In the Supreme Court of Florida

CASE NO.: SC13-1882

WALTER E. HEADLEY, JR., MIAMI LODGE NO. 20, FRATERNAL ORDER OF POLICE, INC.,

Petitioners,

v.

CITY OF MIAMI, FLORIDA,

Respondents

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

Respectfully Submitted,

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Introduction - The issue in this case concerns the proper standard that is to be used when a public employer unilaterally modifies the terms of a collective bargaining agreement (CBA) with its unions. The correct standard is stated in *Chiles v. United Faculty of Fla.*, 615 So.2d 671, 673 (Fla. 1993). The First District expressly rejected the use of that standard, and applied a more relaxed standard.

The City uses an inaccurate narrative to paint a false picture of a recalcitrant Union, leaving it no choice but to modify the CBA and imposing sweeping changes to wages and retirement benefits. The City's inaccurate narrative states that the Union never offered any ideas during negotiations to save on personnel costs. This is wrong, and demonstrably so.

Appearing on pages 8-13, infra, we will cite to the Record which demonstrates the many alternatives offered by the Union. Also, there were numerous other alternatives available to the City, which could have been used to save the CBA, in whole or in part, as required by *Chiles*.

We will also demonstrate that the City could not make changes to the CBA without proceeding through the special magistrate process first.

I. THIS COURT'S DECISION IN *CHILES V. UNITED FACULTY OF FLORIDA*, 615 So.2d 671 (FLA. 1993) SETS FORTH THE STANDARD THAT MUST BE USED AND IT WAS ERROR NOT TO FOLLOW IT

Standard of Review - The City is wrong when it claims that the matter before the hearing officer and the First District was predominantly factual and therefore the standard of review on this issue is whether there was competent substantial evidence. The requirements of the Constitution that must be met before fundamental constitutional rights can be abridged is a legal standard.

The Chiles Standard -This Court's opinion in *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993) articulated the standard that must be met before a government can unilaterally alter the terms of a fully formed CBA:

> [T]he 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.

In the Initial Brief we argue that the First District expressly rejected and failed to apply this standard. The First District said: "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." *Headley v. City of Miami*, 118 So. 3d 885, 893 (Fla. 1st DCA 2013).

The City argues that the First District's relaxed standard is justified because the *Chiles* opinion, written by Justice Kogan, is not the majority opinion, and thus

not binding law. Instead, the City claims Justice Grimes' separate opinion concurring with Justice Kogan is the majority opinion. The City is wrong. Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 459 (2005) explained the effect of a separate concurring opinion:

> A separate concurring opinion usually indicates that the Justice fully agrees with the majority opinion but desires to supply additional reasons for supporting the decision and to make additional comments or observations. Concurring opinions often are used when a Justice wishes to explain individual reasons for concurring with the majority. As a general rule, concurring opinions should be presumed to indicate complete agreement with the majority opinion unless the concurring opinion says otherwise. Thus, a concurring opinion can constitute the fourth vote needed to establish both a decision and a court opinion subject only to any reservations expressly stated in the concurrent opinion itself. (footnote omitted)

There are no reservations expressly stated in the concurring opinions of Justices Grimes or Harding, and the City gives no reason why those opinions should not be read as fully agreeing with the majority. Even if the Court were to find that Justice Grimes' formulation of the proper standard differed from Justice Kogan's, (which it did not), there are still the four requisite votes for Justice Kogan's opinion to constitute a majority, binding court opinion. (Chief Justice Barkett, Justices Shaw, Kogan and Harding).

The *Chiles* standard is well established because it is merely the strict scrutiny standard that this Court requires whenever the government seeks to

abridge any fundamental rights guaranteed under the Florida Constitution. The right of contract and the right of collective bargaining are fundamental rights under the Declaration of Rights and require the same treatment as all other fundamental rights.

The second prong of the *Chiles* test, which the City and First District claim is too restrictive, is that the money is not available from any other possible reasonable source. This is also well established. It is the same standard used whenever a government abridges a fundamental right. It is a well-established principle of Florida constitutional law: If government seeks to abridge a fundamental right, it must show a compelling state interest and accomplish its goals by the least intrusive means available. *See, e.g., N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 625 n.16 (Fla. 2003). "Under 'strict' scrutiny, which applies inter *alia* to certain classifications and fundamental rights, a court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means." *See e.g. State v. J.P.*, 907 So. 2d 1101, 1116 (Fla. 2004) (city ordinances burdening juveniles' fundamental rights must use the least intrusive means available to do so).

The standard articulated in *Chiles* is no different than the constitutional standard used in other cases like *J.P.* *Chiles* held that the "legislature must demonstrate that the funds are available from no other possible reasonable source."

If there is money available from other possible reasonable sources in whole or in part, then the City has not used the least intrusive means available.

The Procedures in the Financial Urgency Statute Are Not a Substitute for the No Reasonable Alternative Means Standard In Chiles

Next, the City makes a tortured argument that the procedures set forth in the financial urgency statute "supplants the 'reasonable alternative means standard'" and 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." (City's Answer Brief p. 21). In other words, the City is arguing that the "reasonable alternative means" standard--which is common to fundamental rights cases under the Florida Constitution--has been done away with when it comes to collective bargaining, and has been replaced by certain procedures. The Constitutional protection given to fundamental rights is the same both before and after the adoption of the financial urgency statute. No amount of procedures can allow government to take substantive action that is otherwise constitutionally prohibited.[1]

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[1] Nor are the procedures as favorable to the Union as the City would have this Court believe. At the time *Chiles* was decided, section 447.309(2) provided that failure to appropriate monies to fund a collective bargaining agreement was not evidence of an unfair labor practice. An unfair labor practice is a violation of Florida Statutes. Although an unfair labor practice could not be brought, we know from *Chiles* that a lawsuit could successfully be brought against government for not following its CBA. Also, Florida law requires that CBA's contain a provision for grievances, which end in final and binding arbitration to settle disputes about

This is an as applied challenge, and we are not claiming in this case that the statute cannot be constitutionally applied. We are arguing that it *must* be constitutionally applied. In this case, we accept the statement in *Chiles* that under certain circumstances, a government can modify a CBA. But the financial urgency statute cannot be constitutionally applied unless the strictest of scrutiny is given to the modification of the CBA, which includes that the funds not be available from any other possible reasonable source to save the contract, in whole or in part.

Contrary to the argument advanced by City Amicus Florida League of Cities, the separation of powers doctrine is not at issue here because this case involves local government and not the State. This case does not involve competing constitutional rights, such as collective bargaining and contract on the one hand, and the appropriations power on the other.

In *Chiles*, this Court distinguished *State v. Fla. Police Benevolent Association, Inc.* 613 So.2d 415 (Fla. 1992). In *PBA*, the Legislature failed to fully fund a pay raise for state workers included in a wage agreement negotiated with the executive branch of the state government. This Court held that those public employees' collective bargaining rights were subject to the Legislature's appropriation power, and that the unilateral changes were necessitated by that

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the application or interpretation of a CBA. But with financial urgency, the terms of the contract are modified and it would be useless to bring a grievance. Also, now a union cannot go directly to Court, because improper financial urgency is a ULP, and a union must exhaust its administrative remedies and proceed to PERC

branch's failure to appropriate enough money to fund the agreement as written. *Id.* at 418.

Because the right of the Florida Legislature to appropriate funds is based on the Constitution, the Court rejected the union's argument that the failure to fund the contract had to be justified by a compelling state interest. *PBA,* 613 So. 2d at 419, n.6. The Court also stated, however, that if a unilateral change falls outside the appropriations power it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test. *Id.*

Such was the reasoning in *Chiles* where the CBA had already been funded by the Legislature. This Court concluded that separation of powers did not prohibit it from utilizing the compelling state interest test, with the strictest of scrutiny and ordered the raises reinstated. There is no separation of powers argument at the local level—a fully formed collective bargaining agreement at the local level arises when it is ratified by the legislative body and the union. *See* 447.309(1).

Following *Chiles,* the financial urgency language at issue here was created to apply to local government and the previous underfunding statue as applied to local government was repealed. There is no reason to believe that the Legislature did not know that *Chiles* was decided, that separation of powers would provide no defense to a local government, and that since this Court was not willing to defer to

the State Legislature on issues of raises, it would be given even less deference to local government. But both PERC and the First District used a deferential standard, in direct contravention of this Court's holding in *Chiles*.

THE CHILES STANDARD WAS NOT SATISFIED

Standard Of Review - PERC's decision on this issue is not entitled to any deference at all. PERC's conclusion that the City met the *Chiles* standard requires application of the *Chiles* standard. PERC used the wrong standard, as did the First District, and the union has never had an opportunity to have its arguments analyzed under the correct standard.

Application of the Chiles Standard - The City argues that it had a compelling state interest and that there were no other reasonable alternative means of preserving the CBA. In fashioning this argument, the City tells this Court that, "The City did not receive any ideas for Personnel Cost Reductions from the Union." (City's Brief Page 9). Not so.

The record shows that before negotiations even started, the Union was aware of the City's financial difficulties and on September 26, 2009, the FOP agreed to amend the existing CBA to delay for six months a wage increase that was supposed to occur five days later. The Union also agreed to give up three holidays; to waive their right to uniform replacements, to change payouts for accrued vacation hours; to not require the City to purchase vehicles and to forego their

annual physical examination. These concessions were for the 2009-2010 fiscal year, the year before the City claimed financial urgency. This revised CBA also states that all layoff notices which had been sent to police officers would be rescinded. This agreement was an amendment to the CBA, and had to be ratified by the bargaining unit and the City. Thus, in the year before the fiscal year at issue in this case, the City was prepared to lay-off police officers and that through the negotiation process the police gave up financial benefits in exchange for not being laid off. (R. Vol. 10:1401-1403).

Also, the record shows that the FOP worked to find ways to save the City money on its retirement costs. The FOP proposed changing the method of funding for the pension from what is known as the aggregate to entry age normal. (R. Vol. 12:1895-1401). This had even been recommended by the City's actuary, a few years earlier. (R. Vol. 17:339). As the City's actuary explained, under this procedure, the liabilities do not change, but you change the time over which it is paid. (R. Vol. 17:337). The City admitted that changing the actual funding method "would spread out the repayment of the unfunded debt, *helping current budget requirements*. . ." but turned it down. (Emphasis added). (R. Vol. 12:1403).

The FOP used the services of a pension lawyer and expert to deal directly with the City Manager on trying to find ways to save on the pension costs. (R. Vol.16:164). The expert met with the City Manager on two occasions, and also

sent pension proposals to the City. (R. Vol. 12:1866). He reiterated the FOP's proposal about changing the funding method, but the City rejected it because, "this change alone will not come close to the City's budgetary goal of a $20 million reduction in the City's FIPO contributions for FY 2010-11." (R.Vol. 12:1863-1864).

The Union proposed changing the way cost of living adjustment (COLA), increases were calculated and paid. This proposal would have freed up 50 million dollars, immediately. (R. Vol. 12:1874). The FOP asked for a 3% guaranteed COLA in return. (R. Vol. 12:1868). While this would have significantly increased the liabilities of the pension fund in the future, in exchange for immediate financial relief, the City did not even make a counter–offer, like a smaller guaranteed COLA. On this issue, the City flatly rejected it, saying, "the FOP proposal appears to be more focused on short-term budgetary relief rather than long-term pension reform and cost reduction." (R. Vol. 12:1863-1864). The City insisted on "fundamental changes in FIPO benefits. . . to produce long-term savings." (R. Vol. 12:1863).

The Union proposed creating a second tier of benefits for new hires and higher member contributions. (R. Vol. 12:1803). The City turned down the "second tier" with reduced benefits to new hires. (R. Vol. 12:1864). The Union even proposed raising the retirement age to the "Rule of 70," (where a police

officer could retire when his or her age and years of service equal 70), but the City's actuary claimed that it did not "have a significant reduction in contributions." (R. Vol. 12:1854). Yet, the City imposed this same Rule of 70, using the financial urgency statute.

It was not until August 22, 2010, long after the declaration of financial urgency and right before the contract imposition hearing that the City's actuary wrote to the FOP with a "proposal of pension reform for the FOP." (R. Vol. 12:1854). This was the first time that the City came up with a proposal to allow the police to keep their defined benefit plan. The FOP had been making proposals since June, but the City had stuck to its proposals changing the defined benefit plan to a defined contribution plan, in which the lifetime guarantee of a pension would be lost. The City police are not in Social Security. (R. Vol. 16:162). The FOP indicated that there was some positive feedback to the proposals. (R. Vol. 12:1856). Yet, only a few days later, the City Manager informed the FOP President what actions the City would take to reduce benefits. The FOP President testified that he did not change his wage proposal (neither did the City) because he knew that the savings had to come from pensions, and if an agreement was reached on pensions, then they would talk about wages. (R. Vol. 16:133).

The City misstates the issue when it argues that "there was 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." (City's Answer Brief, p.13) . The burden was on the City to show that there were no other reasonable alternative funding sources, not just that the Union's offer was not reasonable. Perhaps the misstatement of the issue by the City explains its outlandish claim that the Union didn't offer any ideas to save the City on personnel costs.

Here, the changes made by the City were not temporary in nature. The changes were designed to outlast the financial urgency. It was a more reasonable alternative to time limit the changes for the period of time in which the financial urgency existed. *Cf. Baltimore Teachers Union v. City of Baltimore*, 6 F.3d 1012, (4th Cir. 1993). To be constitutionally applied, the changes must not outlive the financial urgency.

The City does not even address other reasonable alternative means available to it, like unpaid furloughs, something it had employed a year earlier. The City claims it did not lay-off anyone, because somehow it would have had to lay-off 1,300 people to overcome the entire deficit for the upcoming fiscal year. The City's own exhibit shows that from 2000-2009 the number of employees in Departments other than Police had grown drastically.[2] The City does not even

[2] The City's number of Parks and Recreation employees grew by 92.7%; General Services employees by 20.6%; Public Works employees by 10.1% and Police by only 2.8%. (R. Vol.11:1586).

attempt to explain why laying off some of those people was not a reasonable alternative. Not all the savings had to come from lay-offs, and strict scrutiny requires that the City show why they could not have found some of the savings from lay-offs.

In connection with taxes, the City refused to use the rolled back rate, which would have given it the same ad valorem tax revenue that it had received the previous year. The City Manager and Chief Financial Officer advised raising the millage rate. (R. Vol. 16:323)(R. Vol. 17:480). The City says that if it raised taxes to the maximum millage, it would have gained the City only 60 million dollars[3]. The City was trying to gain 20 million dollars from the police.

The record shows that the police were willing to work for more years, for less money. Instead, the elected City officials decided that it would impinge fundamental constitutional rights of its employees to curry favor with the electorate. ("But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31, 97 S. Ct. 1505, 1522 (1977)).

THE CITY HAD TO FOLLOW THE IMPASSE PROCEDURE IN FLORIDA STATUTES BEFORE IT CHANGED THE CBA

[3] The City claims here that raising taxes to the maximum it would have saved 50 million. The actual number, as testified to by the City is 60 million. (R. Vol. 17:461).

Standard of Review - PERC's interpretation is clearly erroneous and not entitled to deference. *See Pan Am. World Airways, Inc.*, 427 So. 2d 716, (Fla. 1983).

Florida Statutes Mandate the Impasse Procedure Which Must be Followed - The City claims that it could make the changes to the contract before completing the statutorily mandated impasse process. The City writes "The statute requires that the parties proceed to the impasse process." (City's Brief at p. 30). Actually, 447.4095 states that the "parties shall then proceed pursuant to the provisions of s. 447.403." The City claims that the statute does not prohibit the City from making the change without using the impasse process, but it does, by its very terms and structure.

447.403(2)(a) states that "if the parties agree in writing to waive the appointment of a special magistrate, the parties may proceed directly to resolution of the impasse by the legislative body pursuant to paragraph (4)(d)." Section 3 explains that the special magistrate holds a hearing, and then makes recommendations, which are required to be discussed by the parties. Either side may reject the recommendations. Section 4 sets forth procedures for what happens after the special magistrate issues its recommendation. This includes procedures for accepting or rejecting the special magistrate's recommendations. It then states that the matter must go before the governing body for resolution. Section 4(d)

states that, "*Thereafter*, the legislative body shall take such action.... "Thus, the statute specifically states what must happen *before* the City imposes; the parties must either waive or proceed through the special magistrate process.

The City's argument that there was not sufficient time to complete the impasse process is like the story of the boy who kills his parents and then throws himself on the mercy of the court, because he is an orphan. Here, the parties began exchanging proposals in April and held a number of bargaining sessions throughout June, July, and August, and tentatively agreed on a number of contract articles. (CP 15, 17). The City could have declared impasse rather than financial urgency. Impasse only requires that "[i]f, after a reasonable period of negotiation concerning the terms and conditions of employment to be incorporated in a collective bargaining agreement, a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the Commission." If the City had done so it would not even have an argument that it can modify the contract without a special magistrate hearing. Also, negotiations could have continued during the impasse process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2015, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal and a copy furnished to the following recipients via electronic mail:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Rule 9.210 of the Florida Rules of Appellate Procedure because this brief is in Times New Roman 14 Point Font.

Dated: January 22, 2015.

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