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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.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

ANSWER BRIEF OF RESPONDENT, THE CITY OF MIAMI

ON DISCRETIONARY REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

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INTRODUCTION

This case is on discretionary review of the decision of the First District Court of Appeal in *Headley v. The City of Miami*, 118 So. 3d 885 (Fla. 1st DCA 2013), which was subsequently certified by the Fourth District Court of Appeal to be in direct conflict with that court's decision in *Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood*, 133 So. 3d 1042 (Fla. 4th DCA 2014). The conflict issue is whether the standard for when a local government may act in the face of a financial urgency set forth in this Court's decision in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), applies to the City's use of the subsequently-adopted section 447.4095, Florida Statutes, Florida's financial

urgency statute. Specifically, whether a local government is required to establish that the funds it needs as a result of the financial urgency are available from no other "possible reasonable source" before a modification of a collective bargaining agreement. *Chiles*, 615 So. 2d at 673.

The City asserts that PERC and the First District properly applied the *Chiles* standard. As will be explained more fully below: (1) the language in *Chiles* that the first district chose not to extend to the financial urgency statute was dicta; (2) the City has met the *Chiles* standard; and (3) this Court should defer to PERC's reasonable interpretation of the financial urgency statute as permitting a local government to unilaterally modify a collective bargaining agreement prior to engaging in the impasse resolution procedures referenced in the statute.

STATEMENT OF CASE AND FACTS

During the peak of the recession, in 2010, the City of Miami was in a serious financial crisis. The City had an operating budget deficit in excess of $115-million. (T. 229). The deficit was caused by *inter alia* decreased property values and the increased costs of personnel, healthcare, and pensions. (T. 227-232; R12. 1934-1935). Personnel costs alone would exceed 100% of the City's operating budget. (T. 230). The City attempted to address this financial urgency through collective bargaining with its unions. (T. 98; 239). When bargaining failed, and there were no other reasonable means to preserve the labor contracts,

the City had no other choice but to modify the collective bargaining agreements. (T. 242; R12. 1777-1781; R11. 1652-1699).

The City's deteriorating financial condition

In an effort to examine the City's financial condition, City of Miami Mayor Tomas Regalado consulted with businessman and future City Manager Carlos Migoya. (T. 223).

Upon investigating the City's financial condition for fiscal year 2008-2009, Migoya initially determined that the City had experienced an operating deficit of approximately $20 million. (T. 225). Migoya further determined that money transfers in previous years resulted in approximately $30 million in additional deficits, bringing the estimated budget deficit for fiscal year 2008-2009 to approximately $50 million. (T. 225).

In February 2010, Migoya was appointed City Manager. (T. 225). Upon his appointment, Migoya initially estimated that the deficit for fiscal year 2009-2010 was in the $28-million range. (T. 224-225). The total budgeted revenues for the City of Miami are approximately $500 million. (T. 227).

In an effort to address the budget deficit, Migoya implemented a hiring freeze, completed all scheduled layoffs, stopped procurement, and initiated plans to determine what positions the City could eliminate. (T. 226). Migoya further

retained a municipal and public finance consulting firm to advise on the City's finances. (R11. 1566-1589; T. 226-228).

In April 2010, the City's personnel costs alone consumed approximately 80% of the City's entire operating budget. (T. 230). By May 2010, the estimated operating deficit for the coming fiscal year 2010-2011 was projected at approximately $80 million. (T. 227).

During this time, assessed taxable property values had decreased for the second consecutive year, and were projected to continue falling in fiscal year 2011-2012. (T. 228-229; 235). Based upon the County Appraiser's estimates, the City's projected budget deficit for fiscal year 2010-2011 increased another $20 million, bringing the City's estimated operating deficit to $100 million. (T. 228-29). The City's finance director advised that the shortfall would necessitate the elimination of over 1,100 positions. (R12. 1916-1931).

In addition, in an effort to reign in expenses, the City had been holding back on capital expenditures, such as replacing police and fire vehicles and building maintenance. After making these necessary expenditures, the deficit increased by $15 million, bringing the City's estimated operating deficit for fiscal year 2010-2011 to over $115 million. (T. 229).

With a projected deficit in excess of $115 million, the City's personnel costs alone would consist of 101% of the City's operating budget, leaving no money for

any other purchases by the City. (T. 230). As a result, the City would have been unable to pay utilities or gas for the City's vehicles, or operate the City's buildings. (T. 230).

Healthcare costs were also increasing. Healthcare costs were $7 million over budget for 2009-2010 and, if left unchanged, would increase by another 10% for 2010-2011. (R12. 1934-1935). Health care premiums paid by the City rose 113.9% from 2000 to 2010. (R12. 1934-1935).

At that time, the City had received notice from its actuary that the City's pension contribution costs would increase in a single year by $24 million on October 1, 2010. (T. 231). Pension costs were escalating at a rate of 40-50% while recurring revenues were decreasing. (T. 232). To effectively address that issue there needed to be substantial reductions in the actual benefit plans of the various pension funds. (T. 232).

Efforts to preserve the labor contract

The City's three-year collective bargaining agreement with the Fraternal Order of Police, Walter E. Headley, Jr., Miami Lodge No. 20 (hereinafter "Union") was scheduled to expire at the end of the fiscal year, in September 2010. (R5. 561-711; T. 52). Under the collective bargaining agreement, the City and the Union were required to begin negotiations for a new agreement on April 1, 2010. (R5. 561-711; T. 98).

In April 2010, the Union provided the City with a proposal for a successor collective bargaining agreement. (R6. 791-889; T. 98; 239). The Union's wage proposal called for an increase in wages. (R6. 791-889; T. 99). The Union's proposal for the pension plan was also to maintain the status quo. (T. 99). The Union was aware, however, that the cost of maintaining the pension plan at status quo was going to increase the City's pension payment on October 1, 2010. (T. 100). The pension fund's return on investments in the market was lower than expected in previous years, and the City was required to fund the difference. (T. 100-01).

On April 30, 2010, the City provided the Union with its counter-proposal. (R7. 890-1036; T. 101-02). The City's counter-proposal included a wage proposal with a tiered wage reduction. (T. 102; 246; R7. 890-1036). The tiered approach to wage reductions proposed a 5% reduction for bargaining unit members earning between $40,000.00 and $54,999.99, increasing incrementally to a 12% reduction for bargaining unit members earning $120,000.00 and more. (T. 247; R7. 890-1036). Those bargaining unit members earning less than $40,000.00 would receive no wage reduction. The weighted average of the reductions proposed by the City would be an approximate 5% reduction in wages for bargaining unit members. (T. 247). The City's counter-proposal on wages also proposed

eliminating all supplemental pays, and proposed no increases in wages for three years. (T. 247-48).

The City's counter-proposal also included a proposal on the pension plan, proposing that the current defined benefit plan be frozen and a transfer of participants into a defined contribution pension plan. (T. 102). Generally, a defined contribution plan is funded by an employer depositing a pre-determined percentage of pay or a flat dollar amount into an employee/participant's account each year, and whatever money is in that account at the time the employee/participant separates from service with the employer is their retirement benefit. (T. 155).

The City's counter-proposal also included a proposal to freeze the amount of the City's contribution to the Union Health Trust and proposed making the City's contribution to the Union Health Trust a flat dollar contribution, as opposed to a percentage-based contribution, based on the cost of funding the plan's health benefits. (R7. 890-1036).

The Union and the City met for their first bargaining session on June 7, 2010. In that session the City informed the Union of the projected budget shortfall for the coming fiscal year 2010-2011, and that as a result of this projected deficit to balance the budget for the coming fiscal year the City needed to realize

approximately $20-million in cost reductions in wages and pension for the bargaining unit. (T. 104-05).

The Union was aware of the City's legal obligation to adopt a balanced budget prior to the start of a new fiscal year—October 1, 2010. (T. 115). The City met with the Union as often as possible, offering to meet with the Union any time the Union requested. (T. 245). The City was willing to modify its proposals for reductions in personnel costs in order to obtain agreements regarding the same. (T. 245).

The parties met again to bargain on June 24, 2010. At that bargaining session, the Union did not give the City a written counter-proposal to its pending proposals on wages or pension. (T. 108-09). The Union would not agree to any wage or pension proposal that represented a reduction in benefits. (T. 110; R12. 1777-1781).

The parties conducted a bargaining session on July 1, 2010. The Parties mutually acknowledged that there was a need to identify significant savings to balance the budget through wage, pension and health insurance benefits. (R12. 1752-1776).

At the next bargaining session on July 8, 2010, the Union continued in its refusal to provide the City with a written counter proposal to the City's pending

proposals on wages or pension. (T. 111). The Union represented that it would not agree to any decrease in benefits. (R12. 1752-1776).

At the bargaining session on July 19, 2010, the Union, again, did not provide the City with a written counter proposal to the City's pending proposals on wages or pension. (T. 112). The Union did not modify any of its original April 2010 proposals on wages, health benefits, and pension benefits at any time during negotiations for a successor contract. (T. 239; 242).

Throughout the summer of 2010, the City Manager met with Union leaders, as well as the leadership from the other City unions, to discuss the state of the City's finances. (T. 244). The City informed the unions of the amounts needed from their respective bargaining units in personnel cost reductions to balance the budget. (T. 246). The amounts the City needed to realize were less than the amount of money necessary to cover the projected budget deficit. (T. 246). The City did not receive any ideas for personnel cost reductions from the Union. (T. 243).

The City needed expense reductions in personnel costs to balance the budget by September 30, 2010, and by the middle of July 2010, the City had conversations with the Union president that it was running out of time in that regard. (T. 251-52). However, the Union repeatedly took the position that it

would not agree to any reductions in the areas of wages and pension benefits. (T. 110; 118; 408).

The funds were available from no other possible reasonable source

There were no other reasonable means to preserve the labor contract in light of the serious financial condition of the City. The City Commission and the Mayor believed they could not increase taxes on the City's residents, because Miami was the third poorest city in the nation and the residents could not afford tax increases or absorb any other kind of fee increases that would impact them. (T. 235-36). Unemployment in the City was among the highest in the nation at 13.5%. The number of homes with negative equity led the nation at 49%. Household incomes fell to approximately $28,000.00 per household, per year. Property values and reduced tax incomes were falling by over 50%.

Further, if the City raised the millage rate to the maximum allowed by law, ten mills, the amount of additional revenue would be no greater than $60-million dollars, leaving over 60% of the City's $115-million deficit unaddressed. (T. 233.) Raising the millage rate to the maximum would also have the adverse effect of negatively impacting the City's bond ratings. When the City's bond rating is devalued, the cost of the debt maintenance and available funds to borrow becomes more expensive and harder to obtain, which results in even greater decreases in revenues.

Negotiating the "impact" of the financial urgency

With no progress on negotiations or personnel cost reductions, the City notified the Union that it declared a financial urgency on July 28, 2010, pursuant to section 447.4095, Florida Statutes, so that it could manage personnel expense reductions that were necessary before September 30, 2010. (T. 251-52; 283-84; R12. 1906-1912).

During the summer of 2010, and continuing even up to the time of the administrative hearing before the Public Employees Relations Commission (PERC) in this case, the Union and the City negotiated and exchanged proposals for a successor collective bargaining agreement on a variety of non-economic issues and economic issues other than wages and pension benefits. (T. 256; 410; R12. 1782-1851).

During the 14-day period of negotiations on the impact of the financial urgency pursuant to section 447.4095, the parties met on numerous occasions. On August 9, 2010, the parties conducted a bargaining session. The Union voiced a desire to have the City continue current funding levels of the health insurance plan. (R12. 1752-1776). The City advised the Union of the need to discuss the details and impact of the urgency and, in particular, pension and wages. At this bargaining session, the Union did not identify any impacts associated with the declaration of the financial urgency. (T. 117-18).

The parties conducted another bargaining session on August 12, 2010. The City identified a $116-million budget shortfall. The City explained what was required in cuts from each bargaining unit. The Union refused to consider changes to the health insurance plan. At this bargaining session, the Union did not identify any impacts for negotiation related to or flowing from the declaration of the financial urgency. (T. 118).

After the fourteen day period of impact negotiations, on August 16, 2010, the City sent the required notice of impasse to the Chair of PERC. (R12. 1913-1915; T. 256).

At no time did the Union request an extension of the fourteen day period of impact bargaining called for in section 447.4095. (T. 123).

The City presented the union with proposed modifications to the labor contract pursuant to section 447.4095. At a bargaining session on August 27, 2010, the Union did not provide the City with a written counter-proposal to the City's proposals on wages or pension. (R10. 1405-1407; T. 114-15).

On August 31, 2010, at a public hearing, the City Commission adopted a resolution that unilaterally modified the wages and pension benefits for the Union. (T. 242; R12. 1777-1781; R11. 1652-1699). The resolution also adopted modifications to the wages, healthcare benefits, and pension benefits for the City's other bargaining units. (T. 242; R11. 1652-1699).

The City adopted and passed a balanced budget on September 30, 2010 for the 2010-2011 fiscal year. (T. 258).

The Union filed an Unfair Labor Practice charge alleging *inter alia* that the City of Miami improperly declared a financial urgency pursuant to section 447.4095, Florida Statutes, and that the City improperly modified the collective bargaining agreement prior to completion of the impasse process under section 447.403, Florida Statutes. After an evidentiary hearing, the Hearing Officer recommended dismissal of the charge. PERC adopted the recommendation.

The Union appealed that decision to the First District Court of Appeal, which affirmed the final order. In its decision, the First District addressed the application of the standard set forth by this court in *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993), to Florida's subsequently-enacted financial urgency statute. In doing so, the district court adopted the test set forth in *Chiles*—that the City was required to demonstrate a compelling state interest and that the "financial condition [cannot] be adequately addressed by other reasonable means." *Headley*, 118 So. 3d at 892. But the district court declined to extend dicta in Chiles, that a local government "must demonstrate that the funds are available from no other possible reasonable source," to section 447.4095. *Id.* at 893. The Fourth District Court of Appeal certified conflict in *Hollywood Fire Fighters,*

Local 1375, IAFF, Inc. v. City of Hollywood, 133 So. 3d 1042 (Fla. 4th DCA 2014).

These discretionary review proceedings followed.

SUMMARY OF ARGUMENT

The First District and PERC properly applied the *Chiles* standard to Florida's subsequently-enacted financial urgency statute. The dicta on which the petitioners rely as establishing a basis for conflict here was not joined by a majority of the *Chiles* court. Instead, the majority holding, as expressed by Justice Grimes' concurrence was that the legislative body was required to consider alternative "reasonable sources of revenue" prior to modifying the labor contracts at issue. *Chiles*, 615 So. 2d at 674 (Grimes, J., concurring). The district court's reading of *Chiles* and interpretation of section 447.4095 is entirely consistent with this standard.

Nonetheless, competent, substantial evidence presented to the hearing officer demonstrated that there were no possible *reasonable* alternative sources of funding. PERC and the First District correctly found that the City of Miami was experiencing a financial urgency requiring the modification of the collective bargaining agreement with the Union. The City was experiencing a budgetary shortfall of more than $115 million threatening the future solvency of the City based upon *inter alia* a drastic decline in property tax revenues and increase in

wages, pension costs and health insurance rates. Hence, the City demonstrated a compelling state interest requiring modification of the labor contract. And, even if the City was required to establish that the funds were available from no other reasonable source, there is competent substantial evidence to support the City's assertion that none of the "reasonable" alternative funding sources proposed by the Union were, in fact, reasonable.

The First District, adopting PERC's reasonable interpretation of the statutory scheme, correctly found that the City was authorized to make changes to the collective bargaining agreement prior to the conclusion of the impasse procedures under section 447.403, Florida Statutes. Nothing in the language of the statute specifically precludes the City from making modifications immediately and before completing the impasse process where the intent of the statute is to enable the City to address a financial urgency without delay. Requiring the City to wait until completion of the impasse procedures would frustrate the City's ability to address an urgent financial condition. Moreover, the statute specifically directs the parties to negotiate the "impact" of the urgency. This indicates that the legislative scheme calls for "impact bargaining," which in the context of labor relations permits the employer to exercise a right without completion of any statutory impasse process. Hence, the modifications to the collective bargaining agreement prior to completing the impasse procedures complied with Chapter 447.

ARGUMENT

POINT I

PERC AND THE FIRST DISTRICT COURT OF APPEAL PROPERLY APPLIED THE *CHILES* STANDARD TO FLORIDA'S SUBSEQUENTLY-ENACTED FINANCIAL URGENCY STATUTE

A. Standard of Review.

Although questions of law are generally reviewed *de novo*, PERC should be accorded substantial deference in determining the standards to be applied to the financial urgency statute. PERC's field of expertise is public sector labor regulation. *Communications Workers of Am. v. Indian River Cnty. Sch. Bd.*, 888 So. 2d 96, 100 (Fla. 4th DCA 2004). PERC has the responsibility of implementing Chapter 447. *See id.* Florida courts place responsibility for applying and developing public employee relations in the hands of PERC as an expert administrative body. *See Florida Public Employees Relations Council v. Fraternal Order of Police,* 327 So. 2d 43 (Fla. 2d DCA 1976) (comparing NLRA with PERA). Based on these factors, PERC's decision construing a statute within its substantive jurisdiction should not be reversed unless it is clearly erroneous. *See Pan Am. World Airways, Inc. v. Florida Pub. Servs. Comm'n*, 427 So. 2d 716 (Fla. 1983). Hence, the decision of PERC in interpreting section 447.4095, is entitled to substantial deference. *See id.* (holding that "this Court is *required* to

give deference to an agency's interpretation of a statute within its substantive jurisdiction … when an agency interprets such a statute, this Court will not reverse based on that interpretation unless it is clearly erroneous."); *McQuade v. Florida Dep't of Corr.*, 51 So. 3d 489, 492 (Fla. 1st DCA 2010); *Brenner v. Department of Banking & Fin.*, 892 So. 2d 1129, 1130 (Fla. 3d DCA 2004) (stating that the rule is clear that an agency's interpretation of a statute, with which it is legislatively charged with administering, shall be accorded great weight and should not be overturned unless clearly erroneous).

B. The lower tribunals properly applied the *Chiles* standard to the financial urgency statute.

The conflict issue presented for review is whether, before unilaterally modifying a collective bargaining agreement under the financial urgency statute, the employer must demonstrate that the funds are available from no other possible reasonable source. *See Chiles*, 615 So. 2d at 673. Although petitioners frame this issue as whether the district court properly "rejected" the standard set forth in *Chiles*, in fact, and as will be explained more fully below, the First District *adopted* the majority opinion of *Chiles*.

The decision of the First District adopted the test articulated in *Chiles*. The *Chiles* majority decision held that, before a legislature may unilaterally modify a collective bargaining agreement in the face of financial urgency, the legislature

must first establish a compelling state interest. *Id.* at 673. A three-justice panel articulated an additional requirement, that "the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, in either in whole or in part . . . that the funds are available from no other possible reasonable source." *Id.* The First District here did not adopt this exacting standard. But that statement was not joined by a majority of the court, and, therefore constitutes dicta. Instead, Justice Grimes's concurrence recognizes his agreement that the legislature must seek other "reasonable sources of revenue" prior to unilaterally modifying a labor contract. *Id.* at 674 (Grimes, J., concurring). Taken together, a majority of the *Chiles*' court agreed simply that the legislature could only modify a labor contract upon a showing of a compelling state interest and no reasonable alternative funding sources.

Here, the First District interpreted the term "required" in the financial urgency statute as incorporating the second prong of the *Chiles* standard, as follows:

> based on the plain language of the statute, section 447.4095 may only be invoked if the financial condition requires modification of the agreement. Thus, if the financial condition can be adequately addressed by other reasonable means, then a modification of the agreement is not "required." If, however, the other reasonable alternatives available to the local government are not adequate to address the financial condition facing the local government, then section 447.4095 permits the local government to unilaterally modify the CBA.

Headley, 118 So. 3d at 892. The First District adopted the standard announced in *Chiles*. *See id.* ("in order for the Legislature to validly exercise this authority, it must demonstrate (1) 'a compelling state interest,' and (2) that there are 'no other reasonable alternative means of preserving its contract with public workers, either in whole or in part.'"). The district court went on to note that it was not extending the dicta with regard to the second prong of the *Chiles* standard to section 447.4095, explaining:

> We recognize that in discussing the second prong of the test set forth above, the Court stated that "the legislature must demonstrate that the funds are available from no other possible reasonable source." However, we are not persuaded that this *restrictive standard* is constitutionally mandated or that it should be extended to section 447.4095. Accordingly, *we conclude that in a proceeding under section 447.4095, the local government is not required to demonstrate that funds are not available from any other possible source to preserve the agreement; instead, the local government must only show that other potential cost-saving measures and alternative funding sources are unreasonable or inadequate to address the dire financial condition facing the local government*.

Headley, 118 So. 3d at 893 (internal citation omitted; emphasis added). In doing so, the First District was applying, not rejecting, the holding of *Chiles*.

The dicta should not be adopted or extended to section 447.4095. After *Chiles*, in 1995, the financial urgency statute was enacted and created a statutory method to balance the interests of both public employer and employee. *See* Ch. 95-218, § 2, Laws of Fla.; § 447.4095, Fla. Stat. (1995). Before enactment of the

financial urgency statute, at the time of the *Chiles* decision, section 447.309(2) provided that failure to appropriate monies to fund a collective bargaining agreement was not evidence of an unfair labor practice. The financial urgency statute provided unions with rights that they did not previously have under section 447.309(2)—the right to expedited impact bargaining and the right to file an unfair labor practice charge if they disputed the existence of a financial urgency. Moreover, the language of 447.4095 requires not only a compelling state interest, but that the financial urgency actually "requires" the modification of the labor contract, as follows:

> 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.

§ 447.4095, Fla. Stat. (2010). This scheme addresses and supplants the "reasonable alternative means" standard by creating a system that is the least intrusive means to accomplish its ends and that safeguards the employees' rights. It is a *legislative codification* of procedures that constitute the least restrictive

means of permitting a municipality to address a financial urgency while protecting collective bargaining interests. *Cf. State v. Cunningham,* 712 So. 2d 1221 (Fla. 2d DCA 1998) (finding that state statute was constitutional where the statute employed least intrusive means to accomplish its goal).

The intent of the Legislature in codifying 447.4095, while repealing Section 447.309(2) with respect to local governmental entities, was to provide the local public employer with a process by which it could effectively and timely take action with regard to an urgent financial circumstance. *See, e.g., Sarasota County Sch. Dist. v. Sarasota Classified Teachers Ass'n,* 614 So. 2d 1143, 1146 (Fla. 2d DCA 1993) ("We conclude that the statute applies whenever a legislative body . . . is requested to appropriate public funds to satisfy an obligation which arises out of collective bargaining. If we were to accept the agency's interpretation of section 447.309(2), a public employee would have a right he did not bargain for, *i.e.* an unconditional right to receive funding[.]"). This is consistent with the distinction recognized by the Court between public and private sector collective bargaining. *See, e.g., State v. Florida Police Benevolent Ass'n, Inc.,* 613 So. 2d 415, 418 (Fla. 1992); *United Teachers of Dade FEA/United AFT, Local 1974 v. Dade County Sch. Bd.*, 500 So. 2d 508, 512 (Fla. 1986); *Miami v. F.O.P., Miami Lodge 20,* 571 So. 2d 1309, 1326-1327 (Fla. 3d DCA 1990). Thus, the dicta in *Chiles* that the "legislature must demonstrate that the funds are available from no other possible

reasonable source" need not and should not be applied to section 447.4095. *See Manatee Educ. Ass'n v. School Bd. of Manatee County*, 62 So. 3d 1176, 1183 (Fla. 1st DCA 2011) (declining to adopt *Chiles* at that juncture and leaving a question of the standard of financial urgency to PERC in the first instance).

POINT II

THE *CHILES* STANDARD WAS SATISIFIED.

A. Standard of Review.

The matter before the hearing officer, and subsequently the First District, was predominantly a factual issue—whether the City faced a financial urgency within the contemplation of section 447.4095, Florida Statutes. *See Manatee Educ. Ass'n*, 62 So. 3d at 1183 (stating that PERC has responsibility of making the "initial factual determination" of whether the entity was faced with a financial urgency).

Under section 120.68(7)(b), Florida Statutes, an appellate court reviewing a final agency action may modify, remand, or set aside agency action if it finds, in pertinent part "the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record of a hearing . . . however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." *Jerry Ulm Dodge, Inc. v. Chrysler Grp. LLC*, 78 So. 3d 20, 22-23 (Fla. 1st DCA 2011) ("An appellate court

reviewing an agency action may not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact if the agency's finding of fact is supported by competent, substantial evidence.") (internal quotations omitted).

"It is the hearing officer's function to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact . . . it is the hearing officer's role to decide the issue, and neither PERC nor this court can overturn the officer's findings based on disputed issues of fact." *Boyd v. Department of Revenue*, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996).

Hence, the standard of review is whether the decision is supported by competent substantial evidence. *See City of Marathon v. Professional Firefighters of Marathon, Inc.*, 946 So. 2d 1187, 1189 (Fla. 3d DCA 2006) (holding that where there is competent substantial evidence in the record which supports an agency's determination of fact and the agency's interpretation of the applicable law is not clearly erroneous, the agency's action must be affirmed); *City of Winter Park v. Florida Pub. Employees Relations Comm'n*, 349 So. 2d 224, 225 (Fla. 4th DCA 1977) (recognizing that in reviewing final agency action, a court of appeal's authority is limited to a determination of whether there has been a departure from

the essential requirements of law and whether there is competent substantial evidence to support the determination).

B. The City of Miami established a Financial Urgency Requiring Modification of the Collective Bargaining Agreement.

a. Compelling State Interest.

The Union admits that it "did not contest the fact that the City had significant financial difficulties" before PERC. *See* initial br. at 8. However, a factual dispute as to whether those financial difficulties amounted to a compelling state interest was presented to the Hearing Officer and PERC. The Hearing Officer and PERC found that the financial urgency facing the City presented a compelling state interest. And this finding was supported by competent substantial evidence and was not clearly erroneous.

The City's financial crisis, manifesting in 2009 and mounting up to and through the declaration of financial urgency in 2010, presented a compelling state interest. In 2009, the City began to experience the significant economic effects of the recession with a $21 million budgetary shortfall. Declining property values and tax revenue, wage increases, rising health insurance and pension costs indicated an increase in the budgetary shortfall to $60 million in fiscal year 2009-2010. Notwithstanding the implementation of a series of cost-saving measures by

the City, by the time the financial urgency was declared, the City was facing a budgetary shortfall of more than $115-million.

The City's entire budget is approximately $500-million. Eighty percent of the City's budget is for personnel costs. This financial urgency had to be addressed by reduction in personnel costs via the modification of the labor contracts. Unless the collective bargaining agreements were modified, fundamental municipal services would be eliminated thereby resulting in a detrimental impact on the citizens of the City. *See Miami-Dade Cnty. v. Transport Worker's Union of America, Local 291*, 22 So. 3d 785, 786 (Fla. 3d DCA 2009) (overruling a stay of impasse where the court found it necessary for the parties to come to an immediate resolution of the impasse for the benefit of all parties, and most importantly, the citizens "who need the security of knowing that services are not interrupted, but being delivered at costs that can be met under current financial conditions.").

The City was required to pass a balanced budget. *See* § 166.241, Fla. Stat. Regardless of the ability to amend the budget, the future solvency of the City was clearly at stake. The circumstances facing the City presented a compelling state interest requiring modification of the collective bargaining agreements. *Communications Workers of America,* 888 So. 2d at 101 ("Needless to say, the

future solvency of the employee's health insurance plan, assuming such a financial urgency exists, is surely a compelling interest.").

b. There were No Other Reasonable Alternative Means of Preserving the Labor Contract.

Even if section 447.4095 requires that there be "no other reasonable alternative means" of preserving the labor contract, *i.e.* that "the funds are available from no other possible reasonable source," this standard was satisfied. The evidence presented and the findings of the Hearing Officer and PERC lead to one inescapable conclusion: there were no reasonable alternative means to avoid modifying the labor contract and the funds were not available from any other possible reasonable source. (R15. 2474-2475; R15. 2341-2343).

Leading up to the financial urgency, the City made many attempts to address the budgetary shortfall. The City articulated reasons why the Union's proposals would not work. Competent substantial evidence in the record demonstrated that the Union's proffered alternatives were unreasonable.

Systematic, widespread layoffs were not a reasonable means to address the budgetary crisis. In order to compensate for the deficit, the City would have needed to layoff 1,300 employees, or approximately 1/3 of the City's workforce. These layoffs would deplete hundreds of police and fire positions and impact essential services to the citizens. Such a layoff action would be a potential

endangerment of the health and safety of the City's residents. PERC agreed with this conclusion. (R15. 2474).

Raising taxes was not a reasonable alternative. First, the power to impose and collect taxes upon person and property is an attribute of sovereignty; and it is essential to the maintenance and operation of government. *See Fleisher Studios, Inc. v. Paxon*, 2 So. 2d 293 (Fla. 1941). The sovereign power of taxation is beyond compulsion by the Union.

Second, increasing taxes and fees was also not a reasonable alternative because the citizens of the City were experiencing significant financial challenges. Unemployment in the City was among the highest in the nation at 13.5%. The City led the nation in housing foreclosures. Average annual household incomes fell to approximately $28,000.00 per household. Property values and reduced tax incomes fell by over 50%. The City determined that raising taxes and fees was not a reasonable option. PERC agreed with this conclusion. (R15. 2475).

Third, even if the City were to increase property taxes to the maximum 10 millage rate permitted by law, it would only raise approximately half of the needed funds to balance the budget. The budget shortfall for 2010-2011 was $116-million dollars. The highest tax revenue increase that could be realized by imposing a maximum 10 millage rate would only gain approximately $50-million. Raising the millage rate to the maximum would also have the adverse effect of negatively

impacting the City's bond ratings. When the City's bond rating is devalued, the cost of the debt maintenance and available funds to borrow becomes more expensive and harder to obtain. This results in even greater decreases in revenues.

POINT III

THE LANGUAGE AND INTENT OF SECTION 447.4095 AUTHORIZED THE CITY OF MIAMI TO IMMEDIATELY MODIFY THE SUBJECT COLLECTIVE BARGAINING AGREEMENT WHEN FACED WITH A FINANCIAL URGENCY, BEFORE COMPLETION OF THE IMPASSE PROCESS.

A. Standard of Review.

As with Point I, above, although questions of law are generally reviewed *de novo*, PERC should be accorded substantial deference in interpreting section 447.4095. PERC's determination on this issue should not be reversed unless clearly erroneous. *See Pan Am. World Airways, Inc.*, 427 So. 2d 716. Hence, the decision of PERC, in interpreting section 447.4095 is entitled to substantial deference. *See id.*; *McQuade*, 51 So. 3d 489; *Brenner*, 892 So. 2d 1129.

B. The City was not Required to Complete the Impasse Process Before Modifying the Collective Bargaining Agreement.

The First District in this case held that "a local government acting pursuant to section 447.4095 is not required to proceed through the impact resolution process in section 447.403 before modifying the CBA." *Headley*, 118 So. 3d at

896. As this interpretation is consistent with the language and intent of the statute, the First District's decision should be affirmed.

The First District summarized the statutory procedure:

> Section 447.4095 provides for an expedited period of negotiation, not to exceed 14 days, upon declaration of a financial urgency by a local government and requires the parties to meet as soon as possible after the declaration to "negotiate the impact" of the financial urgency. The statute further provides that, if a dispute remains between the parties after the expiration of the expedited negotiation period, an impasse shall be deemed to have occurred and "[t]he parties shall then proceed pursuant to the provisions of s. 447.403." § 447.4095, Fla. Stat.
>
> The impasse resolution process in section 447.403 begins with the appointment of a special magistrate who is charged with conducting a hearing and making a recommendation to the local government's legislative body as to the resolution of any disputed issues. *See* § 447.403(3), Fla. Stat. The statute does not establish a deadline for the hearing, but it does provide for at least 45 days of post-hearing procedures. *See* § 447.403(3)-(4), Fla. Stat. (providing 15 days for the special magistrate to submit his or her recommended decision to the parties, 20 days for the parties to reject the special magistrate's recommendations, and then 10 days for the local government's chief executive officer to submit his or her recommendations to the legislative body). The legislative body is not required to accept the special magistrate's recommendations and, thus, the end-result of the impasse resolution process may be the local government unilaterally imposing changes to the agreement. *See* § 447.403(4), Fla. Stat.

Headley, 118 So. 3d at 894.

By its express terms, section 447.4095 does not prohibit the City from making modifications to the collective bargaining agreement *before* completing

the impasse process. Under the statute, the existence of a financial urgency presupposes the "requirement" that the labor contract be modified. *See* § 447.4095 ("in the event of a financial urgency *requiring* modification of an agreement …") (emphasis added). The statute requires that the parties *proceed* to the impasse process; however it does not expressly prohibit the City from making the changes necessary to address the financial urgency. The interpretation proffered by the Union would improperly add a provision that is not included in the statute. *See Florida Hosp. v. State of Fla., Agency for Health Care Admin.,* 823 So. 2d 844, 848 (Fla. 1st DCA 2002) (courts are not at liberty to add words to statutes that were not placed there by the Legislature).

As found by the First District in this case, requiring the City to wait until after the impasse process could result in substantial delays and eliminate the ability of the City to address a financial urgency contravening the obvious purpose of the statute. *See Headley*, 118 So. 3d at 895-896 ([T]he impasse resolution process includes 45 days of process *after* the special magistrate hearing is completed. Indeed, as PERC noted in the final order, requiring a public employer to wait to take action until after the completion of the process hinders the employer's ability to take immediate action, which, by the very definition of financial urgency, is required."). *See also Manatee Educ. Ass'n*, 62 So. 3d at 1181 ("[S]ection 447.4095 was 'intended to provide public employers and bargaining

agents an opportunity to engage in abbreviated impact bargaining when faced with a financial urgency requiring modification of an agreement.' Requiring proof of financial urgency before resort to section 447.4095 could result in substantial delays, delays which could effectively eliminate the ability to address a financial urgency, frustrating the obvious purpose of the statute. We affirm PERC's determination that section 447.4095 does not place any temporal preconditions on the initiation of the process section 447.4095 authorizes.").

Furthermore, in enacting section 447.4095, the Legislature specifically used the term "impact" to describe the nature and the scope of the negotiations to be conducted after the declaration of a financial urgency. In using the term "impact" the Legislature was aware of its unique meaning in Florida's public sector collective bargaining law. *See Overstreet v. State,* 629 So. 2d 125, 126 (Fla. 1993) ("The legislature is assumed to know the meaning of the words in the statute and to have expressed its intent by the use of those words."). As stated by the First District in this case:

> Most pertinent here is the rule of construction that when the words used in the statute are technical in nature and have a fixed legal meaning, it is presumed that the Legislature intended that the words be given their technical meaning. *See Crews v. Fla. Pub. Emp'rs Council 79 AFSCME*, 113 So.3d 1063, 1069 (Fla. 1st DCA 2013) ("In an effort to ascertain and give effect to the intention of the Legislature as expressed in the statute, courts should give words in a statute their ordinary and every day meaning unless the context reveals that a technical meaning applies.") (internal quotation and

> citation omitted); *see also* 48A Fla. Jur. Statutes § 139 ("[T]echnical words and phrases that have acquired a peculiar and appropriate meaning in law cannot be presumed to have been used by the legislature in a loose, popular sense. To the contrary, they are presumed to have been used according to their legal meaning"); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1246–47 (11th Cir. 2008) ("When Congress employs a term of art, it presumptively adopts the meaning and 'cluster of ideas' that the term has accumulated over time.").

Headley, 118 So. 3d at 894-895.

"Impact bargaining" is a term of art in public sector labor law that describes the type of bargaining applicable to managerial decisions that impact terms and conditions within the bargaining unit. *See Headley,* 118 So. 3d at 895; *Sch. Dist. of Indian River Cnty. v. Fla. Pub. Emps. Relations Comm'n,* 64 So. 3d 723, 729 (Fla. 4th DCA 2011). Unlike collective bargaining negotiations, when an impasse is reached over *impact bargaining*, the employer may implement the managerial decision and then subsequently complete the impasse resolution process, which is exactly what occurred here. *See Jacksonville Supervisors Ass'n v. City of Jacksonville*, 26 FPER ¶ 31140 (2000) ("However, in satisfying this bargaining obligation, an employer need only provide notice and a reasonable opportunity to bargain before implementing its decision. This opportunity *does not* require the employer to submit an impasse in negotiations to the statutory resolution process prior to implementation. *See* § 447.403, Fla. Stat. (1999). Indeed, to so require would, as the City contends, would effectively eliminate its management right.").

The procedure undertaken by the City was demonstrated in *Communications Workers of America v. Indian River County School Board*, 888 So. 2d 96, where the school board declared a financial urgency arising from a need to address an increase in contractual health insurance costs affecting its budget. The school board faced a time sensitive deadline of implementing changes to health insurance benefits prior to the beginning of the plan year. The school board contacted PERC to seek an expedited impasse process associated with its declaration of financial urgency so that the impasse portion of the process could be completed by June 20, 2001. In response, the General Counsel of PERC issued an opinion letter to the school board and advised that an expedited impasse process was unnecessary under section 447.4095. The General Counsel's reading of section 447.4095 "allows an employer to unilaterally change wages, hours, and terms and conditions of employment after bargaining the *impact* of the change for a 'reasonable period' not to exceed 14 days." *Id.* at 98 (emphasis added). Thereafter, the school board imposed the unilateral changes to the health insurance plan and without exhausting the steps of the section 447.403 impasse process. The City in this case proceeded in the same fashion as the school board in *Communication Workers*.

Based on the foregoing, the conclusion reached by PERC on this issue was directly within the scope of the substantial deference accorded to it within its expertise in labor law and responsibility of applying and developing labor law.

Since section 447.4095 by its own terms references impact bargaining, the clear intent of the Legislature was to allow the City to make modifications prior to completion of the process. *See Headley,* 118 So. 3d at 896 ("We agree with PERC that it is reasonable to infer that the Legislature intended the phrase "negotiate the impact" in section 447.4095 to be a reference to "impact bargaining." The declaration of the financial urgency and the 14–day negotiating period in the statute is the notice and reasonable opportunity to negotiate that is required in the context of "impact bargaining." Then, if a dispute remains at the end of the negotiation period, the impasse resolution process is available for the parties to resolve the dispute but, consistent with the principles of impact bargaining, the local government may immediately impose the modifications to the agreement needed to address the financial urgency."). To interpret the statute otherwise would be to ignore its clear language and purpose, and hinder the public employer's ability to address the financial urgency. This interpretation is eminently reasonable. *See Humhosco v. Department of Health & Rehab. Servs.,* 476 So. 2d 258 (Fla. 1st DCA 1985) (When an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable). Hence, the decision of PERC was not clearly

erroneous, and the City properly made changes to the labor contract before completion of the impasse process.

CONCLUSION

Based on the foregoing arguments and authorities, the City of Miami respectfully requests that this Court affirm the decision of the First District Court of appeal in *Headley v. The City of Miami*, 118 So. 3d 885 (Fla. 1st DCA 2013).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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