

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.

- - -
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:
3 BERGER SINGERMAN
4 MITCHELL W. BERGER, ESQUIRE
5 350 East Las Olas Boulevard
6 Suite 1000
7 Fort Lauderdale, Florida 33301

8 BERGER SINGERMAN
9 DANIEL H. THOMPSON, ESQUIRE
10 125 South Gadsden Street
11 Suite 300
12 Tallahassee, Florida 32301

13 CYPEN & CYPEN
14 STEPHEN H. CYPEN, ESQUIRE
15 777 Arthur Godfrey Road
16 Suite 320
17 Miami Beach, Florida 33140

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.)

3 * * * * *

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

