

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL  
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CONSOLIDATED CASE NO. 12-001000 Div. 5

THE BOARD OF TRUSTEES OF THE  
CITY OF HOLLYWOOD FIREFIGHTERS'  
PENSION SYSTEM, and  
WILLIAM HUDDLESTON,

Plaintiff,

vs.

CITY OF HOLLYWOOD,

Defendant.

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- - -  
HEARING BEFORE THE HONORABLE RICHARD D. EADE  
- - -

Friday, October 5th, 2012  
1:40 p.m. - 3:30 p.m.

201 Southeast Sixth Street  
Room 1030-B  
Fort Lauderdale, Florida 33301

Susan D. Fox, Florida Professional Reporter  
Notary Public, State of Florida

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:  
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18 ON BEHALF OF THE DEFENDANT:  
19 BRYANT MILLER OLIVE  
20 DAVID C. MILLER, ESQUIRE  
21 MICHAEL L. ELKINS, ESQUIRE  
22 One Southeast Third Avenue  
23 Suite 2200  
24 Miami, Florida 33131

25 CITY OF HOLLYWOOD  
JEFFREY P. SHEFFEL, ESQUIRE  
2600 Hollywood Boulevard  
Suite 407  
Hollywood, Florida 33020

ALSO PRESENT:  
Adolfo Arenas  
Larry Bernstein

20  
21  
22  
23  
24  
25

1           (Thereupon, the following proceedings  
2       were had.)

3           THE COURT:   Okay.

4           Good afternoon, everyone.

5           All right.   Appearances for our two  
6       Plaintiffs.   Actually, there are three  
7       Plaintiffs, I believe, aren't there?

8           MR. BERGER:   There are four  
9       Plaintiffs, Your Honor.

10          THE COURT:   I'm having another senior  
11       moment.   I thought there were three; the  
12       Trustees of the City of Hollywood  
13       Firefighters' Pensions Systems, one.

14          MR. BERGER:   Yes, Your Honor.

15          THE COURT:   Our policemen, there's  
16       two.

17          MR. BERGER:   And we have another  
18       individual Plaintiff, Your Honor.

19          THE COURT:   We have William  
20       Huddleston, three.

21          MR. BERGER:   Yes.

22          THE COURT:   And who is number four?

23          MR. BERGER:   Van Szeto, Your Honor.

24       Mr. Szeto.

25          THE COURT:   Okay.

1 All right. Appearances for each of  
2 these four Plaintiffs.

3 MR. BERGER: Your Honor, my name is  
4 Mitchell Berger, along with my colleague,  
5 Dan Thompson, from Berger Singerman, and  
6 also Mr. Stephen Cypen from the Cypen  
7 law firm are here on behalf of the  
8 Plaintiffs.

9 THE COURT: All four?

10 MR. BERGER: Yes, Your Honor.

11 THE COURT: All right.

12 On behalf of the City of Hollywood?

13 MR. MILLER: David Miller, from  
14 Bryant Miller Olive.

15 MR. ELKINS: Michael Elkins, of  
16 Bryant Miller Olive.

17 MR. SHEFFEL: And Jeff Sheffel, City  
18 Attorney for the City of Hollywood.

19 MR. BERGER: And, Your Honor, if it  
20 please the Court, while we do not  
21 represent them, I've been asked to  
22 introduce Mr. Adolfo Arenas, who is a  
23 firefighter, and Mr. Larry Bernstein, who  
24 is a police officer with the City of  
25 Hollywood.

1 THE COURT: All right.

2 Welcome, gentlemen.

3 All right. This is our second  
4 hearing on to dismiss. We covered count  
5 one at our last hearing. We're now going  
6 to engage in counts two, three, and four.

7 MR. MILLER: Your Honor, the  
8 Plaintiffs have voluntarily dismissed --  
9 correct me if I get these numbers wrong --  
10 I'm going to address them by topic.

11 They've dismissed the counts in each  
12 complaint in which they allege lack of  
13 compliance with chapters 175, 185, and  
14 certain sections of the city code. They  
15 have dismissed the count that is unique to  
16 the fire complaint that dealt with the  
17 submission of an actuarial impact  
18 statement.

19 The result -- and, again, correct me  
20 if I'm wrong -- the result, I believe, is  
21 that we are here today solely on the final  
22 count in each complaint which deals with  
23 --

24 THE COURT: Financial urgency?

25 MR. MILLER: -- financial urgency,

1           having fully argued, as I understand it,  
2           fully argued count one previously.

3           MR. BERGER:  If it please the Court?

4           THE COURT:  One moment.

5           All right.  Go ahead.

6           MR. BERGER:  Yes.  If it please the  
7           Court, the state, when these cases  
8           originally originated, the state had ruled  
9           one way with respect to certain aspects of  
10          this, and it changed its mind on Monday.  
11          As soon as we knew we dropped the counts.  
12          There is no need to do that.  But we also  
13          filed for summary judgment on count three  
14          and count four, the financial urgency and  
15          whether or not the legislative action in  
16          connection with the financial urgency  
17          could exceed a year.

18          We filed for summary judgment on  
19          those counts, and there's been a cross  
20          motion for summary judgment on those  
21          counts.

22          THE COURT:  On counts -- which counts  
23          now?

24          MR. BERGER:  Counts four --

25          MR. MILLER:  We're talking about two

1 different complaints.

2 MR. BERGER: Please.

3 MR. MILLER: Three in one and four in  
4 the other.

5 MR. BERGER: It's count four of the  
6 firefighters and count three of the  
7 police.

8 THE COURT: All right. So, with  
9 respect to both entities, there are  
10 dueling motions for summary judgment with  
11 respect to the last count filed in each  
12 complaint which is the same ground, which  
13 is the financial urgency determination?

14 MR. BERGER: Yes, Your Honor.

15 THE COURT: So, that summary judgment  
16 was just recently filed?

17 MR. BERGER: We filed first, Your  
18 Honor. We filed that summary judgment  
19 first. There was a cross motion for  
20 summary judgment, and we have no problem,  
21 even though it was filed within the 21-day  
22 period to argue both motions for summary  
23 judgment today, Judge.

24 THE COURT: When?

25 MR. BERGER: Today.

1 THE COURT: Today?

2 MR. MILLER: No -- to be argued  
3 today.

4 MR. BERGER: To be argued today.

5 MR. MILLER: The Plaintiff's motion  
6 for summary judgment was filed on the 21st  
7 day prior to this hearing.

8 THE COURT: Well, it meets the 20-day  
9 rule.

10 MR. MILLER: And was noticed for this  
11 hearing that was set for the motion to  
12 dismiss.

13 We contacted Counsel for Plaintiffs,  
14 advised them that we intended to file a  
15 cross motion for summary judgment on the  
16 same topic, and that we would not object  
17 to their setting their motion improperly  
18 on this hearing date if they would agree  
19 that our cross motion which was filed  
20 within the 20-day period could be heard.

21 THE COURT: Got it.

22 MR. MILLER: That agreement was made,  
23 so I want it clear on the record that we  
24 are hearing both of these motions by  
25 agreement of Counsel.

1           MR. BERGER: Yes. I'm sorry if I  
2           misstated it. Absolutely correct. We are  
3           here on cross motions by agreement of  
4           Counsel.

5           MR. MILLER: So, if that is  
6           acceptable to Your Honor, we can proceed  
7           on the cross motions. If it is not  
8           acceptable to Your Honor to hear the  
9           city's cross motion, then we will object  
10          to the motion for summary judgment which  
11          was not properly noticed being heard  
12          today.

13          THE COURT: Well, first of all, let  
14          me see if I understand something. Instead  
15          of going forward on a motion to dismiss,  
16          the financial urgency determination count,  
17          both sides have agreed to abandon that  
18          motion and simply go to summary  
19          judgment?

20          MR. MILLER: That is correct, Your  
21          Honor.

22          MR. BERGER: Correct, Your Honor.

23          MR. MILLER: The city's view is, it's  
24          a pure --

25          THE COURT: Matter of law.

1 MR. MILLER: -- matter of law.

2 THE COURT: You are not moving to  
3 dismiss it. Hear it on its merits --

4 MR. MILLER: Hear it on its merits --

5 THE COURT: -- as a pure matter of  
6 law --

7 MR. MILLER: -- on the summary  
8 judgment evidence before it.

9 THE COURT: -- for that one count?

10 MR. BERGER: Yes, Your Honor.

11 THE COURT: Now, with respect to  
12 count one, that's still alive and kicking  
13 as far as your motion to dismiss count  
14 one?

15 MR. MILLER: That is correct.

16 THE COURT: Now, counts two and  
17 three -- now, count three is being  
18 abandoned in its entirety, am I correct?

19 MR. BERGER: I think I'm the best to  
20 give you a graphic resource here.

21 Count one of both counts is under  
22 submission.

23 THE COURT: At a pleading-stage  
24 motion?

25 MR. BERGER: At a pleading-stage

1 motion.

2 THE COURT: All right.

3 MR. BERGER: Count three of the  
4 police complaint and count four of the  
5 fire complaint --

6 THE COURT: Is the summary judgment?

7 MR. BERGER: -- are cross motions for  
8 summary judgment.

9 THE COURT: Today?

10 MR. BERGER: Yes.

11 Counts two and three of the  
12 firefighters' complaint have been  
13 dismissed without prejudice, and counts  
14 two of the police complaint has been  
15 dismissed without prejudice.

16 MR. MILLER: And that is the city's  
17 understanding, as well.

18 THE COURT: All right.

19 I'm just making sure I have a global  
20 understanding.

21 What we really have is a count, one  
22 count, count one, which the Court needs to  
23 make a pleading determination as to  
24 whether or not the motion to dismiss is  
25 meritorious or not, and another count

1           which is going to summary judgment hearing  
2           today?

3           MR. BERGER:   Correct, Your Honor.

4           MR. MILLER:   Correct, Your Honor.

5           THE COURT:   All right.

6           MR. MILLER:   The analogous counts on  
7           financial urgency in each of the  
8           complaints.

9           THE COURT:   I got it.

10          I got it.

11          Now, by the way, just for your  
12          information, even if you had not reached  
13          and agreement with respect -- when you  
14          did, and I'm going to adopt it.  I'll hear  
15          the opposing motions for summary  
16          judgment.  There is case law that says  
17          that even if I didn't hear it, I could  
18          rule on yours if by operation of law a  
19          granting or a denial of his motion for  
20          summary judgment would be by operation of  
21          law a granting or a denial of your  
22          opposing motion.

23          MR. BERGER:   Correct.

24          MR. MILLER:   I'll glad to hear that.

25          THE COURT:   But --

1 MR. MILLER: We're hyper-cautious.

2 THE COURT: I don't blame you.

3 But there is that fall back that even  
4 if I had not allowed the stipulation and I  
5 heard theirs, if I granted it, I could  
6 automatically deny yours, even though it  
7 wasn't scheduled, hypothetically. Or if I  
8 denied theirs I could grant yours, even  
9 though it was not -- there was a  
10 disagreement about scheduling it on its  
11 merits today. But I adopt the  
12 stipulation.

13 MR. BERGER: I think that's the  
14 summary judgment rule, Judge.

15 THE COURT: Okay.

16 MR. BERGER: I think it's right in  
17 the rule.

18 THE COURT: Who wants to go first?

19 MR. BERGER: It was our motion. It  
20 was their cross motion. We would prefer  
21 to go first, Your Honor.

22 THE COURT: All right.

23 MR. MILLER: No objection.

24 THE COURT: We are on the financial  
25 urgency determination count.

1           You've got the floor.

2           MR. BERGER: Thank you, Your Honor.

3           The financial urgency determination  
4 was for a year, and the real issue is,  
5 what effect does the legislative action  
6 have as a result of the financial  
7 urgency?

8           I don't think there is any dispute  
9 that the financial urgency was only for a  
10 year. It was determined --

11          THE COURT: Have they stipulated to  
12 that?

13          MR. BERGER: I don't think that is  
14 a --

15          THE COURT: Because on the motion to  
16 dismiss that was very contentious.

17          MR. BERGER: Not that issue that it  
18 was a financial urgency made for a year.  
19 That's what it says. That's what the  
20 ordinance says. It's for a year. That's  
21 what the statute says.

22          THE COURT: All right.

23          MR. BERGER: So, I mean, if that's a  
24 dispute, then we'll try that issue I guess  
25 if that's going to be in dispute.

1 THE COURT: I don't know. I'll have  
2 to hear from the city.

3 MR. BERGER: Right.

4 So, the issue, just to frame it,  
5 Judge, is what is the legislative action  
6 that is taken after the financial urgency  
7 is declared? Can it exceed a year?  
8 That's the simple issue that we're here to  
9 talk about today, and we are here on these  
10 cross motions.

11 For the purposes of this motion, we  
12 are presuming the financial urgency is  
13 properly declared for the purpose of this  
14 motion. For the purpose of this motion,  
15 it is presumed --

16 THE COURT: I'm going to interrupt  
17 you again. I'm sorry. I've tried to  
18 minimize it. I want to be sure I  
19 understand something.

20 Are you simply asking the Court,  
21 because I haven't actually seen the motion  
22 for summary judgment.

23 MR. BERGER: We're sorry, Your Honor.  
24 We'll give you a --

25 THE COURT: I've got three notebooks.

1 I thought this was on the motion to  
2 dismiss.

3 MR. BERGER: Right.

4 THE COURT: Is the motion -- it's  
5 your motion for summary judgment?

6 MR. BERGER: Yes.

7 MR. MILLER: All three are in that  
8 binder.

9 MR. BERGER: They're all in the  
10 binder.

11 MR. MILLER: You'll see the tab where  
12 it says "LAW" --

13 MR. BERGER: We agreed to do one  
14 binder, Judge, this time.

15 THE COURT: I appreciate that.

16 MR. BERGER: We're getting along so  
17 well.

18 THE COURT: I appreciate that.

19 I didn't know it had turned into a  
20 motion for summary judgment.

21 MR. BERGER: No, not --

22 THE COURT: Do you know what number  
23 your motion for summary judgment is?

24 MR. BERGER: I am not sure, Judge,  
25 but --

1 MR. MILLER: If you will look at the  
2 tabs that say "LAW" in big letters -

3 THE COURT: All right.

4 MR. MILLER: The motions are  
5 immediately in front of those.

6 THE COURT: Because there are a  
7 number of them that say "LAW".

8 MR. MILLER: So, there's a motion  
9 right in front of the one that says "LAW".  
10 There is a partial motion in front of the  
11 next one that says "LAW", and then there  
12 is a response. Plaintiff's response to  
13 the cross motion is in front of the last  
14 tab that says "LAW".

15 THE COURT: Here it is. Plaintiff's  
16 Motion for Partial Summary Judgment.

17 MR. BERGER: Yes, Your Honor.

18 THE COURT: So, I just want to be  
19 sure. The only issue, legal issue which  
20 you would like a declaration of this court  
21 on your motion for summary judgment,  
22 you're not asking me to invalidate count  
23 four; you're simply saying that you want  
24 as a pure matter of law the Court to  
25 declare that the ordinance was, with

1           respect to the financial urgency  
2           determination, was for one year and one  
3           year only?

4           MR. BERGER:   Yes, Your Honor.

5           THE COURT:   Is that the only legal  
6           ruling you want from the Court on this?

7           MR. BERGER:   May I be heard on this,  
8           Your Honor?

9           THE COURT:   All right.

10          MR. BERGER:   To clarify the question,  
11          what happens is, the City of Hollywood  
12          declares a financial urgency.  And what  
13          they've done in this instance was say, we  
14          have a financial urgency, it is for a  
15          year, we need to find eight million  
16          dollars.  That's what their advertising  
17          was.  That's what happened.

18          Then there are two ways to implement  
19          a financial emergency, either through  
20          commission voting or through a referendum.  
21          We went through a lot of that in our last  
22          hearing.

23          THE COURT:   Yes.

24          MR. BERGER:   They chose to go through  
25          a referendum.  Count one will challenge

1           some of the things they've done in that  
2           referendum.

3           For the purposes of this motion,  
4           we're accepting that the referendum was  
5           correctly implemented. The legislative  
6           action was correctly implemented.

7           The issue is whether or not that  
8           referendum could exceed a year.

9           THE COURT: Got it.

10          Now, I've got it.

11          MR. BERGER: Okay. That's the issue;  
12          whether, if correctly implemented, could  
13          it exceed a year? Because the only time a  
14          financial urgency was declared for was for  
15          a year. So, that is the simple issue. I  
16          can't say it any simpler than that.

17          THE COURT: I got it.

18          MR. BERGER: Right.

19          My colleagues are saying that if you  
20          declare a financial urgency and then you  
21          take what's called legislative action,  
22          either through the commission vote or  
23          through referendum vote, that you can  
24          extend that financial urgency  
25          indefinitely. That's my colleagues' view

1 of the law. That is not, I think,  
2 constitutional.

3 My clients, the pension fund, are in  
4 doubt as to what they are supposed to do  
5 to administer the fund.

6 I used to be on the board of the  
7 South Florida Water Management District.  
8 When we had a doubt as to how to implement  
9 something or not implement something, we  
10 would ask the courts. Some of it went as  
11 far as the Florida Supreme Court to tell  
12 us what certain referendum votes meant on  
13 behalf of the voters.

14 With respect to the Everglades  
15 restoration, we actually petitioned the  
16 Florida Supreme Court and said, we are in  
17 doubt as to what we're supposed to do  
18 under this constitutional amendment, and  
19 the Florida Supreme Court gave us  
20 guidance.

21 THE COURT: You flooded the courts,  
22 huh?

23 MR. BERGER: Yes, we flooded the  
24 courts.

25 THE COURT: I apologize. I can't

1 help it. I can get away with it here; not  
2 at home.

3 MR. BERGER: We had, of course, when  
4 I was on that board, fiduciary  
5 responsibilities, and we had legal  
6 obligations. The clients I represent here  
7 have fiduciary, financial responsibilities  
8 and legal obligations.

9 Now, if they administer these pension  
10 funds one way, certain people will take  
11 offense to that and sue them. If they  
12 administer these pension funds a different  
13 way, people will take offense to that and  
14 sue them. So, that is why we are asking  
15 this Court to advise us as to, through  
16 declaration, what it thinks our  
17 obligations are.

18 We think, of course, that our  
19 obligations are not to implement a  
20 financial urgency beyond the year declared  
21 by the city, but --

22 THE COURT: When would that year end?

23 MR. BERGER: September 30th. Last  
24 Sunday. That's why we didn't move on an  
25 emergency basis when we got this hearing.

1           THE COURT: So, if you prevail on  
2 count four, the year would have already  
3 expired as of September 30th?

4           MR. BERGER: As of last Sunday.

5           THE COURT: Okay.

6           MR. BERGER: So, then that's the  
7 setting under which we find ourselves.

8           Constitutionally, under the Florida  
9 Constitution, public employees' collective  
10 bargaining rights and agreements are  
11 guaranteed by Article One, Section 6 and  
12 Section 10 of the Florida Constitution.

13           Section 6 of the Constitution, the  
14 pertinent part is that the rights of  
15 employees by and through a labor  
16 organization to bargain collectively shall  
17 not be denied or abridged.

18           Section 10, Prohibited Laws, pretty  
19 standard, prohibited, constitutional since  
20 the Magna Carta. No bill of attainder, ex  
21 post facto law or law impairing the  
22 obligation of contracts shall be passed.

23           So, what have courts done when the  
24 crown, when the city has a financial  
25 urgency and can't pay its contracts? The

1 courts have tried to find a way to make an  
2 exception for the crown, make an exception  
3 for the city.

4 The Chiles case is the case that  
5 outlined those exceptions. The Chiles  
6 majority held that a legislature cannot  
7 modify a collective bargaining  
8 agreement -- these are agreements as well,  
9 contracts as well -- absent compelling  
10 circumstances. Any effort to do so will  
11 be subject to strict scrutiny.

12 I don't think there is a lawyer in  
13 the room that would argue with that kind  
14 of reasoning.

15 Any financial urgency abrogating a  
16 collective bargaining agreement would need  
17 to be reviewed annually as part of a  
18 budget analysis, otherwise a city could  
19 declare, I'm always having financial  
20 urgency, and even though I made this  
21 agreement with you, Mr. Citizen, we're  
22 never going to honor it. So, the Chiles  
23 court put some limitations on that.

24 For instance -- and, of course, just  
25 as a side note, it's the public policy of

1       this state, the Crist vs. Florida  
2       Association of Criminal Defense Lawyers  
3       case, to try and view pension laws, public  
4       pension laws liberally for the benefit of  
5       the beneficiaries, for our public  
6       servants.

7               By way of example, Judge, and by way  
8       of argument, the City of Miami declares a  
9       financial emergency for the last three  
10      years, and they probably have one, and  
11      they've been through this.

12             The City of Hollywood declared  
13      financial urgencies for two years, 2010 to  
14      2011, and from 2011 through expiration,  
15      September 30th of 2012. Despite only  
16      claiming financial urgency through fiscal  
17      year 2012, the city claims it can  
18      indefinitely modify the terms with no set  
19      time limit for the existing contracts for  
20      the fire and police unions and their  
21      pension funds.

22             The legislature adopted changes to  
23      the 447 Statute, the Financial Urgency  
24      Statute, after the Chiles decision to  
25      provide for an orderly process to

1           implement the Chiles holding.

2           The City of Hollywood case -- it  
3           seems the City of Hollywood is often in  
4           these -- vs. Municipal Employees, and we  
5           have the case for Your Honor, confirms  
6           that 447 means what it says; that any  
7           legislative action taken pursuant to a  
8           financial impasse declaration shall take  
9           effect for the remainder of the fiscal  
10          year for which the financial impasse was  
11          declared.

12          In this instance, the declaration  
13          expired, as I said, last Sunday, and along  
14          with it, in our view, the legislative act  
15          necessarily had to expire. If the  
16          legislative act did not necessarily  
17          expire, the legislative act would have  
18          violated the Chiles case.

19          You know, we have a financial  
20          urgency. We can't go past that fiscal  
21          year, and if it does go past that fiscal  
22          year, then in our view it would violate  
23          the Chiles case. That's one of reasons  
24          we've asked for help.

25          Now, we're not the only ones, by the

1 way, who view the financial urgency law  
2 this way. While this is not a PERC  
3 case -- we are not a labor union.

4 THE COURT: No, you're not a labor  
5 union.

6 MR. BERGER: Right. While this is  
7 not a PERC case, we are trustees seeking  
8 guidance so that the unions don't sue us,  
9 the city doesn't sue us, somebody doesn't  
10 sue us. We're not a labor union.

11 The Teachers case which we've cited  
12 in our materials, which is a PERC case,  
13 had a similar situation where there is  
14 some dicta in that case, and it's in  
15 Teachers vs. Lee County, and they said --

16 THE COURT: What district is that?

17 MR. BERGER: It's a PERC decision.

18 THE COURT: It's a PERC decision?

19 It's now out of the courts?

20 MR. BERGER: No.

21 THE COURT: Okay.

22 MR. BERGER: It's an administrative  
23 law decision.

24 THE COURT: Administrative, got it.

25 MR. BERGER: We are persuaded by the

1 plain language of the statutory provisions  
2 and consideration of the mechanics of the  
3 impasse resolution process, that while a  
4 legislatively-imposed provision which, by  
5 its terms, would take effect after  
6 expiration of the remainder of the fiscal  
7 year that was the subject of the  
8 negotiations is void ab initio. If it  
9 goes beyond the year, it's void.

10 The mere adoption of such provision  
11 is not in itself prohibited by the  
12 statute, but if it goes beyond the year,  
13 it's void. The impasse statute is the  
14 process by which the government through  
15 constitutional means, or what we perceive  
16 to be constitutional means, can legislate  
17 a change to an existing contract.

18 Now, of course, there might be some  
19 people on the Supreme Court of the United  
20 States which would say the government can  
21 never legislate a change to an existing  
22 contract, but we're under state law here,  
23 and we have massaged this to allow some  
24 legislative changes to sacrosanct  
25 contracts in public context.

1           When the unions are contracting with  
2           the crown, they take certain risks that  
3           the crown might not be able to pay, the  
4           tax payers might not be able to pay, but  
5           they don't take indefinite risks, and  
6           that's what 447 is about. If you have a  
7           financial urgency, you can tell us for a  
8           year you have a problem. You can't tell  
9           us for the next century you have a  
10          problem. That's how we have gotten  
11          through this process.

12          In other words, so long as the  
13          legislative action implementing the  
14          financial urgency, the referendum, or the  
15          vote, or the council vote does not exceed  
16          in time the fiscal year in which it was  
17          adopted, the legislative action satisfies  
18          the strict scrutiny requirements of  
19          Chiles. All right? It's just that  
20          simple. It's not that complicated.

21          Once it is determined that the  
22          legislative action implementing the  
23          financial urgency cannot exceed the fiscal  
24          year for the financial urgency, that is  
25          constitutionally and statutorily required

1 implementing this constitutional  
2 requirement to restore the, what happens  
3 next? What happens after September 30th?

4 What should happen, of course, is the  
5 parties are restored to their prior  
6 contract, whatever that was. That's what  
7 happens, and that's what the law is. In  
8 both this, the fire case and the police  
9 case, the prior contracts are in place.  
10 They remain in place after the financial  
11 urgency has expired by their own terms.  
12 They are annual renewal contracts that  
13 renew in the absence of parties saying, we  
14 want to modify provisions of the  
15 contracts.

16 The contracts can only be terminated  
17 by a precise -- and this is another case  
18 we have -- Florida Police Benevolent  
19 Association. The contracts could only be  
20 terminated by precise, contractual written  
21 notice, which was never given, and the  
22 notice has to be precise.

23 There is no dispute that the fire  
24 fighters never sent a notice. No dispute.  
25 I mean, no one is arguing that the fire

1 fighters ever sent a notice. The police,  
2 however, are different.

3 But before I get to those, the case  
4 says, when terms or conditions of  
5 employment -- and I'm quoting the Florida  
6 Police Benevolent Association case -- when  
7 terms or conditions of employment are in a  
8 contractual provision, the status quo is  
9 determined -- the status quo -- I'm sorry,  
10 I'm not reading right now, I'm trying --  
11 the status quo being what happens after  
12 the financial urgency has expired. The  
13 status quo, the old contract is determined  
14 by reference to the precise wording of the  
15 relevant contractual provision. If the  
16 contract provision is explicit, no  
17 extrinsic evidence of past practice to  
18 determine the status quo will be  
19 considered. Instead, the employees'  
20 reasonable expectations as to the  
21 continuation of certain benefits should  
22 properly be founded upon the precise  
23 contractual language, rather than past  
24 practice.

25 In other words, Judge, except for the

1 Chiles exception to contracts, except for  
2 that exception, when you go back to the  
3 city declares its financial emergency, the  
4 employees are entitled to have their old  
5 contractual expectation.

6 I mean, we allow this exception to  
7 the Magna Carta. We allow this exception  
8 to bills of attainder, the government  
9 acting to abrogate a contract. We allow  
10 this exception for public unions in this  
11 limited circumstance when there is a  
12 financial urgency, and then after the  
13 financial urgency has expired, the  
14 contract parties are entitled to rely upon  
15 the contract that was entered into. That  
16 is the -- you go back to the status quo.

17 So, as I said, with respect to the  
18 firefighters, there is no dispute that the  
19 precise contractual language provides in  
20 Section 3 -- and we have that contract for  
21 you. I don't want to clutter you. It's  
22 all up there.

23 I don't think anyone disputes what it  
24 says:

25 This agreement shall automatically be

1 renewed from year to year thereafter,  
2 unless either party shall have notified  
3 the other in writing by January 1st of  
4 2012 that it desires to modify the  
5 agreement with negotiations to begin 30  
6 days thereafter or such other date as  
7 mutually agreed upon. The terms and  
8 conditions of employment reflected in this  
9 agreement shall remain in full force and  
10 effect until replaced by either a  
11 subsequent ratified replacement agreement  
12 or actions resulting from the provisions  
13 of the 447.403.

14 THE COURT: Now, which contract did  
15 you just read from?

16 MR. BERGER: The firefighters'.

17 THE COURT: The firefighters'?

18 Do you know where it is in this index  
19 off hand?

20 MR. BERGER: I apologize to the  
21 Court. I've been in hearings all week,  
22 and I am not as prepared on exactly --

23 THE COURT: That's --

24 MR. MILLER: Here it is.

25 THE COURT: I just want to -- we have

1 got all of these indexed numbers here. I  
2 thought maybe -- I'll find it.

3 MR. MILLER: Yeah.

4 MR. BERGER: It's in --

5 MR. MILLER: It's an attachment to  
6 our complaint. It's Exhibit F to the  
7 motion for summary judgment.

8 MR. BERGER: Tab 2. It's Exhibit F  
9 to Tab 2, Your Honor.

10 MR. MILLER: Way in the back towards  
11 the law.

12 THE COURT: I'm at the front of the  
13 --

14 MR. MILLER: And it's just the one  
15 page, plus the cover page.

16 THE COURT: Is this it, right here?

17 MR. MILLER: No, it's not. I'm  
18 sorry.

19 THE COURT: It's on the -- wait a  
20 minute. I'll find it.

21 MR. MILLER: Right there. That's it.  
22 That's the police one, I'm pretty sure.

23 THE COURT: What you just read from,  
24 is this it right here?

25 MR. BERGER: Yes. Section 3, Your

1 Honor.

2 THE COURT: Section 3.

3 No. No. This is the -- that's all  
4 right. I'll find it.

5 MR. BERGER: No. We'll give it to  
6 Your Honor.

7 Here's the firefighters', Your Honor,  
8 and please, one for the other side,  
9 please.

10 Thank you.

11 THE COURT: Let me give this back to  
12 you.

13 MR. BERGER: Thank you.

14 MR. MILLER: If it's in this, I've  
15 got it.

16 MR. BERGER: All right. So, that's  
17 the firefighters', Judge.

18 THE COURT: It's titled "Employee  
19 Organization Agreement"?

20 MR. BERGER: Yes.

21 THE COURT: Yeah, for the  
22 firefighters.

23 What page were you reading from?

24 MR. BERGER: I was reading from  
25 Section 3, Your Honor.

1 THE COURT: Right here?

2 MR. BERGER: Yes.

3 THE COURT: Under Article 48?

4 MR. BERGER: Yes.

5 THE COURT: All right.

6 I just want to be sure. This is in  
7 Section 3?

8 MR. BERGER: Yes, Your Honor. I  
9 believe that we both agree on that.

10 THE COURT: Got it.

11 Okay.

12 MR. BERGER: There is no dispute that  
13 no such notice was given with respect to  
14 either party containing precise  
15 contractual language from the  
16 firefighters, or for that matter, any  
17 notice was given with respect to the  
18 firefighters. No one doubts that.

19 So, again, with respect to the  
20 firefighters, this is a very clear, in our  
21 view, determination, but rather than act,  
22 we have private citizens here who are  
23 doing public service, a declaration we  
24 thought was appropriate.

25 With respect to the police contract,

1           there is a similar provision, and we'll --

2           THE COURT: I'll give you this one  
3 back. You gave me two copies of E.

4           MR. BERGER: Thank you.

5           THE COURT: That's Exhibit E.

6           MR. BERGER: With respect to the  
7 police contract, Judge --

8           THE COURT: All right. This is F?

9           MR. BERGER: Right -- the duration of  
10 the agreement, Section 49.2 --

11          THE COURT: All right.

12          MR. BERGER: This agreement shall  
13 automatically be renewed from year to year  
14 thereafter unless either party shall  
15 notify the other in writing and by  
16 certified mail, not later than May 15th,  
17 2012, that it desires to modify the  
18 agreement with negotiations to begin in  
19 June of 2012. Such negotiations shall  
20 include a list of articles which shall  
21 inform the other party of the items they  
22 desire to negotiate.

23                 A letter was sent by the police.  
24 That is in the record and we have the  
25 letter here.

1           Do you have that, Dan, please?

2           In this letter, the police notified  
3           the city that they wished to have -- this  
4           is the letter that was sent by the  
5           police. No such letter exists from the  
6           firefighters.

7           This letter shall serve as official  
8           notification that the P.D.A. Bargaining  
9           Unit wishes to begin negotiations for  
10          successor collective bargaining agreement  
11          to the current one which expires on  
12          September 30th of 2012.

13          This letter was sent. We don't deny  
14          that this letter was sent. This letter  
15          does not, however, comport with the  
16          requirements of Florida Police Benevolent  
17          Association.

18          Mr. Morano, who is an experienced  
19          labor person, did not say I wish to, as  
20          the contract requirements say, such  
21          notification shall include a list of  
22          articles which shall inform the other  
23          party of the items they desire to  
24          negotiate. It does not say they wish to  
25          modify the agreement. It says they wish

1 to have a replacement agreement.

2 Such replacement agreement,  
3 obviously, was never reached, so the  
4 status quo is the old agreement, and  
5 that's just a matter of interpreting this  
6 letter and the contract provision.

7 So, while the firefighters admittedly  
8 are a much easier case, there was no  
9 letter. The police is admittedly a harder  
10 case, but the letter does not comport, and  
11 we think as a matter of law does not  
12 change that it was automatically renewed,  
13 the agreement was automatically renewed,  
14 and that there was no desire to modify the  
15 agreement.

16 THE COURT: Well, the letter doesn't  
17 talk in terms of modifying it. It appears  
18 to talk in terms of actually superseding  
19 it.

20 MR. BERGER: Yes. That's why we  
21 think as a matter of law the old agreement  
22 still is in place, and under the Police  
23 Benevolent case, for the old agreement not  
24 to be in place they needed to talk in  
25 terms of modification.

1           So, Judge, for these reasons, we  
2 believe, as I said, the firefighters is  
3 very easy. The police admittedly did send  
4 a letter, but it was not to modify; it was  
5 to replace, which meant the existing  
6 contracts in both instances continued in  
7 full force and effect at the time of the  
8 expiration of the financial urgency. For  
9 these reasons, it is undisputed, in our  
10 view, that both agreements were in place  
11 after September 30th of 2012.

12           No one has suggested there is no  
13 contract with the police or fire union.  
14 No one has come to the pension board and  
15 said, hey, there is no contract with these  
16 people. There is a contract. The  
17 question is, what contract is in place?  
18 Is it the contract that exists from year  
19 to year, or is it the contract that is  
20 subject to the financial urgency? The  
21 financial urgency expired on September  
22 30th. Those are the two choices. We have  
23 a contract as written, as we agreed to,  
24 just as if I were to negotiate with  
25 Mr. Cypen, make an agreement. Is that

1 contract in place, or is the financial  
2 urgency contract in place? That's why  
3 this is a pure legal issue.

4 Briefly, just very briefly, and for  
5 the record on standing, I think the Court  
6 does understand this. This is not a case  
7 between public employees and employers.

8 THE COURT: It doesn't appear to be a  
9 PERC case.

10 MR. BERGER: No, not this count.

11 This count concerns the trustees of a  
12 public pension fund and they need to know  
13 how to act given the complicated statutory  
14 regime that was in place after Chiles.

15 By the way, if we were in England  
16 where the crown does no wrong and then  
17 when the crown does something wrong, refer  
18 to rule number one, you know, we would  
19 have probably fought a revolution about  
20 this, but we did -- oh, we did fight a  
21 revolution about this. And the government  
22 in our country agreed that it would not  
23 pass bills of attainder, and that's what  
24 this is an attempt to do.

25 So, similarly, with respect to the

1 individuals, this is not a PERC case.  
2 This is a case which is seeking a  
3 declaration that the financial urgency  
4 expired on September 30th; therefore, the  
5 government can't act past the time it  
6 proscribed, and if it wished to renew its  
7 financial urgency, it could have done so.

8 So, what are we doing here?

9 The Court, we would hope -- just  
10 because these folks are union members,  
11 just because it's a public employee union,  
12 just because it's unpopular doesn't mean  
13 that the government doesn't have to follow  
14 the law to abrogate a contract, and in  
15 this instance, in our view, the government  
16 is acting unconstrained. If it wishes to  
17 declare a new financial urgency, it knows  
18 how to do it. There are statutes that  
19 allow it to do that.

20 Judge, for these reasons, we would  
21 hope that you would rule in our favor and  
22 constrain the City of Hollywood from  
23 acting without authority.

24 Thank you.

25 THE COURT: Thank you, Mr. Berger.

1           May I hear from the City?

2           MR. MILLER:   What I would like to do  
3           is initially respond to a number of  
4           discrete matters that Mr. Berger has  
5           argued in presenting his motion for  
6           summary judgment, and then present my  
7           argument on the city's cross motion for  
8           summary judgment.

9           I could try to conflate the two.  I  
10          think it might become confusing because,  
11          contrary to what you've heard, I believe  
12          that this is not an extremely simple  
13          situation.  I believe it's a rather  
14          complex situation.

15          THE COURT:  I hope it's not as  
16          complicated as the rule against  
17          perpetuities.  I had trouble with that in  
18          law school, sir.

19          MR. MILLER:  I was told to answer C  
20          on the Bar Exam for any rule against  
21          perpetuities question, no matter what the  
22          answer might be.

23          THE COURT:  All right.

24          MR. MILLER:  Financial urgency, the  
25          resolution by which the city declared

1 financial urgency did identify themselves  
2 as pertaining, one, to fiscal year  
3 '11/'12, and one to fiscal year '12/'13,  
4 the just expired -- I'm sorry -- '10/'11  
5 and '11/'12. So, the first two, '10/'11,  
6 the second two, '11/'12. The fiscal year  
7 just expired on September 30th, 2012.

8 The only significance, as has been  
9 ruled by PERC in the Hollywood cases, one  
10 of which is in your materials at I believe  
11 Tab 2, number 15, is this binder is  
12 constructed --

13 THE COURT: You mean this binder  
14 here?

15 MR. MILLER: The new binder that  
16 you've got.

17 THE COURT: Let me see if I can find  
18 it. It's a maze here.

19 MR. BERGER: It is, Judge.

20 THE COURT: It's got indexes up to  
21 23, and then it starts again at 1 to 21,  
22 and then --

23 MR. MILLER: So, try 15 of that  
24 second group. That should be the --

25 MR. BERGER: I was looking at it last

1 night and I gave up.

2 THE COURT: All right.

3 MR. MILLER: And we were trying --

4 and everyone was trying to --

5 THE COURT: You make me feel better.

6 It's not just my age anymore. All right.

7 Number 15?

8 MR. MILLER: Try 15. Is that a

9 Hollywood case?

10 THE COURT: It's Hollywood

11 Firefighters vs. City of Hollywood.

12 MR. MILLER: That is a --

13 THE COURT: July, 12th, 2012.

14 MR. MILLER: There you go.

15 THE COURT: It's a PERC case?

16 MR. MILLER: It's a PERC case. In  
17 fact, it involves the very matters of many  
18 -- well, the very events from which this  
19 whole thing arises.

20 THE COURT: All right.

21 MR. MILLER: In that case, you will  
22 see PERC reasoning that says the financial  
23 urgency, the existence of it or not is  
24 judged at the time the financial urgency  
25 is declared.

1           Were you to review the financial  
2           urgency statute, which is 447.4095 and is  
3           in these materials, you would see no  
4           reference whatsoever to a time period, to  
5           a beginning date, to an ending date, to an  
6           expiration date. There is no time limit,  
7           no mention of time at all in section 4095.

8           The significance of associating any  
9           timing with the declaration of a financial  
10          urgency, according to PERC's rulings in  
11          the case before you, the Hollywood case  
12          before you, and in all of the other PERC  
13          rulings on financial urgency, the two  
14          Miami cases and the two Hollywood cases  
15          where this has arisen is that -- is only  
16          that a financial urgency, a financial  
17          condition, must exist at the time it is  
18          declared, otherwise there is no financial  
19          urgency. The city or the employer is  
20          potentially acting in bad faith. You  
21          can't invoke the provisions of the law.  
22          That is the only timing issue.

23          The fact that the resolutions  
24          referenced a particular fiscal year was  
25          not intended and cannot be read in the

1 resolutions to imply that the financial  
2 urgency extends throughout any period of  
3 time or ends at any particular period of  
4 time. It simply does not have the  
5 operation that the Plaintiffs have argued  
6 that it does.

7 These are discreet points, so these  
8 aren't going to necessarily hang together  
9 as a full argument as will my presentation  
10 to follow.

11 To clarify the record a little bit on  
12 some matters of -- I don't want to say  
13 fact, because these matters were not  
14 alleged as facts by either party in the  
15 summary judgment evidence, but I want to  
16 clarify it. This is argument of Counsel,  
17 as was Mr. Berger's reference to what I'm  
18 about to say.

19 Mr. Berger referred to a shortfall of  
20 eight million dollars. He referred to the  
21 establishment of a financial urgency  
22 through a referendum. That's a little bit  
23 confused.

24 In fiscal 2011 there was an eight-  
25 million-dollar shortfall that was

1 addressed by the 2011 financial urgency  
2 and the modifications made pursuant to  
3 that. It has nothing to do with the  
4 pension ordinance that we're here on in  
5 this cause of action. The pension  
6 ordinance was not touched for fiscal  
7 2011.

8 In fiscal 2012, there was a  
9 38-million-dollar shortfall, and as a part  
10 of addressing that financial crisis, the  
11 city took action to save approximately  
12 eight and a half million dollars from the  
13 pension for that year and others -- well,  
14 eight and a half million for fiscal '12.  
15 That's where the eight-million-dollar  
16 figure I think is coming from, and the  
17 referendum, again, had nothing to do with  
18 financial urgency. The referendum  
19 pertained solely to the pension  
20 modifications because the city code  
21 provides that the pension can be amended  
22 through a referendum of the electorate,  
23 and I think we went into that quite a bit  
24 in the initial argument.

25 So, financial urgency does not

1           require a referendum. Changing the  
2           pension ordinance required a referendum.  
3           That's to clarify the record.

4           There was reference by Mr. Berger to  
5           Article 1, Section 6 of the Florida  
6           Constitution, which is sometimes called  
7           the Right to Work Amendment and sometimes  
8           called the Right of Collective Bargaining,  
9           and it does have those two pieces to it.

10           What is guaranteed by Article 1,  
11           Section 6, is the right to bargain, as it  
12           says in the text of that amendment, there  
13           is a right to collective bargaining. It  
14           does not guarantee a right to any  
15           particular outcome as might be reasonably  
16           inferred from what Mr. Berger says. All  
17           it guarantees is a right to bargain. No  
18           employer and no union is compelled under  
19           the constitution to agree to anything,  
20           whether a benefit or a concession.

21           Mr. Berger also argued at some length  
22           the Chiles vs. United Faculty of Florida  
23           case, which was decided I believe in --  
24           1995 --

25           MR. BERGER: 1994 or '5. I'm not

1           sure.

2           MR. MILLER:  -- by the Supreme  
3           Court.

4           That's an extremely interesting  
5           case.  It is a hotly-disputed case.  And,  
6           in fact, the Chiles ruling and whether it  
7           applies in financial urgency cases is  
8           central to every single one of the  
9           financial urgency cases that have come  
10          before the courts so far, not only  
11          including the two Hollywood cases and the  
12          two Miami cases, but also including the  
13          Manatee School Board case that was before  
14          the 1st D.C.A. in 2010, or 2009 and 2010.

15          In that case -- and that case is in  
16          your materials as well -- the 1st D.C.A.  
17          was urged by the unions to adopt the  
18          Chiles standard in judging whether  
19          financial urgency existed and whether it  
20          privileged an employer to change terms and  
21          conditions of employment for unionized  
22          employees.

23          The 1st D.C.A., as I will urge this  
24          Court to do, deferred to PERC.  The 1st  
25          D.C.A. said, we are urged to adopt the

1 Chiles standard as to financial urgency.  
2 We will defer to PERC's initial  
3 determination of that question, and it  
4 remanded the case on that question and  
5 others to PERC.

6 It did so rightly in pursuance of the  
7 doctrine that PERC, as I will elucidate on  
8 more in my formal argument, has preempted  
9 and in some cases exclusive jurisdiction  
10 over matters that fall within it's  
11 purview, and that was referenced by the  
12 1st D.C.A. in the Manatee case.

13 The Chiles standard has not been  
14 found by any court to be applicable to  
15 financial urgency and has expressly been  
16 found in four cases by PERC not to apply  
17 to financial urgency. The only authority  
18 extant on the question is that Chiles does  
19 not apply; admittedly PERC decisions. No  
20 court decision on that except the 1st  
21 D.C.A. that said, we're going to give PERC  
22 the first bite at this apple.

23 This question is now pending before  
24 the 1st D.C.A. in a Hollywood case, before  
25 the 4th D.C.A. in a Hollywood case, and

1 before the 3rd D.C.A. in two City of Miami  
2 cases.

3 THE COURT: They're all up on appeal  
4 right now?

5 MR. MILLER: All up on appeal as we  
6 speak.

7 THE COURT: Have any of them gone to  
8 oral argument?

9 MR. MILLER: None have been briefed.

10 The initial briefs have been filled  
11 in at least one of the Miami cases. The  
12 initial briefs are due in the Hollywood  
13 cases in October.

14 There was reference by Mr. Berger to  
15 the Lee County case, PERC case, as you  
16 observed, which is relied on heavily, and  
17 which I'll address at some length later.  
18 But I can't help but note as Mr. Berger  
19 quoted to you, PERC in that case said that  
20 what was invalid under impasse was for  
21 modifications -- or I'm going to use the  
22 term "alteration", of terms of employment  
23 through impasse. What was invalid was an  
24 alteration that takes effect after the end  
25 of the fiscal year in question.

1 I'm going to -- this is a spoiler  
2 alert now. I'm taking you right to the  
3 bottom line on this.

4 What is settled labor law for 30  
5 years -- and I will cite you cases and  
6 I'll take you through some cases. Settled  
7 law for 30 years under PERC and in the  
8 courts on impasse is that the employer in  
9 imposing matters through impasse, may  
10 effect alterations only within the fiscal  
11 year that's relevant to the impasse -- a  
12 single fiscal year.

13 Alterations that take effect, in the  
14 words of the Lee County case, after the  
15 end of the relevant fiscal year may not be  
16 made. However, there is another fundament  
17 of Florida public sector labor law, and  
18 that is that terms and conditions of  
19 employment, of unionized employees may  
20 only be changed in three circumstances;  
21 bargaining to agreement, impasse, or  
22 exigent circumstances such as a hurricane  
23 that forces you to do things that you  
24 would not ordinarily do, like making  
25 people work 24 hours in a row, or

1 something of that nature; not relevant  
2 here.

3 Therefore, when a public employer  
4 imposes a change to a term of employment  
5 through impasse, that change becomes the  
6 status quo. That change becomes the new  
7 reality for that term of employment and it  
8 cannot be changed under the law absent  
9 bargaining to agreement or a new impasse  
10 or a hurricane -- exigent circumstances.

11 That is why, when a term of  
12 employment is changed to take effect on  
13 the last day of the fiscal year --  
14 September 30 for cities -- that term of  
15 employment that has been changed remains  
16 that way on October 1, the new -- the  
17 first day of the new fiscal year until it  
18 is changed by bargaining or a further  
19 impasse. I'll explain that a little bit  
20 further, but that really is the bottom  
21 line here on that part of their argument.

22 Mr. Berger referred to another case  
23 in which -- and if I understand his  
24 argument correctly, he is arguing that on  
25 the first day of the new fiscal year --

1       this is the next fiscal year -- somehow  
2       the terms of employment that were altered  
3       during the prior fiscal year -- and in  
4       this case we're talking about the  
5       pension -- snap back.

6             Speaking of property, I remember  
7       something about bouncing and springing and  
8       jumping reversions, so I guess that's what  
9       we are talking about here.

10            The altered term of employment snaps  
11       back to what it was prior to when it was  
12       altered on the first day of the next  
13       fiscal year.

14            What does it snap back to? In the  
15       view of the Plaintiffs, it apparently  
16       snaps back to whatever it was in the  
17       collective bargaining agreement prior to  
18       the modification of that collective  
19       bargaining agreement through impasse.

20            Look again to the statute. Look  
21       again to Section 4095. This is a point  
22       that has been fairly strenuously argued in  
23       another context by the unions in these  
24       PERC cases that are now before the  
25       D.C.A.s, and that point is this: The

1 statute refers to a financial urgency that  
2 requires the modification of a contract.

3 If you accept Plaintiff's view of the  
4 world, when the impasse occurred and when  
5 the city commission imposed something,  
6 what were they imposing? Under the  
7 statute, apparently imposing a  
8 modification to the contract; therefore,  
9 the precise contract language to which  
10 Mr. Berger refers would be the modified  
11 contract language.

12 What is the modified contract  
13 language? In the case of the pension it  
14 is an article that says the pension is  
15 governed by the new pension ordinance.  
16 Again, these are not facts that are before  
17 you as summary judgment evidence, but  
18 argument of Counsel like Mr. Berger's.

19 The city provided precise legislative  
20 format contract articles to the city  
21 commission -- to the unions as well -- but  
22 to the city commission when the imposition  
23 took place. So, there is existing precise  
24 contract language that was imposed during  
25 fiscal '12 that says the new pension

1 ordinance applies, so if you're looking  
2 for contract language, that's it.

3 Mr. Berger then argues about the  
4 renewal language in the collective  
5 bargaining agreements. The city had  
6 provided summary judgment evidence, and  
7 Mr. Berger has referred to it, at least in  
8 part that, number one, the police union  
9 president did request bargaining, and the  
10 city summary judgment evidence shows, and  
11 it is undisputed, that both the police and  
12 the fire unions are engaged in active  
13 contract bargaining for fiscal 2013 as we  
14 speak.

15 Now, interestingly, Mr. Berger  
16 insists on a strict reading of the  
17 collective bargaining agreement and says  
18 that the police letter, and the absence of  
19 a letter in the case of fire, means that  
20 the contracts in question renewed  
21 automatically on October 1, 2012. What I  
22 believe that implies is that the  
23 bargaining that's being engaged in right  
24 now, were it to come to fruition, and in  
25 the case of fire, I believe it is about to

1           come to fruition, and there are  
2           significant benefits to be bestowed on the  
3           employees by the agreements that are being  
4           bargained right now. Were that to come to  
5           fruition, evidently, Mr. Berger would  
6           argue it's void. Void ab initio. And I'm  
7           sure that would come as a surprise to the  
8           union members observing these proceedings.

9           Those are my individual responses to  
10          what I heard Mr. Berger say.

11          I would like now to address the  
12          city's cross motion for summary judgment.  
13          Some of this -- well, it all ties in  
14          together, but I'm going to present it to  
15          you in a somewhat more point-by-point  
16          fashion.

17          The Plaintiff's theory of labor law  
18          is that the pension ordinance should have  
19          been limited to a single fiscal year,  
20          fiscal 2012 under a provision of state  
21          labor law, and it's unclear to me whether  
22          that provision that's being referred to is  
23          Section 4095 or whether it's Section 403.

24          4095 is the financial urgency  
25          section. Section 403 -- and both of these

1 sections are in your materials -- Section  
2 403 controls impasse.

3 As I said previously, there is no  
4 reference whatsoever in 4095 to any sort  
5 of timetable or limitation with the  
6 exception that it requires a period of  
7 bargaining not to exceed 14 days, which  
8 has nothing to do with what we are talking  
9 about here.

10 403 I believe is 4-E. 403, parens, 4  
11 parens E. It contains the language that I  
12 think we are talking about which says that  
13 imposed terms of employment shall be  
14 imposed for the remainder of the fiscal  
15 year that's being talked about, that's  
16 being bargained about.

17 Let's step back and go to 10,000  
18 feet.

19 THE COURT: To when?

20 MR. MILLER: 10,000 feet. Let's take  
21 the 10,000 view.

22 What have I been arguing about for  
23 the last ten minutes or so, and what was  
24 Mr. Berger talking about? We're talking  
25 about Section 447.409(5). We are talking

1 about Section 447.403. Those are both  
2 sections of the Public Employees Relations  
3 Act. We're talking about collective  
4 bargaining agreements. We're talking  
5 about pension ordinances that change terms  
6 and conditions and benefits that accrue to  
7 employees who are represented by unions.

8 These are all matters that are at the  
9 core of PERC's administrative expertise.  
10 These are all matters that the courts have  
11 said are within PERC's preemptive  
12 jurisdiction. Not only that, at least to  
13 the extent that their allegations describe  
14 a unilateral change -- that is a change  
15 without bargaining -- to collective  
16 bargaining agreements, those allegations  
17 describe an unfair labor practice which  
18 the courts, as I refer to in my papers,  
19 have said is the exclusive jurisdiction of  
20 PERC.

21 This whole argument and everything  
22 you have heard is all about state labor  
23 law. You are being asked to construe the  
24 collective bargaining right in the  
25 Constitution. You are being asked to

1           construe the financial urgency law which  
2           I've already said is a matter of extremely  
3           hot debate before the D.C.A.s right now  
4           and is, I'm confident, going to come  
5           before the Supreme Court within a year or  
6           two as a result of those cases.

7           You are being asked to walk straight  
8           into the middle of PERC jurisdiction that  
9           the courts have said, we will defer  
10          initially to PERC and the judicial review  
11          that's embodied in the Administrative  
12          Procedures Act -- that is through the  
13          D.C.A.'s process already well under way --  
14          or the courts have said that is exclusive  
15          PERC jurisdiction, subject to the judicial  
16          review procedures of the A.P.A.

17          THE COURT: I should punt, sir?

18          MR. MILLER: You should punt. You  
19          should dismiss this count as a matter of  
20          law, because this Court either must under  
21          prudential doctrine defer to PERC to avoid  
22          inconsistent adjudication, to accord the  
23          expert agency its bite at this apple --  
24          which it's already taken by the way -- or  
25          you should dismiss with prejudice because

1           there is no jurisdiction in this Court to  
2           hear these matters.

3           You have heard Plaintiff's argue  
4           about how long this pension ordinance  
5           should last; that is to say, how long the  
6           terms and conditions of employment that  
7           the pension ordinance changed should last.  
8           Why should there be any time table on it,  
9           according to Plaintiffs, because the  
10          resolution in their view limited itself to  
11          a single fiscal year, or because Section  
12          403, which is the impasse section, has the  
13          language in it about a single fiscal year,  
14          and because the Lee County PERC case and  
15          others cited by them has language that  
16          they say says limits the effects of  
17          alterations of terms and conditions of  
18          employment to a single fiscal year.

19                 Again, what are we talking about?

20                 We're talking about labor law here.

21                 We're not, as Plaintiffs try to  
22          disguise it, talking about just construing  
23          a pension ordinance, a run-of-the-mill,  
24          municipal ordinance, and what are its  
25          effects? Well, it's the what are its

1 effects that takes you right into the core  
2 of PERC jurisdiction.

3 One final word on this, and then i  
4 will go to the second half of the  
5 conversation.

6 What else are Plaintiffs asking you  
7 to do with this ordinance and the  
8 ordinances attached to the complaint? And  
9 you can read that ordinance until you're  
10 blind, and it's pretty small type, so it  
11 could do that to you.

12 There is nothing in there about a  
13 sunset provision. There is nothing in  
14 that ordinance that says it's going to  
15 last forever and there is nothing in there  
16 that says it will expire of its own terms  
17 on any particular date. It's a matter of  
18 common knowledge that most municipal  
19 ordinances, most statutes don't have a  
20 sunset provision. Some do. Some don't.  
21 Most do not.

22 Everything else aside, Plaintiffs are  
23 asking this Court to write into a  
24 legislatively-passed ordinance a sunset  
25 provision, I don't think that I have to

1 cite any cases to you, and as Mr. Berger  
2 said, I don't think any lawyer in this  
3 room would argue that any court has the  
4 authority to write provisions into laws.  
5 It's just a fundamental cannon of  
6 statutory interpretation.

7 The Court has no jurisdiction here,  
8 or at best should defer under a long line  
9 of cases, under rock solid jurisprudence  
10 that's cited in our papers and is  
11 presented to you here in this binder.

12 Should, however, the Court choose to  
13 move ahead and consider Plaintiff's  
14 arguments and try to figure out when or  
15 how or whether this pension ordinance  
16 should sunset on September 30, 2012, the  
17 basis of Plaintiff's argument is simply  
18 not correct.

19 I have already given you the spoiler.  
20 It's not correct because their view of the  
21 law is not correct. PERC has never said  
22 you can only impose a change that expires  
23 at the end of a fiscal year. No.

24 What PERC says, what the cases are  
25 clear about, the cases that they cite

1 themselves, and I'm going to take you  
2 through them, is that a legislative body,  
3 a city commission, board, whatever it is,  
4 public employer may not impose through the  
5 impasse process an alteration of a term of  
6 employment that occurs after the end of  
7 the fiscal year. So, the firefighters, or  
8 let's say Mr. Sheffel here is a unionized  
9 employee and I'm his employer, and for  
10 fiscal '12 I impose a pay increase of 20  
11 percent. He really didn't want that; he  
12 wanted 30. I didn't agree, and I imposed  
13 20, and I say, all right, Sheffel, you've  
14 got a 20-percent raise. It happens to be  
15 September 30. On October 1st you bump  
16 back down 20 percent.

17 Mr. Sheffel brings an unfair labor  
18 practice charge and he says on October 1  
19 they changed my term of employment back to  
20 what it was before that changed it.

21 They've actually imposed a change that  
22 took place after the end of the fiscal  
23 year. Mr. Sheffel would be correct. That  
24 would be an unfair labor practice. Why?

25 It was a change that took effect after the

1 end of the fiscal year in question.

2 What occurs is, when I impose that  
3 20-percent raise to Mr. Sheffel, it stays  
4 in place. Did it alter a term of  
5 condition in fiscal '13? No, it did not.  
6 It was the status quo that existed when  
7 fiscal '13 happened to roll around.

8 Now, maybe Mr. Sheffel is going to  
9 demand bargaining. Under Article 1,  
10 Section 6, I must respond, and under  
11 Chapter 447, I must respond as the  
12 employer. I must go to the table. I must  
13 bargain in good faith, and maybe we'll  
14 reach an agreement whereby I give him his  
15 30 percent, only now it would be another  
16 10 percent, or maybe we'll reach an  
17 agreement where I take back the 20 percent  
18 that I gave him last year, but we're only  
19 going to do it under bargaining or through  
20 impasse, and that is what the law says.

21 I'm going to take you quickly through  
22 the impasse process, because I think it  
23 elucidates what we are talking about.

24 Under the ordinary process, the  
25 parties, the employer and the union,

1           bargain. They don't reach an agreement.

2           Somebody declares impasse.

3                   A special magistrate is appointed by  
4           PERC, chosen by the parties. The special  
5           magistrate has a hearing. The two parties  
6           present their sides of what they have been  
7           bargaining about. The two sides brief the  
8           mater.

9                   The special magistrate renders a  
10          decision. His decision is not binding;  
11          it's advisory only. The recommendation or  
12          decision of the special magistrate is  
13          presented to the union and it's presented  
14          to the legislative body of the public  
15          employer, in our case, the city  
16          commission.

17                   The recommendation of a special  
18          magistrate may be accepted in whole or in  
19          part by either side. It may be rejected  
20          in whole or in part by the other side. If  
21          any part of it is rejected, that piece  
22          that is rejected, or all of it if all of  
23          it is rejected, goes to the legislative  
24          body -- in our case, the city commission  
25          -- for resolution of the impasse, and that

1 is called imposition. That's the final  
2 step; imposition.

3 The legislative body hears from city  
4 staff and it hears from the union and it  
5 make a decision. It takes a vote and it  
6 says, we are going to give Mr. Sheffel his  
7 20-percent raise. We're not going to give  
8 him his 30-percent raise, or whatever it  
9 does, or in this case it says, we are  
10 going to change the pension. We're going  
11 to take whatever steps are necessary to  
12 change the pension, which in this case  
13 included a referendum.

14 This process takes months. It can  
15 take more than a year. And it typically  
16 until recently only happened when the  
17 parties were at the end of a contract and  
18 were negotiating for a new one. Why?  
19 Because that's the only time that it came  
20 up.

21 There were some other rare cases if  
22 you were going to try to do some midterm  
23 changes through a reopener or this or  
24 that, but only since financial urgency has  
25 been utilized, which really only the last

1 three years to any real degree has this  
2 idea of going to impasse midterm in a  
3 contract arisen.

4 So, we're trying to fit together  
5 financial urgency, and all financial  
6 urgency does is open the door to impasse,  
7 because ordinarily in the middle of a  
8 contract you can't get to impasse because  
9 you can't force a party to a midterm  
10 contract to come to the table.

11 Mr. Employer, we would like to bargain.  
12 The employer says, we're in the middle of  
13 a contract. You agreed to this. I don't  
14 have to change it. I don't have to come  
15 bargain with you.

16 Financial urgency says, yes, you do.  
17 You can force the other party to come to  
18 the table so you can bargain, so you can  
19 get to that impasse procedure if you can't  
20 reach an agreement in the middle of a  
21 contract.

22 Section 403 -- Section 409(5) just  
23 says if you get to the impasse, see  
24 Section 403. It doesn't spell out  
25 anything about what you do; it just says

1 go to 403. 403 goes through that whole  
2 process that I just told you and includes  
3 the language about the fiscal year and all  
4 of the decisional law that comes along  
5 with it.

6 Plaintiff's position requires that  
7 the Court determine that changes made  
8 through impasse pursuant to a financial  
9 urgency snap back after a single fiscal  
10 year. You're being asked to construe a  
11 novel question of law under Section  
12 409(5), which has been construed by a  
13 court in any even tangentially-related way  
14 only twice, and both of those cases have  
15 been cited to you; the Manatee and an  
16 older case, Indian River, out of the 4th  
17 D.C.A. that bears tangentially on our  
18 issues here.

19 What would be the implications of  
20 ruling the way Plaintiffs want the Court  
21 to rule? That the terms are good only for  
22 a single fiscal year, either because the  
23 resolution, the Hollywood resolution said  
24 this pertains to X fiscal year, or because  
25 Section 403 has the fiscal year language

1 in it? What would be the implication of  
2 that? Well, it would be exactly what  
3 they're asking for, that the terms and  
4 conditions of employment snap back to what  
5 they were. Presumably, in their view, of  
6 course, they want it to snap back to what  
7 it was prior to the modification. Think  
8 about the implications of that on a  
9 pension plan.

10 For 12 months we've had this  
11 particular regime in place. It was a  
12 thorough revision of the pension. It's in  
13 your materials. It's part of the  
14 evidence.

15 They eliminated what is called a drop  
16 program. I imagine you're familiar with  
17 that. They've changed multipliers.  
18 They've changed retirement dates. They've  
19 made a lot of changes, significant  
20 changes. It had to be significant in  
21 order to get eight and a half million  
22 dollars worth of savings out of that in a  
23 year.

24 It's not just these two plans.  
25 There's a third plan that's not before

1           you, as well. Changes were made as well.

2           What happens if all of that snaps  
3 back, particularly in a situation like a  
4 pension where contributions and  
5 liabilities of the plan are actuarially  
6 determined and amortized over 30 to 40  
7 years? Chaos happens, is what happens.

8           You've got terms and conditions of  
9 employment and you have enormous financial  
10 obligations of the employer, not to  
11 mention the finances of the employees  
12 yo-yoing every year. We're up. We're  
13 down. We're out. We're sideways. It's a  
14 mess, and there's no predictability. That  
15 surely cannot be the public policy  
16 implications of financial urgency, and  
17 it's not the law of labor in this state.

18           The law of labor in this state, let's  
19 take a look at Tab 6 in the second section  
20 of the binder, and this is Communications  
21 Workers of America vs. City of  
22 Gainesville, 1994.

23           THE COURT: I've got it.

24           MR. MILLER: Take a look at page 6 of  
25 this PERC decision.

1 THE COURT: Wait a minute. I've got  
2 to get it out of my mind.

3 It says City of Gainesville. I'm  
4 thinking about tomorrow's L.S.U. --

5 MR. BERGER: It is, your Honor.

6 THE COURT: -- Florida game.

7 MR. BERGER: It is.

8 MR. ELKINS: Go Gators.

9 THE COURT: I've got to get back  
10 to --

11 MR. BERGER: It is the big game.

12 THE COURT: I'm rooting for Florida  
13 only because it's a Florida team. It  
14 doesn't mean I'm a number one Gator fan --  
15 sorry -- but it's a Florida team, so  
16 I'm --

17 MR. MILLER: It's a hierarchy of  
18 loyalty.

19 THE COURT: All right.

20 MR. BERGER: Your Honor, I'm a  
21 Tennessee football season ticket holder.  
22 Does that mean you'll rule against me  
23 automatically?

24 MR. MILLER: He won't, because I'm a  
25 Tennessee alum as well.

1 THE COURT: I won't volunteer an  
2 answer.

3 MR. MILLER: We have something in  
4 common.

5 (A recess was taken.)

6 THE COURT: All right.

7 We are at the case.

8 MR. MILLER: We're at the case.

9 Look at page 6.

10 THE COURT: Page 6.

11 MR. MILLER: And in the middle of the  
12 page, the case is referring to another  
13 case, Hillsborough County P.B.A. vs. City  
14 of New Port Ritchie.

15 THE COURT: I see that.

16 MR. MILLER: And it characterizes the  
17 case, and in fact this is close to a quote  
18 from that case, and I will provide that  
19 case to you.

20 What occurred in Hillsborough County  
21 vs. New Port Richie, is that the city  
22 imposed some changes through impasse,  
23 including some changes that were  
24 beneficial to the employees, some  
25 increases to the employees, and the union

1 didn't like an aspect of what was imposed,  
2 and it did like some other aspects of what  
3 was imposed. And the union filed an  
4 unfair labor practice and it said, okay.  
5 We went ahead and we ratified that  
6 agreement. We voted in favor of those  
7 changes. We were coerced into doing that,  
8 because we wouldn't have gotten the good  
9 stuff unless we agreed to the bad stuff,  
10 and that's unfair.

11 And you see that in this case where  
12 it says the union ratified the agreement  
13 under the mistaken belief that unless it  
14 did so it would not secure even the items  
15 resolved by the legislative body.

16 THE COURT: Where are you reading  
17 from now?

18 MR. MILLER: I am now in the middle  
19 of the page, the paragraph beginning, "The  
20 commission's decision in Hillsborough  
21 County".

22 THE COURT: Okay.

23 MR. MILLER: The last sentence of  
24 that paragraph, the union ratified the  
25 agreement under the mistaken belief.

1           Well, what was the union's mistaken  
2 belief? That's answered in the next  
3 paragraph.

4           The union's mistaken belief was that  
5 those items that had been imposed in the  
6 prior fiscal year by the city commission  
7 were going to go away at the end of that  
8 fiscal year unless the union ratified the  
9 agreement.

10           PERC says not so. You would have  
11 secured those items as part of the status  
12 quo, ratification or not, because they had  
13 been imposed and they were now what you  
14 were operating under until there was  
15 another change by impasse or by agreement.  
16 That's the law. You change it during one  
17 fiscal year, you're restricted to changing  
18 during the relevant fiscal year, and  
19 thereafter it's the status quo. That's  
20 how it is until you bargain again.

21           Take a look -- well, let me give you  
22 the full New Port Richie case, but the  
23 crux of it is summarized there in the  
24 C.W.A. case.

25           THE COURT: Thank you.

1 MR. MILLER: And there is the New  
2 Port Richie case, Your Honor.

3 Let me refer you -- did I give you  
4 the New Port Richie case, Your Honor?

5 THE COURT: Yes.

6 MR. MILLER: Okay.

7 THE COURT: 1984.

8 MR. MILLER: Right.

9 Let me refer you to another case,  
10 Daytona Beach Fire Rescue vs. I.F.F., June  
11 21, 2012, PERC.

12 MR. BERGER: Your Honor, these are  
13 pre Chiles cases.

14 THE COURT: They're, what?

15 MR. BERGER: They're pre Chiles.

16 MR. MILLER: 2012?

17 MR. BERGER: The 1984 case.

18 THE COURT: Well, now, he said --

19 MR. ELKINS: He said another one.

20 THE COURT: So, the New Port Richie  
21 case, you're talking about is pre Chiles?

22 MR. BERGER: Yes, pre Chiles, right.

23 THE COURT: Let me make a note here.

24 Pre Chiles.

25 Okay.

1 MR. MILLER: Chiles is really not  
2 implicated by these cases.

3 Here is the Daytona Beach case, and  
4 if you will look --

5 THE COURT: June 21st is here.

6 MR. MILLER: -- and I'm just going to  
7 give you a --

8 MR. BERGER: I apologize for  
9 interrupting.

10 THE COURT: The ink smudges.

11 All right.

12 MR. MILLER: If you look at page 4 of  
13 the Daytona Beach case -- and I'll just  
14 read the cite into the record -- 39 F.  
15 PERC, paragraph 28 June 21, 2012.

16 THE COURT: That's a PERC case.

17 MR. MILLER: And if you look on page  
18 4 of this case and the third full  
19 paragraph beginning "Local 1162" --

20 THE COURT: Exceptions 3 and 5?

21 MR. MILLER: Correct.

22 THE COURT: All right.

23 MR. MILLER: And the last two  
24 sentences of that paragraph:

25 In so far as the city commission was

1 acting in this case as the legislative  
2 body, to impose a new status quo on wages  
3 for one fiscal year, it could limit the  
4 language of the wage article status quo  
5 regarding automatic pay raises to the  
6 expiration of that year.

7 In other words, if it wanted to it  
8 could say they expire at the end of the  
9 fiscal year.

10 Quoting again:

11 If there were no contract thereafter,  
12 the new status quo -- i.e., the wage  
13 changes -- would continue.

14 What is changed in one fiscal year  
15 continues as the status quo thereafter  
16 until changed.

17 I apologize for the delay while I  
18 sift through this binder.

19 THE COURT: That's all right.

20 How are you doing? Are you okay?

21 THE COURT REPORTER: Oh, yes.

22 THE COURT: Do you need a break?

23 THE COURT REPORTER: No, Your Honor.

24 THE COURT: If you do, let me know.

25 THE COURT REPORTER: Thank you.

1           MR. BERGER: I'm going to need, with  
2           the Court's permission, just a brief  
3           rebuttal, and if you don't --

4           THE COURT: Oh, yes. I'll give it to  
5           you. We're fine.

6           MR. MILLER: If we look at the City  
7           of Hollywood case relied upon by the  
8           Plaintiffs, which is in the last section  
9           of the binder at Tab 6, the City of  
10          Hollywood vs. AFSCME, the municipal  
11          employees.

12          THE COURT: One moment.

13          MR. MILLER: Which is 1985.

14          THE COURT: The City of Hollywood vs.  
15          Hollywood Municipal Employees?

16          MR. MILLER: Yes, Your Honor. Page  
17          5.

18          THE COURT: May 3rd, 1985.

19          MR. MILLER: The point of this case  
20          is that the city and the union reached an  
21          impasse, continued to engage in bargaining  
22          post special magistrate hearings, which is  
23          fine under the law, and continued to  
24          bargain about items that had been  
25          presented to the special magistrate and

1           opined on by the special magistrate.

2           Totally fine. Completely fine under  
3           labor law. You can reach an agreement at  
4           any time. It doesn't have anything to do  
5           with impasse, however, although that's  
6           what the union asserted in this case.

7           The union asserted that since they  
8           were still bargaining with the city about  
9           items 1 through 7 in the -- however, I'm  
10          making these numbers up -- 17-item impasse  
11          process -- items 1 through 7 were no  
12          longer on the table for imposition by the  
13          city commission.

14          PERC said, no, that's not true; there  
15          is finality at the end of the special  
16          magistrate process, and that's what the  
17          city commission or the employer gets to  
18          rule upon in an imposition hearing.

19          This case is not on point.

20          This case deals at least in part with  
21          the idea of whether an employer can impose  
22          duration clauses. A duration clause is,  
23          the contract expires on such-and-such a  
24          date. The contract is of such-and-such a  
25          duration.

1           PERC, by statute -- or not PERC by  
2           statute -- but the legislature by statute  
3           has said, you can't impose a duration  
4           clause, and there is some discussion in  
5           Plaintiff's papers about how that all came  
6           about.

7           It's not relevant. There is no  
8           duration clause in question here.

9           What we're talking about is whether  
10          the employer -- in this case the City of  
11          Hollywood -- imposed an alteration that  
12          took effect after the fiscal year in  
13          question. If it took effect during, or  
14          was affected perhaps is a better way to  
15          put it -- if it was affected during the  
16          fiscal year in question, it continues as a  
17          status quo item until it's changed by  
18          bargaining or impasse. I think I've said  
19          that about 17 times now. And that is  
20          exactly the situation that we have in this  
21          case. Therefore, the Plaintiff's view of  
22          labor law and how it operates through the  
23          impasse procedure is mistaken.

24          The mention of a fiscal year in the  
25          financial urgency resolutions is

1           irrelevant to the length of the financial  
2           urgency. It is relevant only to whether  
3           the financial urgency was declared in good  
4           faith and that it actually existed as of  
5           that date.

6           The Plaintiff's view that there must  
7           somehow be a reversion of imposed terms  
8           and conditions of employment to the prior  
9           state at the end of the fiscal year  
10          arising either from that resolution or  
11          from 403 is, as these cases and the cases  
12          that it cites, all of which deal with an  
13          alteration that occurred after the end of  
14          a fiscal year and was therefore illegal,  
15          not with an alteration that occurred  
16          within a fiscal year and continued as  
17          status quo, is mistaken.

18          Their view of the law is wrong. The  
19          city is entitled to judgment as a matter  
20          of law on any set of facts that have been  
21          argued to you.

22          I'm going to step back one more time  
23          to close.

24          It's five after three. I've been  
25          talking I don't know how long -- a long

1 time.

2 THE COURT: You're a lawyer. You do  
3 have -- you are still in good standing  
4 with the Florida Bar, right?

5 MR. MILLER: I am.

6 THE COURT: All right.

7 MR. MILLER: The last I checked.  
8 I check frequently.

9 MR. BERGER: Even though he went to  
10 Tennessee.

11 MR. MILLER: That's true.

12 I went to a Florida law school.

13 MR. BERGER: You've redeemed  
14 yourself.

15 MR. MILLER: The bottom line here,  
16 Your Honor, is --

17 THE COURT: Has he snapped back  
18 though to Tennessee?

19 MR. BERGER: I don't know. We'll  
20 find out.

21 MR. MILLER: I snap back once in  
22 awhile to go see my dad.

23 What we've been talking about this  
24 whole time are rather astoundingly  
25 intricate provisions of labor law, most of

1       which, if not all of which are before the  
2       D.C.A.s as we speak. And the central  
3       question of which, or a central question,  
4       the Chiles standard, has already been  
5       deferred by the D.C.A. back to PERC for  
6       further consideration.

7               This is not circuit court  
8       jurisdiction. This is PERC jurisdiction.  
9       The Court should not go here. The Court  
10      should defer to PERC where these questions  
11      are already being debated, and the D.C.A.s  
12      where judicial review is available as the  
13      Administrative Procedures Act foresees.

14             You're being invited to put an  
15      opinion out there that will potentially be  
16      in conflict with decisions of the D.C.A.s,  
17      including the one in which you sit that  
18      will -- well, it will just be a mess.

19             The Court should defer jurisdiction.

20             THE COURT: Do you know what issue is  
21      actually before our 4th D.C.A. right now?  
22      I mean, do you know, or are you --

23             MR. MILLER: I'm intimately  
24      acquainted with the issues.

25             THE COURT: What issue is up there?

1 Is it close to our issue? Is it an issue  
2 as to whether or not this whole arena of  
3 issues should go to PERC?

4 MR. MILLER: No. The question before  
5 the D.C.A. has already been to PERC and is  
6 in appeal from PERC.

7 THE COURT: I know. But what's the  
8 issue in our circuit that's up in front of  
9 the 4th right now?

10 MR. MILLER: There are a plethora of  
11 issues, and they do go to the legality of  
12 the change of the pension ordinance. Was  
13 there a financial urgency for 2012? Was  
14 it implemented correctly? If so, should  
15 something else have happened before it was  
16 implemented?

17 Is Chiles the proper standard? Does  
18 Article 1, Section 6 affect the situation?  
19 Is there an impairment of contract?

20 I haven't gotten the first brief.  
21 It's not due until --

22 THE COURT: Are they --

23 MR. MILLER: -- August 16.

24 THE COURT: Are they -- is the issue  
25 of jurisdiction up there?

1           MR. MILLER: The issue of  
2 jurisdiction?

3           THE COURT: With respect to whether  
4 or not the 4th should defer to PERC?

5           MR. MILLER: No, it's not there  
6 because that matter came from PERC. It  
7 was done correctly in the first place.

8           THE COURT: Oh. So, in other words,  
9 the administrative agency review was  
10 exhausted, and now everybody agrees that  
11 the 4th District has jurisdiction?

12          MR. MILLER: Yes. There is no  
13 question of jurisdiction in that case.

14          THE COURT: Okay. Because you've  
15 argued that strenuously here --

16          MR. MILLER: I know.

17          THE COURT: -- that I should defer.

18          MR. MILLER: And I also in the  
19 last -- well, in my papers I also argue  
20 another Hollywood case. The Broward  
21 Police Benevolent Association sued the  
22 city in circuit court and said that the  
23 city's actions in financial urgency by  
24 changing their contract as to pension --  
25 not the precise question in front of you

1 -- but that lawsuit, of which the order is  
2 in your materials -- it's Broward P.B.A.  
3 vs. Hollywood in the 17th Judicial  
4 Circuit, Judge Tobin Singer.

5 The defense in that case was no  
6 jurisdiction, failure to exhaust  
7 administrative remedies. Judge Tobin  
8 Singer agreed and dismissed it with  
9 prejudice. That case is before the 4th  
10 D.C.A., and I just filed an answer brief.

11 THE COURT: So, this issue is going  
12 in front of the 4th?

13 MR. MILLER: In that case, yes.

14 THE COURT: In that case?

15 MR. MILLER: Yes, on preemptive  
16 jurisdiction and failure to exhaust  
17 administrative remedies grounds.

18 THE COURT: All right.

19 Are you done?

20 MR. MILLER: I am done.

21 THE COURT: So, Mr. Berger, I'm going  
22 to assume that you're going to urge the  
23 Court that I shouldn't join Judge Singer's  
24 case and give the same ruling, correct?

25 MR. BERGER: Of course.

1 Well, first of all, it's not the same  
2 case.

3 THE COURT: Same issue, though,  
4 right?

5 MR. BERGER: No.

6 THE COURT: No? Not even the same  
7 issue?

8 MR. BERGER: No.

9 THE COURT: About deferring to PERC?

10 MR. BERGER: No.

11 THE COURT: Okay.

12 MR. BERGER: No.

13 We are public trustees, and to say  
14 the 4th District Court of Appeals doesn't  
15 handle these cases, you know, that involve  
16 443 is just not true if it's not a direct  
17 labor violation. It's just not a true  
18 statement of the law.

19 The West Palm Beach Association of  
20 Firefighters vs. the Board of City  
21 Commissions of West Palm Beach, the case  
22 did not involve a labor dispute. It did  
23 not go before PERC, but did require an  
24 interpretation of the Public Employee  
25 Collective Bargaining Provisions of 447,

1 just like this case. Okay?

2 THE COURT: 1984?

3 MR. BERGER: Yes. But it's  
4 interpreting the Predecessor Statute.

5 There's no preclusive -- if it  
6 doesn't involve -- the trustees that I  
7 represent are not involved in a labor  
8 dispute.

9 Now, we are involved in determining  
10 what happens -- and I'm quoting my  
11 colleague -- when a financial urgency is  
12 used mid term in a contract to disrupt the  
13 contract. What happens when a financial  
14 urgency is used mid term in a contract to  
15 disrupt the contract? That's the issue.  
16 That's the issue I started with. That's  
17 the issue we agreed upon. Okay?

18 So, the financial urgency is used mid  
19 term to disrupt the existing contract.  
20 That's why the cases, the PERC cases he is  
21 citing to you, if there was no contract  
22 thereafter, the new status quo would  
23 continue.

24 We have a contract. There is a  
25 contract thereafter. If they didn't want

1 us to have a contract it was very simple.  
2 It's very simple what they could have done  
3 and what they can do next May. They can  
4 write us a letter saying we would like to  
5 negotiate.

6 After that occurs in the appropriate  
7 language, we would go to probably impasse.  
8 Then they could impose things.

9 THE COURT: Then they could what?

10 MR. BERGER: Impose things. All of  
11 the things we've just heard all of this  
12 wonderful colloquy about for over an hour.

13 They didn't do that. They declared a  
14 financial urgency in the middle of a  
15 contract, an existing contract. They  
16 didn't do all these -- you know, if they  
17 wanted to do these other things, they had  
18 every opportunity to do that last May.  
19 They didn't do that. Next May, they can  
20 do that if they want to.

21 This last May, they didn't do that.  
22 By their own admission they chose to use a  
23 financial urgency during the middle of an  
24 existing contract. They cannot then  
25 impose a new status quo in the middle of

1 an existing contract. They can impose a  
2 new status quo after impasse at the  
3 expiration of a contract where I started  
4 at the beginning, several hours ago.  
5 Right? Very much at the beginning.

6 If there is an existing contract and  
7 there is a financial urgency, because it's  
8 the state, we allow the state or the  
9 government to say there is a financial  
10 urgency. We are in the middle of a  
11 contract. We cannot pay these terms under  
12 the contract for this year.

13 So, Article 1, Section 6, and Article  
14 1, Section 10 are then stretched, if you  
15 will, to allow the state to do it for a  
16 year. Not forever. They can't impose a  
17 new status quo during the middle of  
18 financial urgency while there is an  
19 existing contract.

20 If they wanted to do the things  
21 they're talking about -- I'm not saying  
22 they couldn't, they just haven't done it  
23 right, in our view. And that's --

24 THE COURT: Are you suggesting that  
25 to do it right they should have said to

1 the voters, we want this -- this financial  
2 urgency is going to be of longer duration  
3 and in the ordinance say that it should be  
4 -- so to alert the residents of the city  
5 that if they approve this ordinance  
6 change, it should be effective for two or  
7 three years?

8 MR. BERGER: Well, what I'm --

9 THE COURT: Should they have done  
10 that? Is that the way they should have  
11 cured this problem?

12 MR. BERGER: I don't think they could  
13 -- I think they could have cured the  
14 problem -- well, I don't think they could  
15 have cured this problem.

16 The problem -- if they wished to  
17 impose a new pension system, they could  
18 have said under the contract, under the  
19 renewal provisions that I've shown to you,  
20 we wish to negotiate the pension part of  
21 the contract. That provision needs to be  
22 negotiated as of May of last year. They  
23 could have said that. Then we would have  
24 gone through all of these impasse  
25 procedures and they could have imposed or

1 attempted to impose certain new  
2 conditions.

3 But what they're trying to do is  
4 Orwellian. What they're trying to do is  
5 declare a financial urgency in the middle  
6 of a contract and then impose new  
7 conditions forever.

8 That, they cannot do. That violates  
9 the law as it exists, the constitution.  
10 And when they say we're asking you to  
11 construe their legislative action, we are  
12 asking you to construe their legislative  
13 action as courts have done since the  
14 beginning of time, just as Justice Roberts  
15 did in the health care law; find a way to  
16 make it constitutional, rather than  
17 overrule the legislative action. Because  
18 if the legislative action is to exist  
19 forever, if they're imposing this new  
20 contract provision forever, then it  
21 violates 443.

22 So, we are saying, okay. They've  
23 made legislative action. By the  
24 definition of the Financial Urgency  
25 Statute it can only exist for that period;

1 not forever. Not forever.

2 My colleague, my fellow Tennessean,  
3 said they used the Financial Urgency  
4 Statute midterm in a contract. There is  
5 doubt that's what they did.

6 So, it's mid term in the contract,  
7 and the financial urgency has expired.  
8 The contract is the status quo.

9 Now, they would wish to negotiate a  
10 new contract. There is a procedure for  
11 that under our existing contract and under  
12 existing labor law. Next April or May,  
13 they send us a notice saying, we would  
14 like to negotiate these provisions of the  
15 contract, and that is what they needed to  
16 do last April if they wished this to exist  
17 beyond September 30th. They did not do  
18 that.

19 So, you know, these are very simple  
20 kind of concepts. I appreciate my  
21 colleague's much more astute analysis of  
22 the labor law and PERC and all of that,  
23 and if I were here representing a police  
24 union or a fire union claiming an unfair  
25 labor practice, he might be right. That's

1 not what I'm here doing.

2 What I'm here doing is saying I run a  
3 pension fund. I have trustees to run a  
4 pension fund, and we think we are supposed  
5 to administer that pension fund in  
6 accordance with the existing contract,  
7 because the financial urgency law only  
8 allows you to interrupt existing contracts  
9 for the term of the financial urgency.

10 This is a -- you know, which way this  
11 goes, you know, this is certainly not a  
12 PERC issue. PERC -- this is certainly not  
13 a PERC issue. This is an interpretation  
14 of 447, the Financial Urgency Statute, and  
15 what my clients need to do.

16 Every one of the, quote/unquote, PERC  
17 cases that have been cited -- this is a  
18 dodge-ball type of analysis to avoid the  
19 issue that we have in front of us, that  
20 financial urgency was used mid term in a  
21 contract to disrupt the contract.

22 This is not a traditional impasse.  
23 That's not what was done here. So, why  
24 they used the financial urgency this way,  
25 I mean, that might be something that if a

1 union were challenging them, to say it was  
2 done inappropriately would be a PERC  
3 issue.

4 That's not what we have said. We are  
5 not challenging the declaration of the  
6 financial urgency. We are not -- for the  
7 purposes of this motion we are not  
8 challenging the legislation that was  
9 passed to implement for the purpose of  
10 this motion. We are saying merely that we  
11 don't think that we can administer this  
12 indefinitely this way because it was done  
13 under the Financial Urgency Statute.

14 If it was done through some other  
15 impasse procedure and after they declared  
16 that they wished to negotiate in  
17 accordance with the collective bargaining  
18 agreement, it might be a different issue  
19 and I might not be able to stand here. I  
20 certainly wouldn't have this client. I  
21 certainly wouldn't have this client. So,  
22 this is what we are facing.

23 You know, in terms of all of the  
24 cases that have been otherwise cited, our  
25 unions are public employees. We are

1           trying to avoid having to go to court  
2           through some sort of challenge --

3           MR. THOMPSON:   Avoid PERC.

4           MR. BERGER:   They're trying to avoid  
5           going to PERC, rather, and go to court.  
6           That's every one of these other cases.  
7           That is the Tobin Singer case as well.  
8           Every other case my colleague, my fellow  
9           Volunteer -- although I didn't go there;  
10          my mother taught there -- has argued.

11          This case, as my colleague said and  
12          where we completely agree, is about a  
13          financial urgency declared mid term in a  
14          contract.  When the financial urgency is  
15          over, the status quo is the contract.

16          That is very simply, Judge, what we  
17          think this case is about.

18          MR. BERGER:   Thank you, Mr. Berger.

19          THE COURT:   You're welcome.

20          MR. MILLER:   If I may, very briefly?

21          MR. BERGER:   Make it very brief,  
22          because you took up the majority of the  
23          time.

24          MR. MILLER:   It's complicated stuff.

25          The West Palm Beach case is about

1           whether a city has the authority to refuse  
2           to place a citizen initiative on a ballot.  
3           It had nothing to do with terms and  
4           conditions of employment that --

5           THE COURT:  You're talking about this  
6           1984 case?

7           MR. MILLER:  It's 448 So.2d 1212.

8           THE COURT:  I'll be looking at it.

9           MR. MILLER:  It had nothing to do  
10          with terms and conditions of employment  
11          that had already been imposed or  
12          bargained, nothing to do with impasse.  
13          It's distinguishable.

14          Mr. Berger said that his client wants  
15          to run the pension plan according to the  
16          contract.  The pension plan does not run  
17          according to the contract; the pension  
18          plan runs according to the ordinances that  
19          set forth its provisions.  In Chapter 447  
20          there's a specific section, which is  
21          Section 409, that says where the contract  
22          and an ordinance conflict, the ordinance  
23          controls until the ordinance is changed.

24          Well, in this case the ordinance was  
25          changed, and the ordinance controls.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Thank you, gentlemen.

4 MR. BERGER: Thank you, Your Honor.

5 THE COURT: You'll be hearing from us

6 on two matters; the motion to dismiss

7 count one, and the dueling motions for

8 summary judgment on count --

9 MR. BERGER: Three and four.

10 THE COURT: -- three and four. Three

11 with respect to --

12 MR. BERGER: Three with respect to

13 the police, and four with --

14 THE COURT: And four with respect to

15 the firefighters.

16 MR. BERGER: -- respect to the

17 firefighters, yes, Your Honor.

18 MR. MILLER: Thank you, Your Honor.

19 MR. BERGER: May we be excused, Your

20 Honor?

21 THE COURT: Yes.

22 MR. ELKINS: Thank you, Judge.

23 MR. BERGER: Thank you, Your Honor.

24 THE COURT: Enjoy the weekend.

25 Let's hope we have some good results.

1                   (The proceedings were concluded at  
2           3:30 o'clock, p.m.)

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## C E R T I F I C A T E

THE STATE OF FLORIDA )

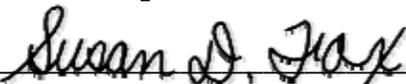
COUNTY OF BROWARD )

I, Susan D. Fox, Florida Professional Reporter and Notary Public in and for the State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing pages are a true and correct transcription of my shorthand notes.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of October, 2012.

  
\_\_\_\_\_  
Susan D. Fox, FPR  
Notary Public - State of Florida  
My Commission EE090684  
My Commission expires 5/15/2015

