STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL

THE BOARD OF TRUSTEES OF
THE CITY, ETC., ET AL.

Appellant/Petitioner(s),

vs.

CITY OF HOLLYWOOD, ETC.,

Appellee/Respondent.
_____/

CASE NO.: 4D13-0014, 4D13-15
L.T. No.: 12-1000 05, 12-1000 05

REPLY BRIEF OF APPELLANTS

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POINT I.

APPELLANTS HAVE NO REMEDY AT PERC

As stated in their Initial Brief, a central argument of Appellants[1] is that they cannot pursue relief at the Public Employee Relations Commission ("PERC") because they lack a remedy that is both available and adequate there. (Initial Brief, pp. 13 ff.) Among other things, relief is neither available nor adequate because PERC lacks subject matter jurisdiction to hear the matter at issue—how long changes to Ordinances governing the Firefighter and Police Pension Systems can remain in effect, given that the changes were enabled by financial urgency determinations under § 447.4095, Fla. Stat., which had a termination date of September 30, 2012, and which Appellants do not contest; and because the Board Plaintiffs lack standing under any set of circumstances to appear before PERC. (Initial Brief, pp. 19-20) Appellants identified case law supporting the right of a plaintiff in such circumstances to seek declaratory relief in circuit court on matters

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[1] The Appellant/Petitioners ("Appellants") appeal two consolidated cases, one brought by the Board of Trustees of the City of Hollywood Firefighters' Pension System and William Huddleston, and the other by the Board of Trustees of the City of Hollywood Police Officers' Retirement System and Van Szeto. The Firefighters Board and the Police Board will collectively be referred to as the "Board Plaintiffs." Huddleston and Szeto will collectively be known as the "Individual Plaintiffs."

involving the Public Employee Relations Act ("PERA"), Ch. 447, Pt. II, Fla. Stat., if no administrative remedy was available or adequate. (*Id.* at pp. 15, 16, 21-23)

The City of Hollywood ("City") recognizes the Circuit Court's dismissal as based exclusively upon PERC's pre-emptive jurisdiction, thereby rendering irrelevant the issue of availability and exhaustion of PERC administrative remedies. (Answer Brief, p. 3) At least as to the Board Plaintiffs, the City now concedes that the Circuit Court's holding was untenable, and instead tries to find another basis for standing for the Board Plaintiffs. (Answer Brief, p. 15, fn. 4)

The City does this by creating a new theory, that the Board Plaintiffs did have PERC relief available, in the form of one, but only one, remedy—a declaratory statement from PERC as to the longevity of the Ordinances at issue. (Answer Brief, pp. 13 ff.) The City relies for this argument on § 447.207(7), Fla. Stat., which gives PERC the authority to develop by rule a procedure for filing and disposing of petitions for declaratory statements.

The City's argument begs the fundamental question as to the Board Plaintiffs' standing before PERC in the first place, as well as PERC's jurisdiction to consider the specific matter at issue. The City has cited no cases, because there are none, holding that an entity that otherwise lacks standing at PERC can nonetheless obtain a declaratory statement at PERC regarding any PERA-related

matter, or holding that PERC can issue a declaratory statement about a PERA-related matter not otherwise associated with a proceeding under its jurisdiction.

The City cites *In Re Petition for Declaratory Statement of James R. Ervin,* Case No. DS-2005-002, 31 FPER ¶ 73, for the proposition that PERC has sweeping declaratory statement powers under § 447.207(7), Fla. Stat. (Answer Brief, p. 14) That statute does give PERC the authority to develop by rule a procedure for filing and disposing of petitions for declaratory statements. PERC, however, has never enacted procedural rules to implement the statute, as shown by their absence in Chapter 60CC, Florida Administrative Code ("F.A.C."), which contains all of PERC's rules. The PERC opinion instead recognizes that PERC follows the same declaratory statement procedures as other state agencies, which are located in §120.565, Fla. Stat., and implementing Rule 28-105.001, F.A.C. (Opinion, pp. 3-4)

Furthermore, *Ervin* does not stand for the proposition that PERC has unlimited declaratory statement jurisdiction. In *Ervin* an agency fired petitioner, and he appealed the firing to PERC. After losing that appeal, he sought a declaratory statement as to the legality of the agency's actions. PERC concluded that the petitioner could not seek a declaratory statement because he already had his day at PERC. (Opinion, p. 4) In other words, the case holds that even if a

party might otherwise have standing at PERC, the party cannot necessarily use the declaratory statement process to obtain another bite of the apple.

The City never even attempts to identify any provision of law discussed in *Ervin* or elsewhere that would grant the Board Plaintiffs standing to appear before PERC, whether seeking a declaratory statement or otherwise. Instead, the City claims that the Board Plaintiffs could gain that standing simply by virtue of seeking a declaratory statement. The City could not identify a single PERC declaratory statement or appellate case that supports that novel proposition, including the very PERC cases the City cites.[2]

In contrast, there is ample undisputed authority holding that an agency cannot exercise jurisdiction beyond the statutory authority that has expressly been granted to it. As stated, for example, in *East Cent. Regional Wastewater Facilities Operation Bd. V. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th DCA 1995):

> An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.

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[2] The City certainly had plenty of sources from which to find a case to support its claim. PERC alone lists close to 100 declaratory statements on its website, at http://perc.myflorida.com/co/orderResults.aspx?Petitioner=&Respondent=&Prefix=DS

Id., quoting from *Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So.2d 787, 793 (Fla. 1st DCA 1982), *review denied*, 436 So.2d 98 (Fla.1983). The City is wrong, therefore, to claim that PERC has the general authority to issue declaratory statements to anyone on any PERA-related subject, because its authority is limited to considering unfair labor practices and other violations of PERA that PERC consider as summarized in Appellants' Initial Brief. (Initial Brief, pp. 18-20)

The City refutes its own claims of PERC general agency declaratory statement authority when trying to distinguish *Artz ex rel. Artz v. City of Tampa*, 102 So.3d 747 (Fla. 2d DCA 2012), from this case. The City concedes that the case holds that that a party need not exhaust administrative remedies at PERC where it is "demonstrably futile" to do so. (Answer Brief, p. 16) The City thus also accepts the premise for the futility doctrine. As stated in *District Bd. Of Trustees of Broward Community College v. Caldwell,* 959 So.2d 767, 770 (Fla. 4th DCA 2007), which *Artz* cited with approval, the premise is that administrative remedies must be available and adequate. *Artz,* 102 So.3d 750. Instead, the City tries to evade the futility doctrine by claiming that unlike in *Artz*, the Board Plaintiffs still could have brought petitions for declaratory statements. (Answer Brief, p. 16)

In actuality, in *Artz* the court concluded that plaintiffs there had no relief at PERC, but could seek declaratory relief in circuit court. If this Court were to accept the City's theory, the court in *Artz* should have sent plaintiffs back to PERC and told them to file their request for declaratory relief there, rather than to allow them to seek relief in circuit court—even though PERC had already concluded that plaintiffs did not have standing to seek relief at PERC. *Id.* at 749. The City's claim that plaintiffs could still have sought a declaratory statement at PERC even after PERC found plaintiffs not to have standing there (Answer Brief, p. 16) not only lacks precedent or other legal support, but also makes no sense.

As to the Individual Plaintiffs, *Artz* is equally applicable to their standing problems, particularly given that plaintiffs there, retired police and firefighters, might in some other circumstances have had standing at PERC to seek relief. *Id.* City claims that the Individual Plaintiffs cannot complain that they lack standing at PERC because their unions can act on their behalf, through an unfair labor practice claim. (Answer Brief, p. 9) The City does not explain how that could be done, however, given that Appellants have not claimed that any aspect of the City's implementation of its financial urgency determination was an unfair labor practice. While the City claims that the issue of how long the Ordinances could remain in effect could have been heard a PERC proceeding, the City makes no attempt to explain how that could have been done. That should have been a critical part of

the City's argument, given that the validity of the financial urgency determination was not being challenged, much less considered an unfair labor practice.

POINT II.

PERC DOES NOT HAVE PRIMARY JURISDICTION OVER THIS STATUTORY CONSTRUCTION ISSUE

The City's argument here reiterates its first argument, that PERC has jurisdiction over all matters relating to PERA, and fails for the same reason. As previously explained, PERC has such jurisdiction only to extent the jurisdiction has been granted to it by law. Appellants have already provided this Court with a statutory analysis of what elements of PERA are within the jurisdiction of PERC, and which are not. (Initial Brief, pp. 18-20) Even the City has acknowledged that PERC jurisdiction has some limits, albeit only tacitly, by inventing an unsupportable theory about parties being able to use declaratory statements to expand the limits of PERC's jurisdictional authority. The City now tries to apply the primary jurisdiction doctrine in the same unsupportable way.

Instead of directly discussing the scope of PERC jurisdiction by analysis of PERC authority as set forth in PERA, the City cites two unfair labor practice cases that are completely irrelevant to the issue here. Neither involves whether a circuit court has jurisdiction interpret an ordinance in any way related to public employee relations. The first, *Manatee Education Ass'n, FEA AFT (Local 3821), AF:-CIO v. School Board Of Manatee County*, 62 So.3d 1176 (Fla. 1st DCA 2011), does not

even involve the interpretation of an ordinance. The second, *Headley v. City of Miami*, --- So.3d ----, 2013 WL 3770839 (Fla. 1st DCA 2013) (decision not yet final), is a financial urgency case, but involves the review of a decision by PERC as to whether the enactment of the financial urgency determination was an unfair labor practice—once again, not the issue here.

In reality, the City can only cite to cases that support the general concept that if a remedy is available at PERC, it must be pursued there, and cannot be bypassed by seeking the relief in circuit court; and that reviewing courts should give deference to decisions by PERC. The City cannot cite to any case that says that if there is no remedy at PERC as to a PERA-related issue, there is no remedy at all. The only cases on point, such as *Artz*, hold the opposite. While, as stated in both cases the City cites, courts should defer to the expertise of PERC rather than interpret PERA statutes independently, a court cannot defer an issue to PERC if PERC is not in a position to rule on the issue itself.

The City's erroneous application of the law is further demonstrated by its misguided efforts to rely on cases applying the doctrine of "primary agency jurisdiction." For this argument the City relies on cases where a circuit court has jurisdiction over the case, but declines to assert jurisdiction over some or all of the case because a particular matter is capable of being resolved at an administrative agency. That is not the case here, unless the Court is willing to accept the City's

novel argument that the declaratory statement statute provides all-purpose standing to all comers.

The City quotes at length from *Flo-Sun, Inc., v. Kirk,* 783 So.2d 1029, 1036 (Fla. 2001), for the proposition that a court should refrain from exercising its jurisdiction over a matter within the special competence of an agency "until such time as the issue has been ruled upon by the agency." (Answer Brief, pp. 19-20) *Flo-Sun* also recognizes that the doctrine of primary jurisdiction does not divest a circuit court of jurisdiction, it simply calls for "judicial restraint" while the issues are pending before an administrative body. *Id.* at 1041. The City, however, does not identify any PERC case where the issue here is pending. Once again, the issue is not whether the City committed an unfair labor practice in making a financial urgency determination, but the statutory interpretation of Ordinances that were enabled by a financial urgency determination that Appellants do not challenge.

The City's reliance on two other cases only further illustrates why the primary jurisdiction doctrine is not applicable here. In *Chiles v. State Employees Attorneys Guild,* 714 So.2d 502 (Fla. 1st DCA 1998) state-employee attorneys filed a declaratory judgment action in circuit court challenging the constitutionality of a statute precluding them from exercising the right to bargain collectively. The district court confirmed the circuit court's ruling striking down the statute for infringing on constitutionally protected collective bargaining rights. The court did

decline to address certain issues. These related to an analysis of application of the constitutional requirements to certain attorney classifications, which the court found more appropriate for consideration at PERC, and not essential to reaching the merits of the underlying case. *Id.* at 508. Here, the City has not attempted to identify any specific portion of the case that should be severed for consideration at PERC. Since Appellants have no standing to appear at PERC, and seek relief that is not cognizable at PERC, there is nothing to defer to PERC anyway.

The City also discusses *Seitz v. Duval County School Bd.,* 346 So.2d 644 (Fla. 1st DCA 1977), but confuses jurisdiction with agency deference. That case involved an appeal of a circuit court order upholding a public school teacher's dismissal—obviously not a PERC case. In a related matter in PERC was considering whether PERA gave persons the right to have union attorneys present at job performance reviews, something that was not available to the dismissed teacher. The court, however, did not consider that issue essential to consideration of the case. *Id.* at 646-647.

POINT III.

THERE IS NO "RECORD" SUPPORT FOR AFFIRMANCE

Though the matter was being heard on cross motions for summary judgment, Judge Eade ruled, based upon the pleadings alone, that the court had no subject matter jurisdiction to hear the case. (Order, pp. 3-5) Therefore, he did not

consider the merits of the case—i.e., how long the Ordinances could remain in effect. As stated in *Applegate v. Barnett Bank of Tallahassee,* 377 So.2d 1150, 1152 (Fla. 1979), "Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it. . . . . However, a misconception by the trial judge of a controlling principle of law can constitute grounds for reversal." (Citations omitted.) The controlling principle Judge Eade misconceived was jurisdiction. The parties themselves recognized that the merits of the issue involved dueling motions for summary judgment asserting undisputed facts, and neither party sought judgment on the pleadings. (R:284-356) Because consideration of the facts, undisputed or otherwise, are essential to resolution of this case, dismissal based upon the four corners of the complaints was inappropriate.

Those merits involve what the City itself considers to be a "novel" issue. (Answer Brief, p. 22) Notwithstanding that novelty, the City claims as "settled law" for "more than 30 years" that all changes to collective bargaining agreements made through impasse are "permanent." The City therefore argues that it is unnecessary to look at the statutory authority to modify these collective bargaining agreements--nor, apparently, the text of the agreements. (Answer Brief, pp. 22-23)

The City's claim of settled law is inconsistent with case law, PERA, and the Florida Constitution. Determining the life of a collective bargaining agreement is

also a fact-specific inquiry. In *City of Hollywood v. Hollywood Mun. Employees AFSCME Local 2432, AFSCME, AFL-CIO,* 468 So.2d 1036 (Fla. 1st DCA 1985), the court noted that § 447.403(4)(e), Fla. Stat., provides that changes to collective bargaining agreements imposed by impasse cannot be of indefinite duration, and are dependent on the facts of the case. In Appellants' Motion for Partial Summary Judgment, they identified specific facts, outside of the four corners of the complaints, that had a bearing on how long the Hollywood collective bargaining agreements lasted. See, Motion for Partial Summary Judgment, Exhibits "E" through "I" of Appellants Motion for Partial Summary Judgment, (R: 313-337)

Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), demonstrates the inconsistency of the City's argument with the Florida Constitution. The case hold that indefinite legislative enactment of unilateral changes to collective bargaining agreements is subject to strict scrutiny to ensure two fundamental constitutional rights: collective bargaining rights for public employees under Article 1, Section 6; and the prohibition against impartment of contracts in Article 1, Section 10. The protection of these rights is a compelling state interest. *Id.*at 673. It would be unconstitutional, therefore, for the City's declarations of financial urgency, which expired on their own terms on September 30, 2012, to be construed to allow for unilateral changes to the Pension Systems that can last forever, as the City claims can be done.

Notwithstanding *Chiles*, the City claims that the impasse process created by § 447.4095, Fla. Stat., can allow for permanent changes to the Ordinances. The City relies on *Manatee, supra,* 62 So.3rd at 1181, to try to refute the proposition that a government must "declare financial urgency for each and every year that a modification may persist," or that "modifications made under [the financial urgency statute] must be limited to a single fiscal year." Neither issue was considered in that case. Rather, what the court held was that a public employer was not required "to prove the existence of a financial urgency before" a financial urgency determination was made—hardly the same issue. (*Id.*, emphasis added.)

The City cites two PERC cases to claim that all changes to collective bargaining agreement that is implemented through impasse are "permanent," thereby creating a new "status quo." In reality, the cases recognize that the issue of length is fact specific, and in any event were considered before *Chiles.* In *Communications Workers of America, Local 3170, v. City Of Gainesville*, 20 FPER ¶ 25226 (PERC 1994), PERC found that the City of Gainesville committed an unfair labor practice by attempting use the impasse process to resolve issues that were not in dispute in an ongoing impasse proceeding. The "status quo" discussed there was the status quo as to the matters upon which the parties had agreed pending resolution of the remaining ones in the collective bargaining process. In *City of New Port Richey,* 10 FPER ¶ 15191 (PERC 1984), PERC rejected the

union's unfair labor practice charge because the parties had previously ratified a collective bargaining agreement covering the pertinent time period.

The only PERC financial urgency case the City uses to argue this point is *FOP v. City of Miami,* 38 FPER 330 (PERC 2012). There the issue was whether the facts supported an employer's financial urgency determination in the context of an unfair labor practice, and not whether such a determination could be indefinitely extended. Thus, that case is not pertinent to this case either.

POINT IV.

THE CONSTITUTIONAL ISSUES WERE APPROPRIATE FOR CONSIDERATION IN CIRCUIT COURT

The City claims that Appellants incorrectly asserted that PERC cannot hear cases where constitutional issues are "implicated." (Answer Brief, p. 25) While Appellants disagree with the City's characterization of their argument, the City has undercut its own argument here by coming up with the notion for the first time in its Answer Brief that interested parties can seek declaratory statements at PERC even when they have no other basis for standing or subject matter jurisdiction.

While agencies may be able to consider their constitutional limitations in formulating agency action under certain circumstances, they clearly cannot consider constitutional issues when issuing declaratory statements. As stated, for example, in *Carr v. Old Port Cove Property Owners Ass'n, Inc.*, 8 So.3d 403, 404 (Fla. 4th DCA 2009), "a declaratory statement may not be used to decide

constitutional issues." As to the City's argument about whether agencies can consider declaratory statements where constitutional issues are "implicated," the Forth District said this:

> The DBPR did not err in denying Carr's petition for a declaratory statement. The questions Carr raised in his petition implicate the issue of whether [Old Cove] has the right, under the First Amendment to the United States Constitution, to engage in lobbying, and the DBPR is not authorized to resolve this issue. *See id.* Moreover, if the DBPR were to ignore this constitutional issue, as Carr would have it do, it would not be able to provide Carr and [Old Cove] with a proper interpretation of chapter 718, Florida Statutes (2006).

Id. at 405 (emphasis added). In other words, binding precedent in the Fourth Circuit specifically rejects the City's argument that PERC is fully capable of considering the constitutional issues "implicated" in this case. The City's argument only provides the Court with one more reason for why the Circuit Court erred in dismissing this case on jurisdictional grounds.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's Order Granting Defendant City's Motion for Partial Summary Judgment and Response to Plaintiffs' Motion for Partial Summary Judgment and remand this action to the trial court for consideration of the parties Motions for Partial Summary Judgment on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August, 2013, a true and correct copy of the foregoing was sent via electronic mail and U.S. Mail, postage prepaid, to David C. Miller, dmiller@bmolaw.com, and Michael L. Elkins, melkins@bmolaw.com, attorneys for Defendant, City of Hollywood, Florida, Bryant Miller Olive P.A., SunTrust International Center, 1 Southeast 3rd Avenue, Suite 2200, Miami, Florida 33131.

By: /s/Daniel H. Thompson
Daniel H. Thompson

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief is being submitted in Times New Roman 14-point, and otherwise complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: /s/Daniel H. Thompson
Daniel H. Thompson

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