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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
Lower Case No.: 1D12-2116

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

Petitioner,

vs.

CITY OF MIAMI, FLORIDA

Respondent.

PETITIONER'S INITIAL BRIEF IN SUPPORT OF JURISDICTION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

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INTRODUCTION

§ 447.4095, Fla. Stat., the financial urgency statute, permits a public employer to repudiate the financial promises it made in a collective bargaining agreement and to change those terms unilaterally, while the CBA is still in effect. Art. I, § 6, Fla. Const., provides in part that "the right of employees by and through a labor organization, to bargain collectively shall not be denied or abridged." In Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), this Court held that the Florida Constitution prohibits a public employer from reneging on a fully formed CBA, unless it meets an exacting test applied by the Court. Included in this standard is that requirement that a public employer must demonstrate the funds are available from no other possible reasonable source to save the CBA, either in whole or in part.

In this case, the City of Miami ("City), using the financial urgency statute, repudiated its contractual commitments and lowered police officers' salaries and pension benefits. The First District expressly rejected the Chiles standard, and used a less restrictive standard. Using that standard, the First District upheld the changes to the CBA.

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal affirmed a decision of the Public Employees Relations Commission ("PERC") dismissing unfair labor practice charges ("ULP")

arising from the City's unilateral changes to the financial terms and conditions of employment, during the term of a collective bargaining agreement ("CBA"). Headley v. City of Miami, (App). The CBA was between the City and union representing police officers, sergeants, lieutenants and captains.

Prior to the unilateral changes, the City claimed that it was in a financial urgency, (App. at 2) and after a brief period of unsuccessful negotiations, the City, acting pursuant to Florida Statute § 447.4095, enacted legislation which changed the CBA, including a reduction of wages, and a lowering of pension benefits. (App. at 4).

At PERC, the union relied on this Court's decision in Chiles which held that the Florida Constitution prohibits a public employer from reneging on its contractual commitments, unless it first establishes that it has met a severely exacting standard. After hearing, PERC dismissed the charges and held that the City properly invoked the financial urgency statute, and that the changes to the CBA it had imposed were lawful. (R. Vol. 15:2482). In reaching its conclusion, PERC rejected the Chiles standard. (R. Vol. 15:2475). The dissenting Commissioner concluded that the Chiles standard must be followed, and that under that standard the City had not met its burden and had committed ULPs in altering the terms of the CBA. (R. Vol.15: 2484;2486).

The FOP appealed PERC's decision to the First District Court of Appeal, which affirmed. In doing so, the First District explicitly rejected the Chiles standard, and used a different, less restrictive standard than Chiles. (App. at 14; App. at 12).

SUMMARY OF ARGUMENT

The right to bargain collectively is a fundamental right, enshrined in the Declaration of Rights. Art. I, § 6, Fla. Const. Chiles held that, consistent with the Florida Constitution, a public employer can renege on its commitments contained in a collective bargaining agreement in only severely limited circumstances. Chiles, 615 at 673. This Court set forth the showing that a public employer must make before it can back out of its contractual commitments. In Chiles, this Court held that the public employer "must demonstrate that the funds are available from no other possible reasonable source." 615 So.2d at 673. The First District specifically rejected the use of the Chiles standard: "However, we are not persuaded that this restrictive standard is constitutionally mandated or that it should be extended to 447.4095." (App. at 14).

There is conflict between the lower court's opinion and this Court's Chiles opinion. Also, the decision below expressly interprets Art. I. § 6, Fla. Const. to allow changes to collective bargaining agreements without meeting the standard that the Constitution requires.

ARGUMENT

I. AN EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIRST DISTRICT'S DECISION BELOW AND THIS COURT'S DECISION IN CHILES V. UNITED FACULTY OF FLORIDA, 615 So.2d 671, 673 (Fla. 1993).

Article I, § 6 provides that "the right of employees by and through a labor organization, to bargain collectively shall not be denied or abridged." §447.4095, permits a local government public employer to alter the terms of an existing collective bargaining agreement under certain limited circumstances:

> *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. (emphasis supplied).

As the First District acknowledged, 447.4095 required it to determine whether the local government was facing a "financial urgency," (App. at 15), and whether the financial condition requires a modification of the agreement. (Emphasis original) (App. at 12). In doing so, the First District was required to interpret 447.4095 so as to render it constitutional, if possible. See Haddock v. Carmody, 1 So.3d 1133, (Fla.

1st DCA 2009). Chiles squarely holds that the following standard must be met before a public employer can renege on its commitments in a CBA:

> 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.* (emphasis added).

Id. at 673.

The First District expressly rejected this Court's standard in Chiles:

> 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." *Id.* at 673. However, we are not persuaded that this restrictive standard is constitutionally mandated or that it should be extended to section 447.4095.

(App. at 14)

In Chiles, there was a revenue shortfall, and the legislature postponed contractually bargained for raises, and then, as the fiscal situation got worse, the legislature rescinded the raises. After stating what the constitutionally mandated standard was, and applying that standard, this Court nullified the actions of the legislature both in postponing and then rescinding the raises. Id. at 673. Here, too, there was a fully formed contract and the public employer was facing financial problems. In Chiles, this Court recognized that the state legislature "must be given some leeway to deal with bona fide emergencies" and could, in appropriate circumstances, reduce previously approved appropriations to pay public workers salaries. 615 So.2d at 673. But this Court, recognizing that the right to bargain collectively is a constitutional right, explicitly set forth the standard required by the Florida Constitution that must be met before a government can eliminate its own contractual commitments with its unionized employees. Without explanation, the First District rejected that standard.

The Chiles holding and the standard it developed was based squarely on the Florida Constitution. ("we affirm the order of the trial court below based on Article I, §§ 6 and 10 of the Florida Constitution"). 615 at 673. ("These conclusions are compelled by the Florida Constitution.")[1] Id. at 673. The First District's decision

[1] The Court in Chiles recognized that the separation of powers was not at issue. Id. Certainly, there is no separation of powers issues with local governments.

expressly declined to adopt the Chiles requirement that before it can renege on a contract "the legislature must demonstrate that the funds are available from no other possible reasonable source." Indeed, the decision below recognizes that the standard in Chiles is a "restrictive standard." (App at 14). The First District developed a different standard than which Chiles held is constitutionally required and gives a public employer more leeway to repudiate its promises than the Florida Constitution allows.

There are numerous reasons why the Court should exercise its discretion and review this case. First, the standard that a Court uses in determining whether a fundamental, constitutional right can be abridged is very important to the final result. In T.M. v. State, 784 So.2d. 442, 444 (Fla. 2001), and J.P. v. State, 788 So.2d 953, (Fla. 2001), this Court accepted jurisdiction on the certified question of "what level of scrutiny must the Court apply when reviewing the constitutionality of a juvenile curfew ordinance." This Court determined that the Second District had used an intermediate standard and not the strict scrutiny which was required. 784 at 444; 788 So.2d 953. On remand, the correct standard was applied and a different result was reached. See State v. J.P., 907 So.2d 1101 (Fla. 2004). On review, this Court once again dealt with the standard to be used, determined that the Second District had now applied the correct, heightened standard and affirmed the decision of the Second District. Id. Surely, in constitutional analysis, the standard used often drives the

result. ("Not only is the applicable standard the threshold determination in any constitutional analysis; it is often the most crucial." State v. J.P., 907 So. 2d 1101, 1120 (Fla. 2004) (Cantero, J. dissenting.)

Second, the financial urgency was declared not only on the police, but on three other of the City's unions as well. (R. Vol. 12: 1933); (R. Vol. 12: 1906-1912).[2] We would expect that in good financial times it will rarely be invoked, and just the opposite will occur in bad financial times.

Additionally, in this case, against the advice of its City Manager, (R. Vol. 16:323) and driven at least in part by political considerations (R. Vol. 16:235), the City Commissioners used a millage rate which reduced the City's tax receipts from the previous year. (R. Vol. 16:87). By not requiring a public employer to "demonstrate that the funds are available from no other possible reasonable source," the First District has allowed public employers to voluntarily take in less money, and then walk away from its contractual promises.

Another reason why this Court should accept jurisdiction is that the showing that a public employer must make before it can change the terms of a CBA goes right to the heart of the fundamental right of collective bargaining. The desired result of collective bargaining is the formation of a CBA. Chiles relied on Hillsborough Cnty. Governmental Employees Ass'n, Inc. v. Hillsborough Cnty. Aviation Auth., 522

[2] In 2012, the City of Miami had 1,144 sworn police officers. http://www.miami-police.org/docs/PD_Annual_Report_12.pdf.

So.2d 358, 362 (Fla. 1988), where this Court stated, "it is presumed that the intent of the constitution is to grant the right of *effective* collective bargaining." (Emphasis original). "Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract there is no valid contract and neither side may be bound." Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla. 1984).

But when a Florida public employee union enters into a collective bargaining agreement, even if the public employer has agreed not to reopen the contact, as it did here, (R. Vol. 1:52), the financial urgency statute allows it to do so under certain circumstances. Here, we do not challenge the facial validity of the financial urgency statute and we accept that a public employer may, consistent with the Florida Constitution, unilaterally reopen the CBA and change its terms under certain circumstances. The important question is what standard must a court apply in determining when a CBA can be unilaterally altered under the financial urgency statute. There can be no doubt about the importance of this statute. It looms large in collective bargaining, and creates uncertainty. Parties to CBA's enter into zipper clauses, in which they agree not to change the terms and conditions of employment while the CBA is in effect. ("The clear purpose of zipper clauses is to permit both parties to agree to maintain the status quo during the term of the agreement, to prevent either party from seeking to reopen

negotiations.") Palm Beach Jr. Coll. Bd. of Trustees v. United Faculty of Palm Beach Jr. Coll., 475 So. 2d 1221, 1226 (Fla. 1985). The financial urgency statute creates a statutory exception, and the exception must be applied in a constitutional manner. The showing that the public employer must make is key in the ultimate determination of just how solid the deal is. Public employers and unions throughout the state should know what standard courts will use to allow contractual changes, especially because it involves fundamental rights.

II. THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONSTRUES ART. I § 6, FLA. CONST.

The Chiles decision was based squarely on the Constitutional rights of collective bargaining and freedom from the impairment of contract. The right of collective bargaining is a fundamental right, and can only be abridged if the Chiles standard is met. Here, the First District said that it is "not persuaded that this restrictive standard is constitutionally mandated..."

CONCLUSION

Wherefore, and based upon the above and foregoing, the union, respectfully requests that this Honorable Court accept jurisdiction in this matter to resolve the conflict between Chiles and the decision below and to provide certainty to public employers and public employees in collective bargaining as to the showing that the public employer must make before it can walk away from its contracts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent by E-Mail and US Mail to: **John A. Greco, Assistant City Attorney**, City of Miami, Office of the City Attorney, 444 SW 2nd Avenue, Suite 945, Miami, Florida 33130; **William D. Salmon,** Staff Counsel, Public Employees Relations Commission, 4050 Esplanade Way, Tallahassee, Florida 32399-0950; **Michael Mattimore**, Allen, Norton & Blue, PA., 906 N. Monroe Street, Tallahassee, FL 32303; **Luke Savage,** Allen, Norton & Blue, P.A., 121 Majorca Avenue, Suite 300, Coral Gables, FL 33134; **Julie Bru**, City Attorney and **Diana Vizcaino**, Assistant City Attorney, 444 SW 2nd Avenue, Suite 945, Miami, Florida 33130; **Thomas W. Brooks,** Meyer, Brooks, Demma and Blohm, P.A., 131 North Gadsden Street, P.O. Box 1547, Tallahassee, Florida 32302; **Paul A. Donnelly**, Donnelly and Gross, P.A., 2421 NW 41st Street, Suite A-1, Gainesville, Florida 32606; **G. Hal Johnson**, Florida Police Benevolent Association, P.O. Box 11239, Tallahassee, Florida 32301; **Richard A. Sicking,** Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO, 1313 Ponce de Leon Blvd., #300, Coral Gables, Florida 33134; and **David C. Miller, James C. Crosland,** Bryant Miller Olive, SunTrust International Center, 1 SE 3rd Avenue, Suite 2200, Miami, Florida 33131 on this 30th day of September, 2013.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief is in Times New Roman 14 Point Font and is in compliance with Rule 9.210, Fla. R. App. P.

By: *s/Ronald J. Cohen*
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