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

STEVEN SPARKMAN, LUIS A. ORTIZ, JOHN KIDD, ARNOLD CAMPBELL, DANIEL CASEY, DANA DOKLEAN, and MICHAEL MCKINNEY,

Petitioners,

v.

CITY OF HOLLYWOOD POLICE OFFICERS' RETIREMENT SYSTEM,

Respondent.
_____/

APPEAL: CACE 19-015953 (AW)

APPELLATE DIVISION

RESPONDENT, BOARD OF TRUSTEES FOR THE CITY OF HOLLYWOOD POLICE OFFICERS' RETIREMENT SYSTEM'S RESPONSE TO ORDER TO SHOW CAUSE

ROBERT D. KLAUSNER
Florida Bar No. 244082
STUART A. KAUFMAN
Florida Bar No. 979211
BLANCA T. GREENWOOD
Florida Bar No. 919004
KLAUSNER, KAUFMAN JENSEN & LEVINSON, P.A.
7080 N.W. 4th Street
Plantation, Florida 33317
Telephone: (954) 916-1202
Fax: (954) 916-1232

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ATTORNEY GENERAL OPINION

I. INTRODUCTION

Respondent, the Board of Trustees for the City of Hollywood Police Officers' Retirement System (the "Board"), files this Response, pursuant to Rule 9.100 (j) of the Florida Rules of Appellate Procedure, to the Court's Order Directing Respondent to File a Response to Petition for Writ of Certiorari. For the reasons which follow, the Petition for Writ of Certiorari filed by Petitioners, Steven Sparkman, Luis A. Ortiz, John Kidd, Arnold Campbell, Daniel Casey, Dana Doklean, Michael Mckinney ("Petitioners"), should be denied.

1. The Petitioners failed to provide for a verbatim transcript of the proceedings under appeal. Absent a verbatim transcript the record is inadequate to support quashing or reversing the Board's findings. The Court need proceed no further.

2. The Board accorded due process, observed the essential requirements of law, and its Final Administrative Order Denying Re-Classification of Credited Service of June 28, 2019, ("Final Order") is supported by substantial competent evidence. (Tab 1). The Board's decision is properly affirmed.

The City of Hollywood ("City") established the City of Hollywood Police Officers' Retirement System, ("Plan") to provide eligible police officers with

retirement benefits[1]. In accordance with City of Hollywood City Code §33.125 ("Ordinance"), the Board is responsible for administering the Plan as codified and is vested with the general administration and responsibility for the proper operation of the retirement system. (Tab 2). Moreover, pursuant to Section § 33.132(L), of the Code, "[t]he Board of Trustees shall have the power to examine facts upon which any pensions are granted under this subchapter, and to ascertain if any pension has been granted erroneously, fraudulently, or illegally for any reason." (Tab 3).

II. STATEMENT OF THE CASE

This case is a Petition for Writ of Certiorari seeking review of the Board's final administrative order denying Petitioner's request to reclassify time served as a City of Hollywood corrections officer from the General Employee Retirement System to the City of Hollywood Police Retirement System.

III. STANDARD OF REVIEW

Petitioner has sought a writ of common law certiorari to quash or reverse the Board's Final Order. This Court acts in its appellate capacity in reviewing the Board's Final Order and in considering whether to grant such a writ. Consequently, the scope of review in this proceeding is narrowly prescribed. A circuit

[1] Employees who are not police officers are eligible for retirement under the City of Hollywood General Employee Retirement Plan. §33.072, Hollywood City Code.

court sitting in its appellate capacity may only determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgement are supported by competent substantial evidence. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Pompano Beach Police and Firemen's Pension Fund v. Franza*, 405 So. 2d 446 (Fla. 4th DCA 1981); *City of Hollywood v. South Broward Hospital District*, 504 So. 2d 1308 (Fla. 4th DCA 1987). This standard constitutes the full extent of circuit court review. If the reviewing court finds that the administrative agency afforded the Petitioner due process, reached a decision in line with the law, and supported its decision by any substantial competent evidence, it must uphold the Board's decision even if the court itself would have reached a different conclusion based on the same evidence[2]. See *Franza,* supra. See also *Henshaw v. Kelly,* 440 So. 2d 2, 6 (Fla. 5th DCA 1983) (holding that although some of the evidence might be in conflict "[i]t is not the province of this court to reevaluate conflicting evidence as such action would amount to an improper granting of a trial de novo").

IV. FACTS OF THE CASE

As reflected in the minutes of the April 26, 2019 Board meeting, Petitioner Sparkman appeared before the Board and advised he was hired in 1995 as a

[2] As Petitioners failed, despite sufficient notice of the need, to provide a verbatim record, there is no basis to consider any factual challenge. See argument *infra*.

Corrections Officer for the detention area and spoke of others in a similar situation. (Tab 4). Petitioner Sparkman explained to the Board, in detail, that due to his duties and responsibilities as a corrections officer, he felt his service time should be counted in the Police Pension Plan instead of the General Employee Plan, where his time currently stands. Petitioner Sparkman became a police officer in 1996 and enrolled in the Police Pension Plan at that time. (Petition Appendix Exhibit A). The Board's attorney advised he would look into the matter and advise accordingly.

Contrary to Petitioners' assertions, the item was properly placed on the Agenda and publicly noticed for the June 28, 2019 Board meeting[3]. (Tab 5). For reasons unknown, Petitioners failed to appear at the June 28, 2109 Board meeting. The Board properly and publicly considered the issue, having taken under advisement Board counsel's opinion and Sparkman's previous presentation, and denied Petitioners' request. Prior to issuing its order, the Board provided public opportunity to present facts, testimony and/or evidence relevant to the issue at hand. As reflected in the June 28, 2019 meeting minutes, the opportunity was presented, yet no facts, evidence and/or testimony contrary to Board counsel's opinion was presented. (Tab 6).

Florida State Statutes, Ch.185.05(1) and Ch.185.06(4), grant the Board of Trustees sole responsibility for administering the trust fund and prevent the Board

[3] Agendas are posted on the Plan website and the City website.

from amending any provision of the retirement plan without the approval of the City. (Tab 7, Tab 8). The City of Hollywood has encoded the definition of a police officer in the Ordinance creating the Plan, and the definition does not include corrections officers. The Board is bound by the Ordinance and it must abide by that definition.

V. ARGUMENT

A. Petitioner Has Failed to Provide a Record of The Proceedings Below

The failure to provide a verbatim transcript is fatal to the Petitioner's claim. Absent such record, the Board's finding cannot be reversed.

"The appellant has the affirmative duty to present the appellate court with an adequate record for appellate review; indeed, this rudimentary principle is inseparably connected to and well-grounded in appellate review...[t]hus, in the absence of an adequate record of the proceedings below, we cannot resolve the issues raised in this appeal." *Baez v. Padron*, 715 So. 2d 1128 (Fla. 3d DCA 1998); *Seal Prods. v. Mansfield,* 705 So. 2d 973, 975 (Fla. 3d DCA 1998)*; Van Den Boom v. YLB Invs., Inc.,* 687 So. 2d 964, 965 (Fla. 5th DCA 1997)*; Graham v. Lomar Indus.,* 583 So. 2d 819, 820 (Fla. 4th DCA 1991)*; McNair v. Pavlakos/McNair Dev. Co.,* 576 So. 2d 933, 933 (Fla. 5th DCA 1991). *See also* Fla. R. App. P. 9.200(e).

"When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial

proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory." *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979). "The appropriate means for a party to demonstrate the character of the evidence presented at the hearing is specific references to the transcript of the proceeding." *Jason Borakove v. Florida Unemployment Appeals Com'n and AUCC, Inc.*, 14 So. 3d 249 (Fla. 2009). "Where the crux of Appellant's argument relates to the appeals referee's findings of fact and other evidentiary matters, the absence of a copy of the transcript as part of the appellate record 'is fatal.'" *Id*.

After being provided notice of their responsibility to provide for a verbatim record of the proceeding, Petitioners failed to do so. Therefore, the court lacks a proper record of the proceeding to be reviewed, as required by law. Importantly, each of the Board's Public Notice of meetings and agendas contain the following language:

> "IF ANY PERSON DECIDES TO APPEAL ANY DECISION MADE BY THE BOARD WITH RESPECT TO ANY MATTER CONSIDERED AT SUCH MEETING OR HEARING, THEY WILL NEED A RECORD OF THE PROCEEDINGS, AND FOR SUCH PURPOSE, THEY WILL NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE WHICH THE APPEAL IS TO BE BASED."

The notice and meeting agenda for the June 28, 2019, Board meeting clearly advised Petitioner of the requirement for a verbatim record of the proceeding for an appeal.

Moreover, the Board is not required to provide a verbatim transcript of meetings[4]. Attorney General Opinion 082-47, makes a clear distinction between minutes and a verbatim transcript:

> My research has failed to disclose any authority whose definition of the term 'minutes' is construed to mean a word for word or verbatim transcript of a proceeding. It is therefore my opinion that the term 'minutes' as used in §286.011 (2) F.S., means as its common and ordinary usage exemplifies, a brief summary or series of brief notes or memoranda of the meeting...By examining the provisions of §286.011 (2) F.S., it becomes clearly evident that the Legislature realized the difference between a 'verbatim record of the proceedings' and 'minutes of a meeting.' (Tab 9).

Petitioner has failed to provide a record, i.e. a verbatim transcript, as required by law and as necessary for this Court's consideration.

Courts have long held that it is Petitioner's duty to create an appendix accompanying the Petition. Failure to do so warrants dismissal. *McCray v. County of Volusia,* 400 So. 2d 511 (Fla. 5th DCA 1981)*; Aleshire v. Ackerman,* 418 So. 2d 307 (Fla. 5th DCA 1982). Petitioner's failure to secure a verbatim record despite a clear advance admonition to the contrary effectively forecloses the advancement of the

[4] Ch. 286.011(2), Fla. Stat.

petition as it can never demonstrate a preliminary basis for relief. *See Aleshire, supra; McCray, supra.* (no rule to show cause can issue where petition and appendix are deficient). Petitioners' Appendix is devoid of the required record and warrants a denial of the Petition.

B. Due Process was accorded.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In *Mathews v. Eldrige*, 96 S.Ct. 893, (1976), a case regarding the termination of social security benefits, the Supreme Court reasoned that an evidentiary hearing was not required and that the present administrative procedures established for such terminations fully comported with due process.

> "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); *Goldberg v. Kelly*, supra, 397 U.S., at 263-266, 90 S.Ct., at 1018-1020; *Cafeteria Workers v. McElroy*, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will

> be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022…Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is factor which must be weighed.
>
> Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it; all that is necessary is that procedure be tailored, in light of decision to be made, to capacities and circumstances of those who are to be heard, to insure that they are given meaningful opportunity to present their case." Id.

Both the minutes of the April 26, 2019, Board meeting and the Final Order reflect that Petitioner Sparkman, on behalf of himself and others in a similar situation, appeared before the Board and presented the facts of his case. The minutes also reflect that Petitioners were made aware that the issue would be considered at a subsequent meeting. The June 28, 2019, Agenda, which is made publicly available, reflects that the matter at hand would be considered by the Board on June 28, 2019. Petitioners had the opportunity to be present and address the Board had they so chosen. In fact, as the minutes of the June 28, 2019 meeting reflect, the Board

publicly and openly inquired if anyone present wished to be recognized. In *Law and Information Services, Inc. v. City of Riviera Beach,* 670 So. 2d 1014 (Fla. 4th DCA 1996), the court, citing *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), reasoned that "when a commission or board meeting has been duly noticed and conducted in public, the public is not deprived of an opportunity to participate in the proceedings if the item at issue before the commission is not one on which members of the public have a right to speak prior to its resolution by the commission or board." Through no fault of the Board, Petitioners were not present and provided no opinion or evidence contrary to that of Board counsel. Petitioners do not contest the factual basis upon which the Board made its finding and further proceedings would only lead to unnecessary fiscal and administrative burdens in violation of *Mathews*.

Moreover, the courts have a longstanding history of recognizing that administrative proceedings do not have the same stringent requirements as courts of justice. See *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142 (Fla. 2017); *Jones v. City of Hialeah*, 294 So. 2d 686 (Fla. 3d DCA 1974). The essential facts of Petitioners' status are not in dispute. Petitioners were correctional officers for the City of Hollywood who later on went to the police academy and became certified as police officers within the definition of the Plan.[5]

[5] §33.126, City of Hollywood Code

The Plan language is clear and unambiguous that creditable service "shall only include that period of employment during which such persons are Police Officers as defined herein." §33.127(3), City of Hollywood Code. Regardless of how Petitioners feel they should be classified, the Petitioners were properly credited for the time they were police officers in accordance with the plan's definition of a police officer, and it is the Plan that dictates.

No additional hearing will change the fact that Petitioners were not police officers during the period in question, and any further proceedings regarding an issue of law that has already been properly decided by the Board only serves to needlessly expend fiscal and administrative resources. It follows that, in this particular instance, where the Petitioners were given ample opportunity to present their case; did in fact present their case; where notice was provided in a publicly posted agenda indicating time and place; and, where Petitioners were not present through no fault of the Board, due process was properly accorded.

C. The Board's conclusion observed the essential requirements of law and is based on substantial competent evidence.

In Section §33.126 of the City of Hollywood Code, a police officer is defined as "[a]ny person who is appointed or employed full time by the city, who is certified or required to be certified as a law enforcement officer in compliance with F.S.

§943.1395." The terms of the Plan and Florida State Statute Ch.185.02 limit membership in this Plan to police officers.[6] The term "police officer" was essentially unchanged between the original adoption of Chapter §185 in 1953 and the addition of the certification requirement in 1991. See Chapter 91-45, Laws of Florida 1991.

Petitioners were originally hired and certified as corrections officers pursuant to Florida State Statute Ch. 943, for the City of Hollywood Police Department. As Sparkman advised the Board, their assigned duties were primarily custody and transportation of inmates in the City jail. Contrary to Petitioners' assertions, the primary duties for a correction officer are different that a police officer and the legislature has encoded each responsibility and criteria differently[7]. While each may play an integral part in the legal system, equating the two as if they were one and the same is a misjustice to both, one that neither the legislature nor the City of Hollywood is prepared to make. In denying Petitioners' request, the Board is following the City Ordinance as it is required to do[8].

In *City of Miami v. Musial,* 291 So. 2d 77 (Fla. 3d DCA 1974), the Third District Court of Appeal denied a transfer from the City's General Employee Retirement plan to the fire and police plan because of the different training for

[6] Ch.185.02(16), Fla. Stat.
[7] Ch. 943.10, Fla. Stat.
[8] See Ch.185.05(1) and 185.06(4), Fla. Stat.

persons in records and identification from those who were police officers, even though the employees all had a police classification. Significantly, the court also noted that a multi-year delay in requesting reclassification constituted a waiver of any potential misclassification.

The Courts have determined that differing job descriptions within the police department led to approval of different pay classifications for persons in the police department corrections division, even though the corrections personnel were classified as police officers. See, *City of Miami v. Rumpf*, 235 So. 2d 341 (Fla. 3d DCA 1970).

Rumpf was a change from the court's findings in *Headley v. Sharpe*, 138 So. 2d 536 (Fla. 3d DCA 1962), where the court had found that the job description for corrections personnel in the city of Miami Police Department met the then applicable definition of police officer for pension purposes.

The *Headley* precedent would have applied if Petitioners had been corrections officers in 1962. However, the passage of time since the applicants were classified from corrections to police and the development of separate certification pathways for corrections and police in Florida support the conclusion that the applicants request must be denied. (See Final Order, Tab 1).

It is well-established that pension benefits are determined by the terms of the governing ordinance and Florida Statutes. Chapter 185 of Florida State Statutes gives the Board the authority to decide all claims for relief[9] and provides that "the sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement trust fund and for making effective the provisions of this chapter are vested in the board of trustees; however, nothing herein shall empower a board of trustees to amend the provisions of a retirement plan without the approval of the municipality."[10]

The Plan language in §33.127(3) of the City Code is clear and unambiguous that creditable service "shall only include that period of employment during which such persons are Police Officers as defined herein." (Tab 10). The Petitioners were properly credited for the time they were police officers in accordance with the Plan's definition of a police officer.[11] The Petitioners' request is tantamount to asking the Board to re-write the ordinance and essentially change the definition of police officer to broaden the period of employment for purposes of calculating creditable time under the Plan. The Board does not have the power to amend, alter or otherwise change provisions the legislature has put in place governing the Plan and

[9] Ch. 185.06(1)(d), Fla. Stat.
[10] Ch. 185.06(4), Fla. Stat.
[11] §33.126, City of Hollywood Code

qualifications contained therein. In *City of Miami v. City of Miami Firefighters' and Police Officers' Retirement Trust & Plan*, 249 So. 3d 709 (Fla. 2018), where the Pension Board attempted to alter an existing Ordinance prior to a Final Order being issued by the Public Employees Relations Commission (PERC). The Third DCA reasoned that "[a]lthough, ultimately, the City may be required to rescind, modify or amend its 2010 pension ordinance to comply with any final order issued by PERC, the obligation and authority to do so rests with the City and not the Board." *Id.*

It is a basic principle of statutory construction that courts "are not at liberty to add words to statutes that were not placed there by legislature." *See Seagrave v. State,* 802 So. 2d 281, (Fla. 2001). "Courts must construe statutes to give each word effect, without limiting the statute's words or adding words not placed there by the legislature." *Martinez v. Golisting.com, Inc.,* 233 So. 3d 1190 (Fla. 2017). The Court does not have the power to change the meaning of a plainly written Ordinance. See *Westphal v. City of St. Petersburg,* 194 So. 3d 311 (Fla. 2016).

The language in the Ordinance is clear and unambiguous. It leaves no room for interpretation different from the Board's interpretation. Section §33-127 simply does not include correctional officers. Police officers are not correctional officers and vice versa. The City of Hollywood in no uncertain terms codified their intent in very succinct and unequivocal language when creating the Plan. In *Palermo v. City of*

Tampa, 945 So. 2d 550 (Fla. 2006), the court, citing *Kephart v. Hadi*, 932 So. 2d 1086 (Fla. 2006), states the "legislative intent must be determined from the words used without looking to rules of construction or speculating as to intent if the language of the statute is clear and unambiguous." Section §33.127(3) is dispositive in this case and can only be changed through legislative action.[12]

As the administrative agency charged by local ordinance with the interpretation of the pension plan, the Board's decision is entitled to great weight and should not be overturned unless "clearly erroneous." *See Williams v. Department of Management Services, Division of Retirement,* 678 So. 2d 1282, 1283 (Fla. 1996) (holding that an agency's interpretation of an operable statute will prevail unless clearly erroneous and not supported by competent substantial evidence); *AmeriSteel Corp. v. Clark,* 691 So. 2d 473 (Fla. 1997) ("an agency's interpretation of a statute it is charged with enforcing is entitled to great deference" and will only be overturned if clearly erroneous); *State ex rel Biscayne Kennel Club v. Board of Professional Regulation,* 276 So. 2d 823, 828 (Fla. 1973). If the Board's interpretation of the ordinance is within the range of possible interpretations, the Board's decision is not clearly erroneous and should be affirmed. *Florida Department of Education v. Cooper,* 858 So. 2d 394 (Fla. 1st DCA 2003).

[12] §33.138, City of Hollywood Code

Applying these principles to this case, this Court should deny the Petition as the Board is the ultimate authority regarding the determination of creditable time under the Plan. Including the time Petitioners spent as correctional officers as creditable time under the Plan is tantamount to rewriting the statute. The terms and conditions of the Plan for what constitutes creditable time were properly interpreted and the Board's Order should not be disturbed. See *Starling v. Jacksonville Police and Fire Pension Board of Trustees,* 656 So.2d 289 (Fla. 1st DCA 1995).

In *Brutus v. Ft. Lauderdale Police and Fire Retirement System Board of Trustees*, No. CACE17-002456 (21), Order (17th Jud. Cir., July 19, 2018), the Judge found that, despite sympathy for the Plaintiff, "under the terms of Chapter 185, Florida Statutes, and the City Code, a police officer must be certified pursuant to section 943.13, Florida Statutes, to be entitled to disability retirement benefits." (Tab 11). Much like Brutus, Petitioners in this case were not certified as police officers for the time they are seeking to be recalculated. Their request, however sympathetic one may be to it, is contrary to the Plan's provisions as set out in the City Code and cannot be granted. Most recently, the Third DCA refused to expand language in a pension ordinance to create a contractual duty that was not expressly stated in the ordinance. See *City of Miami Firefighters' and Police Officers' Retirement Trust & Plan, et al., vs. Lieutenant Jorge Castro, et al.*,

2019 WL 4456066 (Fla. 3rd DCA, Sept. 18, 2019).

VI. CONCLUSION

Petitioner has wholly failed to demonstrate that the Board's Administrative Order Denying Re-Classification of Credited Service should be reversed. Petitioner has not provided a transcript and has committed a fatal error requiring a denial of the Petition. Notwithstanding, Petitioner has failed to demonstrate that the Board's Order departs from the essential requirements of the law and is not supported by substantial competent evidence. Petitioners do not complain of an incomplete record, they offer no additional facts that Board doesn't have, wasn't aware of or didn't consider. Had the Board acted in any way different than what it did, the Board would have been in violation of the Ordinance governing the Plan.

WHEREFORE, Respondent, respectfully prays that the Court deny Petitioner the relief requested and for such other relief as the Court deems just and proper.

Respectfully Submitted,

ROBERT D. KLAUSNER
Florida Bar No. 244082
STUART A. KAUFMAN
Florida Bar No. 979211
BLANCA T. GREENWOOD
Florida Bar No. 919004
KLAUSNER, KAUFMAN JENSEN & LEVINSON, P.A.
7080 N.W. 4th Street
Plantation, Florida 33317
Telephone: (954) 916-1202
Fax: (954) 916-1232

By: ***/s/ Robert D. Klausner***
ROBERT D. KLAUSNER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the court via e-portal and furnished via e-mail, this 15th day of November, 2019 to:

William R. Scherer
Eric M. Yesner
CONRAD & SCHERER LLP
633 South Federal Highway, 8th Floor
Fort Lauderdale, FL 33301
Email: lpiccin@conradscherer.com
eyesner@conradscherer.com
wscherer@conradscherer.com

By: ***/s/ Robert D. Klausner***
ROBERT D. KLAUSNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: ***/s/ Robert D. Klausner***
ROBERT D. KLAUSNER