other rights which courts have declared to be fundamental, such as the right to vote.[5]

The strict scrutiny test requires the government (not the complaining persons) to demonstrate (1) that the statute fulfilled a compelling state interest and (2) that the statute did so in the least intrusive way possible. *Florida Board of Bar Examiners re: Applicant No. 63161*, 443 So. 2d 71, at 74 (Fla. 1983).

The Florida Supreme Court described collective bargaining by public employees as a fundamental right in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). In *Chiles*, the Supreme Court began by explaining that the prior *PBA* case is limited and confined to its facts. *Chiles*, at 672. It reads:

> We begin by noting that the present case is factually quite different from our recent opinion in *State v. Florida Police Benevolent Association*, 613 So. 2d 415 (Fla.

[5] *Gore v. Harris*, 773 So. 2d 524, at 526 (Fla. 2000).

> 1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature. Accordingly, we do not believe that the result reached in *Police Benevolent* dictates the result here.

Chiles v. United Faculty of Florida, supra, at 672.

In *Chiles*, the United Faculty of Florida was in the second year of a collective bargaining agreement which provided for a raise. The Legislature, having a $700 million shortfall, did not give the raise. The Supreme Court held that the Legislature had to give the raise because the State's contracts must be as good as anybody else's. In this, the Court found no separation of powers problem. *Chiles*, at 673. The Supreme Court held:

> ...The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution, and is equally enforceable in labor contracts by operation of article I, section 6 of the Florida Constitution. The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created. Art. I, § 10, Fla. Const. As we stated in *Police Benevolent*, 613 So. 2d at 421,
>
> > [w]here the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced.
>
> 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 some 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, Inc. 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.** [citing authorities] (Emphasis added.)

Chiles v. United Faculty of Florida, supra, at 673.

In *Chiles,* the Supreme Court of Florida held that the right of public employees to bargain collectively could not be impaired. This was constitutionally superior to the Legislature's appropriation power even when there was a budget shortfall. *Chiles*, at 673. (In *Chiles*, it was $700 million of a $28 billion budget; at page 674). The Court stated the strict scrutiny test at page 673: (1) compelling state interest; and (2) no other reasonable alternative.

In the present case, this means that the City of Miami must demonstrate:

1. The City of Miami cannot collect unpaid taxes;

2. The City of Miami cannot raise taxes;

3. The City of Miami cannot borrow money;

4. The City of Miami cannot increase user fees;

5. The City of Miami cannot curtail any non-contractual spending;

6. The City of Miami cannot renegotiate any other contracts; and

7. The City of Miami cannot take any other steps to increase revenue or limit the budget.

In the present case, the City of Miami's employees alone would have to bear the burden. It is a kind of equal protection of the laws issue. When the government needs more money to provide its services, that is a burden that should be borne by all of us. It should not be borne by a discreet identifiable minority, the government's own employees.

Plainly, in the present case, neither the Legislature nor the City of Miami have met the strict scrutiny test, especially the second part.

After *Chiles*, the Legislature amended the Public Employees Relations Act by creating Section 447.4095, Fla. Stat., which is entitled "Financial urgency". It provides:

> –In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have

> occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.
> History.– s. 2, ch. 95-218; s. 159, ch. 97-103.

Section 447.403, Fla. Stat., referred to in the "financial urgency" statute, is entitled "Resolution of Impasses". It provides for the last step in collective bargaining in the event the parties did not reach an agreement: The legislative body (City Commission) is to resolve the disputed impassed issues, subject to ratification by the public employer and the public employees who are members of the bargaining unit. The statute further provides in the event that there is no ratification as follows:

> 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...

This means that if the members of the bargaining unit do not ratify the legislative body's action, the legislative body (City Commission) is authorized by this statute to unilaterally impose its own provisions as to the wages, hours, terms and conditions of employment. This is "the nuclear option" or "the nuclear bomb" because according to the statute, the employer has the ability at the end of the collective bargaining process to dictate

unilaterally the provisions of the wages, hours, terms and conditions of employment for the remainder of the fiscal year involved. Indeed, under the statute, this unilateral process could be repeated by the employer year after year. This unilateral process by which the employer enforces its own will without the consent or ratification by the bargaining unit is not a contract at all. There is no mutual agreement. More importantly, it is not collective bargaining in any sense. Article I, Section 6, of the Florida Constitution, contains no exception that permits either party, labor or management, to impose its own will unilaterally on the other party in place of a collective bargaining agreement under any condition or circumstance.

"Financial urgency" is not defined by the Legislature in the statute. In contrast, the Florida Statutes do define "financial emergency" in Section 218.503, Fla. Stat. This is contained in Part V of Chapter 218 of the Florida Statutes which authorizes the governor to implement measures to resolve a financial emergency of a local government. We could, therefore, conclude as PERC did, that a "financial urgency" is something less than a "financial emergency". This, however, only tells us what financial urgency is not; it does not tell us what it is. Something else it is not: magic words, like "abracadabra", that would allow the City to violate the employees' fundamental right to bargain collectively.

Indeed, PERC's attempt at defining "financial urgency" is a failure because PERC's definition is self-defining. According to PERC, "financial urgency" means any financial condition of the employer that requires immediate voiding of a union contract (CBA) and modifying the CBA, even unilaterally by the employer, if the bargaining unit does not agree to the modification. (PERC Order, page 6.)

Curiously, the financial urgency statute does not authorize government to void and modify any other contracts, such as those for services or supplies. Of course, if it did, that would violate Florida Constitution, Article I, Section 10, as a law impairing the obligation of contracts. Therefore, the financial urgency statute should be considered to violate Florida Constitution, Article I, Section 10, as well.

The First District Court of Appeal has had a sort of "financial urgency" case previously. It is *Manatee Education Ass'n, FEA, AFT (Local 3821) AFL-CIO v. School Board of Manatee County*, 62 So. 3d 1176 (Fla. 1st DCA 2011). The case was remanded to PERC to decide whether a "financial urgency" existed consistent with the Florida Constitution. To date, it remains undecided by PERC.

The question here is whether the City of Miami could, by simply declaring "financial urgency", impose its own provisions of wages, hours,

terms and conditions of employment unilaterally upon its police officers.

The constitutional question is whether this is an abridgement of the employees' right to bargain collectively. Obviously, it is. Article I, Section 6, Fla. Const., does not contain an exception for financial urgency. It states that public employees have a fundamental right to bargain collectively. Such a fundamental right may not be abridged by legislation or by the employer unilaterally, as was done here.

POINT TWO

II. WHETHER A FAILURE TO ABIDE BY THE MANDATES OF THE IMPASSE RESOLUTION PROCESS, INCLUDING THE RIGHT TO A HEARING BEFORE A NEUTRAL SPECIAL MAGISTRATE IS ERROR REQUIRING REVERSAL

(Petitioner's Point II)

The standard of review is de novo. *City of Miami v. McGrath*, 824 So. 2d 143, at 146 (Fla. 2002); *Caribbean Conservation Corps., Inc.*, v. *Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, at 500 (Fla. 2003).

However, it may not be necessary to reach the constitutional question in the present case. Here, the City of Miami unilaterally imposed its own provisions of wages, hours, terms and conditions of employment upon the police officers prior to completion of the resolution of impasse process in the

manner set forth in Section 447.403, Fla. Stat. The City Commission acted like "Sooners"[6]. Since the City did not follow the procedures required by Section 447.403, Fla. Stat., prior to imposition, the terms the City Commission imposed were unlawful, even under the statute. See *Central Fla. Professional Firefighters Ass'n v. Bd. of County Commissioners of Orange County,* 467 So. 2d 1023 (Fla. 5th DCA 1985).

CONCLUSION

The order of the Florida First District Court of Appeal affirming the order of the Florida Public Employees Relations Commission should be reversed.

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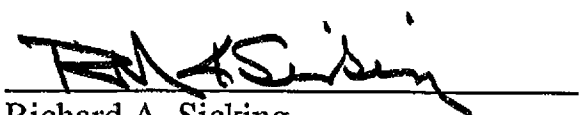

Richard A. Sicking

[6] People who unlawfully jumped the gun in the Oklahoma Land Rush.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 31 day of October, 2014, to: Ronald J. Cohen, Esq. (rcohen@rprslaw.com), Rice, Pugatch, Robinson & Schiller, P.A., 101 N.E. Third Avenue, Suite 1800, Fort Lauderdale, FL 33301; John A. Greco, Esq. (jgreco@miamigov.com), Julie Bru, Esq. (juliebru@me.com), Diana Vizcaino, Esq. (dvizcaino@miamigov.com), Victoria Mendez, Esq. (vmendez@miamigov.com), Office of the City Attorney, City of Miami, 444 S.W. 2nd Avenue, Suite 945, Miami, FL 33130; William D. Salmon, Esq. (Bill.Salmon@perc.myflorida.com), Public Employees Relations Commission, 4050 Esplanade Way, Tallahassee, FL 32399; Michael Mattimore, Esq. (mmattimore@anblaw.com), Allen, Norton & Blue, P.A., 906 N. Monroe Street, Tallahassee, FL 32303; Luke Savage, Esq. (lsavage@anblaw.com), Allen, Norton & Blue, P.A., 121 Majorca Avenue, Suite 300, Coral Gables, FL 33134; Thomas W. Brooks, Esq. (tbrooks@ meyerbrookslaw.com), Meyer, Brooks, Demma and Blohm, P.A., 131 North Gadsden Street, P.O. Box 1547, Tallahassee, FL 32302; Paul A. Donnelly, Esq. (pdonnelly@laborattorneys.org), Donnelly and Gross, P.A., 2421 N.W. 41st Street, Suite A-1, Gainesville, FL 32606; G. Hal Johnson, Esq. (hal@ flpba.org), Florida Police Benevolent Association, P.O. Box 11239,

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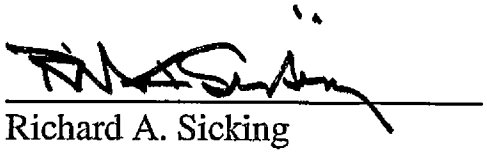

Richard A. Sicking

CERTIFICATE OF FONT SIZE AND STYLE

I CERTIFY that this brief has been typed in 14 point proportionately spaced Times New Roman.

Richard A. Sicking