TAKING THE "URGENT" OUT OF FINANCIAL URGENCY IN FLORIDA PUBLIC SECTOR LABOR LAW

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I. INTRODUCTION

The Financial Urgency section of Florida's Public Employees Relations Act[1] ("PERA") permits a public employer to force a union to the bargaining table when the union could otherwise refuse. Under Florida law, this means that the public employer ultimately can force changes to the contract that controls the terms and conditions of employment of the unionized employees—pay, pension, insurance, hours, almost anything affecting work. The

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1. FLA. STAT. ANN. §§ 447.201–447.609 (West 2017). Financial Urgency is Section 447.4095 of PERA. It states, in its entirety:

> In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

FLA. STAT. ANN. § 447.4095 (West 2017).

plain language of this short Act, just 126 words, seems to make it a powerful tool for a government that finds itself in fiscal crisis.

The Great Recession of the late 2000s pushed many Florida governments toward such crises. The sudden deflation of the real estate bubble hit municipalities especially hard because they are heavily dependent on property tax revenue to fund operations. Cities that had signed multi-year contracts with employee unions, known as "collective bargaining agreements" (CBAs), discovered that the expensive pay and benefits packages to which they had committed themselves during the flush times just before the Recession were now unaffordable.[2]

A few public employers invoked the Financial Urgency section. The Act, although enacted in 1995, had scarcely been before a judge or administrative agency until 2008.[3] Therefore, its use was a venture into all but uncharted legal waters. Predictably, the unions lashed out with litigation.[4] These cases are ongoing and probably will be for years to come. However, that litigation is all postscript. The Florida Supreme Court's initial interpretation of the Act has effectively rendered Financial Urgency meaningless.[5]

II. THE BARGAINING OBLIGATION AND EXCEPTIONS TO IT

Florida is a right-to-work state. The right is set forth in the Florida Constitution, which states:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.[6]

Embedded in that section is the right of collective bargaining. When a union becomes the representative of a group of public employees, the public employer—a city, county, state agency, other unit of government—is obligated by the Florida Constitution and

2. Manatee Educ. Ass'n v. Sch. Dist. of Manatee Cnty., 35 F.P.E.R. ¶ 46 (2009).

3. Pinellas Lodge 43, Fraternal Order of Police v. Sheriff of Pinellas Cnty., 34 F.P.E.R. ¶ 73 (2008).

4. *Id.*; *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46.

5. Headley v. City of Miami, 215 So. 3d 1, 6–7 (Fla. 2017).

6. FLA. CONST. art. I, § 6.

PERA to bargain before changing any term or condition of employment of the represented employees.[7] Absent bargaining, the status quo must be maintained.

Traditionally, three exceptions to the bargaining obligation have been recited: waiver, exigent circumstances, and impasse resolution.[8]

Waivers may be express or implied. Either way, they are construed very narrowly by the Public Employees Relations Commission ("PERC"). A written waiver must be "clear and unmistakable." PERC has stated:

> A "clear and unmistakable" contractual waiver of bargaining rights is demonstrated by language which unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. *Local 2226, IAFF v. City of St. Petersburg Beach*, 10 FPER ¶ 15211 (1984). A waiver of this type must be stated with such precision that simply by reading the pertinent contract provision employees will be reasonably alerted that the employer has the power to change certain terms and conditions of employment unilaterally. *Florida Public Employees Council 79, AFSCME v. Florida*, 10 FPER ¶ 15208 at 417 (1984), *aff'd mem.*, 472 So. 2d 1184 (Fla. 1st DCA 1985).[9]

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7. The courts and the Public Employees Relations Commission ("PERC"), which administers PERA, have so held many times:

> It is well established that an employer breaches its bargaining obligation and commits a per se violation of Section 447.501(1)(a) and (c), Florida Statutes, if, in the absence of clear and unmistakable waiver by the bargaining agent, exigent circumstances requiring immediate action, or legislative body action after impasse, it unilaterally alters the status quo with respect to wages, hours, and other terms and conditions of employment.

Int'l Union of Police Ass'ns v. Sheriff of Lee Cnty., 40 F.P.E.R. ¶ 172 (2013) (citing Fla. Sch. for the Deaf & Blind, Teachers United v. Fla. Sch. for the Deaf & Blind, 11 F.P.E.R. ¶ 16080 (1985)); *e.g.*, Fla. Pub. Emps. Council 79, AFSCME v. Florida, 10 F.P.E.R. ¶ 15208 (1985); Central Fla. Prof'l Fire Fighters v. Bd. of Cnty. Comm'rs of Orange Cnty., 9 F.P.E.R. ¶ 14372 (1983); Indian River Cnty. Educ. Ass'n v. Sch. Bd. of Indian River Cnty., 4 F.P.E.R. ¶ 4262 (1978); Palowitch v. Orange Cnty. Sch. Bd., 3 F.P.E.R. ¶ 280 (1977).

8. Sch. Dist. of Polk Cnty. v. Polk Educ. Ass'n, 100 So. 3d 11, 15 (Fla. 2d Dist. Ct. App. 2011) (quoting Fla. Sch. for Deaf & Blind v. Fla. Sch. for the Deaf & Blind, Teachers United, 483 So. 2d 58, 59 (Fla. 1st Dist. Ct. App. 1986)).

9. Fla. State Lodge, Fraternal Order of Police, Inc. v. Town of Davie, 41 F.P.E.R. ¶ 377 (2015).

Implied waivers will be found only where the circumstances are "such that the only reasonable inference is that [the party] has abandoned it[s] right to negotiate."[10]

Exigent circumstances are events that arise in an emergency and force the employer "to quickly and immediately modify the wages, hours or terms and conditions of employment of its employees."[11] The classic Florida example of exigent circumstances is a hurricane that forces a public employer to have its employees work hours, perform duties, or forego procedures that would be required under the CBA. During such exigent circumstances, the employer does not violate PERA by requiring those changes to terms of employment without bargaining.

Under PERA, an impasse in bargaining may be resolved pursuant to a comprehensive statutory scheme that is unique to Florida.[12] Impasse occurs when, after a reasonable period of bargaining, either party declares it.[13] Thereupon, the parties embark on a lengthy and complex procedural journey summarized as follows:

1. Impasse is declared.
2. Optional mediation may occur (no time limitations).
3. PERC provides a list of special magistrate nominees.
4. Within twenty days, the parties respond to PERC with strikes of nominees.
5. PERC promptly designates the special magistrate.
6. Within ten days, the parties send a list of items at impasse to the magistrate.
7. The magistrate convenes a hearing (this rarely takes place less than thirty days after designation and often is much later—the delay can last many months).
8. After adjournment of the hearing, the parties may submit briefs (this typically is not less than thirty days after the adjournment; the hearing "closes" upon the magistrate's receipt of the briefs).
9. Within fifteen days of the close of the hearing, the magistrate sends a recommended decision to PERC and the parties (extensions, up to months in length, are common).

10. Fla. State Fire Serv. Ass'n v. Florida, 128 So. 3d 160, 165 (Fla. 1st Dist. Ct. App. 2013) (quoting *Sch. Dist. of Polk Cnty.*, 100 So. 3d at 15).

11. Pub. Emps. Union v. City of Lake Worth, 40 F.P.E.R. ¶ 29 (2013).

12. FLA. STAT. ANN. §§ 447.403, 447.405, 447.407 (West 2017).

13. *Id.* § 447.403(1).

> 10. Within twenty days, the parties must approve or reject the magistrate's recommendation; any recommendation not specifically rejected is deemed approved.
> 11. If any recommendation is rejected by either party then, within a reasonable time, the "legislative body" of the public employer—council, commission, other governing body—convenes a public meeting to resolve the impasse.
> 12. Within a reasonable time after resolution by legislative body, the public employer's chief executive reduces to writing a tentative contract that includes any items previously agreed upon and items resolved by the legislative body.
> 13. Within a reasonable time after receipt of the tentative contract, the bargaining unit of employees represented by the union must vote on whether to ratify the tentative contract. If the contract is ratified by both the employees and the legislative body, it goes into effect as a new contract; if not, then the previously agreed items drop out and only the items resolved by the legislative body are changed. All other terms and conditions of employment remain the unchanged status quo.[14]

Even skipping the mediation step, this process can and usually does take many months and may exceed a year in duration.

The obligation to bargain over changes to terms and conditions of employment carries with it the obligation to bargain whenever the other side demands it ("bargain on demand").[15] Refusal to bargain violates PERA. The obligation to bargain on demand does not extend, however, to matters that are covered by an in-force CBA. "It is well established that 'either party may refuse to bargain further with respect to subjects covered by the written terms of a negotiated contract during the contract's life in the absence of a reopener clause.'"[16] CBAs often have multiple-year terms; three years is common and PERC will not invalidate contracts exceeding three years in duration solely for that reason.[17] Thus, the provisions of a CBA can be locked

14. *Id.* § 447.403(1)–(5).

15. Contemporary Cars, Inc. v. Nat'l Labor Relations Bd., 814 F.3d 859, 876–77 (7th Cir. 2016).

16. Port Everglades Auth., 11 F.P.E.R. ¶ 16004 (1984) (quoting Orange Cnty. Police Benevolent Ass'n v. City of Orlando, 6 F.P.E.R. ¶ 11016 at 29 (1979)).

17. *See* FLA. STAT. ANN. § 447.309(5) (West 2017) (stating that CBAs shall not be written with a term of more than three years); Carraway v. Seminole Educ. Ass'n, 26 F.P.E.R. ¶ 31263 (2000) (stating the purpose of Section 447.309(5) is "to provide a window period [of]

in place for three years or more unless both parties agree otherwise.

III. MANAGEMENT RIGHTS AND IMPACT BARGAINING

Terms and conditions of employment are very broadly construed. However, labor law does recognize that some decisions lay beyond the scope of bargaining. This area of law was initially developed under the National Labor Relations Act ("NLRA"),[18] the federal law that governs most private sector union-employer relations.[19]

Under the NLRA, the U.S. Supreme Court has stated, "[T]here is an undeniable limit to the subjects about which bargaining must take place . . . '[i]n general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees.'"[20] The Court in *First National Maintenance Corp. v. National Labor Relations Board* recognized that some management decisions would have a direct impact on employment, but were not bargainable.[21] Thus, an economically motivated decision "akin to the decision of whether to [stay] in business at all" is beyond the scope of mandatory bargaining, even though the decision may eliminate bargaining unit jobs altogether.[22] In reaching this holding, the Court observed that, in enacting the NLRA, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[23] Further, "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the

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at least . . . three years for another union to file a representation petition" but noting nevertheless that a contract longer than three years is not invalid because it will not bar the filing of such a petition).

18. 29 U.S.C. §§ 151–169 (2014).

19. Cases under the NLRA, particularly on matters of first impression, are persuasive authority in interpreting and applying PERA, which was, in part, modeled after the NLRA. *See* City of Lake Worth, 11 F.P.E.R. ¶ 16024 (1984) ("PERA is in large measure patterned after the NLRA. Therefore, in construing the provisions of PERA, the Commission, particularly in cases of first impression, will generally seek guidance from federal precedent interpreting similar provisions of the NLRA.").

20. First Nat'l Maint. Corp. v. Nat'l Labor Relations Bd., 452 U.S. 666, 676 (1981) (quoting Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)).

21. *Id.* at 677.

22. *Id.*

23. *Id.* at 676.

running of a profitable business."[24] Decisions that are not amenable to resolution through the bargaining process are not required to be bargained.[25]

This concept was imported into PERA both expressly in the Act and through case law. The Act sets aside certain "management rights" for which the employer is not required to bargain: to determine the purposes of its agencies, to lay off employees, to direct employees, and to discipline employees for proper cause.[26] Subcontracting work, forcing employees on unpaid furlough, and, in certain circumstances, drug testing have also been found to be management rights.[27] Moreover, the Florida Legislature has evinced a strong public policy that the elected or appointed governing body of a public employer shall have the ultimate say on all matters.[28]

This is an expression of the fundamental democratic tenet that governmental decisions are made pursuant to authority delegated by the citizens to their elected officials.[29] Unelected private parties, such as employees or unions, do not partake in that authority and should not be permitted to usurp it.[30]

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24. *Id.* at 678–79.

25. *Id.* at 678.

26. FLA. STAT. ANN. § 447.209 (West 2017).

27. *See* Local Number 3510, Columbia Cnty. EMS Ass'n v. Colombia Cnty. Bd. of Cnty. Comm'rs, 38 F.P.E.R. ¶ 331 (2012) (finding specifically that the employer's decision to subcontract is a management right); Teamsters Local Union No. 769 v. Martin Cnty. Bd. of Cnty. Comm'rs, Case No. CA-2009-041, 2011 WL 2275530 (PERC Feb. 18, 2011) (opining that "furlough has elements of being a management right" because it affects an employer's "right to relieve employees from duty due to lack of work or for other legitimate reasons"); Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 609 So. 2d 31, 33–35 (Fla. 1992) (finding that, in certain circumstances, drug testing is a prerogative of management and not subject to collective bargaining).

28. *See* City of Miami Beach v. Bd. of Trustees, 91 So. 3d 237, 242 (Fla. 3d Dist. Ct. App. 2012) (pointing out that the legislative body, as elected by the people, is the ultimate authority to decide terms of employment for public employees); *see also* Broward Cnty. Bd. of Comm'rs v. Port Everglades Fire Fighters Ass'n IAFF Local 1989, 23 F.P.E.R. ¶ 28199 (1997) (explaining CBAs providing for binding arbitration in deciding bargaining disputes are void as against Florida public policy, which designates the legislative body as the ultimate decision maker on terms of employment).

29. *See* Chiles v. United Faculty of Fla., 615 So. 2d 671, 677 (Fla. 1993) (McDonald, J., dissenting) (stating "[l]aws must be made by the legislature, not through bargaining by anyone outside the legislature").

30. *See id.* (showing how Justice McDonald argued forcefully on this point). In *Chiles*, discussed below, the Legislature had cut appropriations for an employee pay increase agreed to in a CBA when there was a substantial budget shortfall. A plurality of justices held that the Legislature's action violated the Florida Constitution. Justice McDonald saw this result as an impermissible intrusion by the Court into legislative powers and an upsetting of fundamental constitutional principles.

In both the private and the public sector, management has a prerogative to make decisions without the interference of employees or their unions when those decisions affect core organizational matters. These matters include the purpose of the entity, its structure, the continuation of its existence, the manner in which it accomplishes its mission, its profitability (or, in the public sector, its fiscal soundness), and related questions.[31]

While an employer need not bargain over the decision to exercise a management right, it may nonetheless have an obligation to bargain over the effect or impact that decision has on terms of employment. Under the NLRA, this is referred to as "effects" bargaining; under PERA, it is "impact" bargaining. Impact bargaining requires notice of the decision and a meaningful opportunity to bargain the impact.[32] However, the decision may be implemented by the employer *before* bargaining is completed via agreement or impasse resolution; this is critical for purposes of financial urgency.[33]

> Laws must be made by the legislature, not through bargaining by anyone outside the legislature. Agreeing with the unions' argument that sufficient moneys had been appropriated to cover the pay raises even after the $600 million had been cut from the budget because contracts are involved guts the legislature's power over appropriations. Acceding to the unions' demand in this case would mean that any contract entered into by the state—for purchases, for rent, for collective bargaining—would take precedence in the state budget over any program the legislature might wish to implement.
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> No citizen or group of citizens has a right to a contract for any legislation. The legislature must speak through laws that are binding on all the people, not through contracts that bind only the parties to them. Legislative power cannot be delegated, *Chiles v. Children*, nor can the legislature's power and discretion "be bargained away." *Florida PBA*, 613 So.2d at 418. Thus, the legislature has discretion "either to reduce the appropriations or to raise 'sufficient revenue' to satisfy the appropriations it deems necessary to run the government." *Chiles v. Children*, 589 So.2d at 267. Without the power to cut the specific appropriations it finds necessary, the legislature loses its role as the voice of the people.

Chiles, 615 So. 2d at 677.

31. *See* Leon Cnty. Police Benevolent Ass'n v. City of Tallahassee, 8 F.P.E.R. ¶ 13400 (1982) (finding that an increase in health insurance premiums to be paid by officers was an issue that should have been bargainable after being unilaterally changed); *First Nat'l Maint. Corp.*, 452 U.S. at 677 (discussing the balancing of interests when management decisions affecting the structure, direction, or scope of the enterprise also have impacts on terms and conditions of employment and, therefore, create a tension between bargaining rights and legitimate employer imperatives for control and independence).

32. Amalgamated Transit Union, Local 1579 v. City of Gainesville, 12 F.P.E.R. ¶ 17124 (1986).

33. Jacksonville Supervisors Ass'n Inc. v. City of Jacksonville, 26 F.P.E.R. ¶ 31140 (2000).

IV. GOVERNMENTS' AUTHORITY TO ABROGATE THEIR OWN CONTRACTS[34]

Apart from labor law and collective bargaining, the modification of the terms of a CBA are, at bottom, a contract issue.[35] The use of financial urgency presupposes the existence of a mid-term CBA and its modification, possibly by the unilateral action of the government employer. Put simply, the government is impairing its own contract. Thus, the Contracts Clauses of both the Florida and federal constitutions are implicated.[36] There is a voluminous and well-developed body of law regarding when and how a government may break its own contracts. A vastly abbreviated discussion is all that can be brought within the scope of this Article.

Although drafted in absolute terms, the courts have long permitted governments a degree of flexibility in impairing contracts, even their own contracts.[37] In *United States Trust Co. of New York v. New Jersey*,[38] the state of New Jersey had repealed a

34. The Author wrote most of this Part in conjunction with his presentation to the October 2009 Public Employment Labor Relations Forum, sponsored by the Labor and Employment and the City, County, and Local Government Law sections of the Florida Bar.

35. Bridges v. City of Boynton Beach, 927 So. 2d 1061, 1063 (Fla. 4th Dist. Ct. App. 2006) (holding "[c]ollective bargaining agreements are interpreted under general principles of contract law").

36. FLA. CONST. art. I, § 10; U.S. CONST. art. I, § 10.

37. *See generally* Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 45–46 (2011) (citing Ronald D. Wenkart, *Unilateral Modification of Collective Bargaining Agreements in Times of Fiscal Crisis and Bankruptcy: An Unconstitutional Impairment of Contract?*, 225 EDUC. LAW REP. 1, 19 (2007) (describing cases where the courts gave an unusual amount of deference to legislatures modifying their own contracts, seemingly in opposition to a Supreme Court holding otherwise); Matsuda v. City & Cnty. of Honolulu, 512 F.3d 1148, 1152 (9th Cir. 2008) (describing that when the state action impairs the state's own contracts, the courts will apply a heightened level of scrutiny). That court described the standard of scrutiny:

> Under this heightened scrutiny test, first announced in *U.S. Trust*, we consider (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (citations and internal quotation marks omitted); (2) whether the state law is justified by a "significant and legitimate public purpose," *id.*; and (3) whether the impairment resulting from the law is both "reasonable and necessary to fulfill [such] public purpose," *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889–90 (9th Cir.2003) (per curiam) (citations and internal quotation marks omitted).

Matsuda, 512 F.3d at 1152.

38. 431 U.S. 1 (1977).

statutory agreement to subsidize railway passenger costs. Finding the repeal unconstitutional, the U.S. Supreme Court stated that the sovereign power of states must be reconciled with the requirements of the Contracts Clause: "[A] state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."[39] In *Allied Structural Steel Co. v. Spannous*,[40] in which Minnesota sought to force private employers to pay certain pension benefits to employees, the U.S. Supreme Court articulated the balancing called for in considering a state impairment of contract:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.[41]

In the same vein, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*,[42] stated,

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.[43]

In the labor context, the U.S. Supreme Court has recognized that federal bankruptcy laws permit debtors to abrogate CBAs

39. *Id.* at 30–31.
40. 438 U.S. 234 (1978).
41. *Id.* at 244–45.
42. 378 So. 2d 774 (Fla. 1979).
43. *Id.* at 780.

under appropriate circumstances. In *National Labor Relations Board v. Bildisco & Bildisco*,[44] the debtor employer failed to pay wage increases and benefits at the levels required by a collective bargaining agreement; the National Labor Relations Board found the employer's actions violated federal labor law.[45] The Court, reasoning that a labor agreement deserved special treatment, stated that a bankruptcy court should be satisfied that reasonable efforts had been made to bargain a solution prior to permitting an employer to reject a CBA.[46] Congress amended the Bankruptcy Act in response to *Bildisco*, adding protections for CBAs.[47]

It did not, however, extend those protections to Chapter 9, which governs bankruptcies of municipalities and public agencies.[48] The bankruptcy court in *In re County of Orange*[49] applied *Bildisco*, but also held that the government employer must satisfy California state law in seeking to unilaterally change bargained terms of employment based on a severe financial crisis.[50] The court did not approve sweeping changes proposed by the county, stating: "[W]hen modifying contractual rights under municipal collective bargaining agreements, municipalities must view unilateral action as a last resort."[51] However, a more recent decision by another bankruptcy court in California rejected the idea that state law could put any limitation on a debtor's rights under federal bankruptcy law.[52]

44. 465 U.S. 513 (1984).

45. *Id.* at 519.

46. *Id.* at 523–24, 526.

47. Befort, *supra* note 37, at 20.

48. *See id.* at 20–21 (providing that "[s]ince Section 1113 only applies to Chapter 11 proceedings, the *Bildisco* decision continues to provide the applicable standard for the rejection of collective agreements in municipal bankruptcy proceedings").

49. 179 B.R. 177 (Bankr. C.D. Cal. 1995).

50. *Id.* at 183.

51. *Id.* at 184; *see also* Ass'n of Surrogates & S. Ct. Reporters Within City of N.Y. v. New York, 940 F.2d 766 (2d Cir. 1991), *op. mod. on reh'g*, 969 F.2d 1416 (finding that "lag-payroll" law substantially impaired the State's contractual obligation to the CBAs making it unconstitutional); Sonoma Cnty. Org. of Pub. Emps. v. Cnty. of Sonoma, 591 P.2d 1 (1979) (providing other notable decisions addressing public employers' authority to unilaterally abrogate collective bargaining agreements).

52. In re City of Vallejo, 403 B.R. 72, 76–77 (Bankr. E.D. Cal. 2009) (Memorandum on Motion for Approval of Rejection of Collective Bargaining Agreements).

V. THE ENACTMENT OF FINANCIAL URGENCY

Despite the inclusion of the right-to-work section in the 1968 Florida Constitution, the Legislature did not enact PERA until 1974.[53] There was considerable resistance, both then and through the years, to the idea and the extent of public employee bargaining. In *Dade County Classroom Teachers Ass'n v. Legislature of the State of Florida*,[54] a union sought a writ of mandamus to force the Legislature to enact laws effectuating the right of collective bargaining. After denying the writ on grounds of separation of powers, Chief Justice Roberts wrote:

> In defense of the Legislature, it might be noted that several attempts were made in 1970 to adopt legislation providing appropriate guidelines for collective bargaining by public employees, all of which proposed legislative acts were vetoed by the then Governor. With commendable interest, the Legislature in its 1972 legislative session took note of this constitutional provision relating to collective bargaining and the decision of this Court in Dade County Classroom Teachers Ass'n Inc. v. Ryan, supra, and it entered upon its legislative labors by adopting standards and guidelines for the collective bargaining of fire fighters, a group of public employees. See Chpt. 72–275, 1972 Laws of Florida.
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> We take judicial notice that the 1972 Legislature had many problems to deal with and we must assume that the weight of their labors in other matters precluded the establishing of guidelines for public employees other than the fire fighters. And it is fair to assume that many Legislators, like the then Governor, may be opposed to the principle of collective bargaining for public employees and to incorporating this principle into our State constitution, as was the author of this opinion at the time when a member of the Florida Constitutional Revision Commission. But the people of this State have now spoken on this question in adopting Section 6 of Article I, supra.[55]

He closed the opinion with this delicate caution:

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53. FLA. STAT. § 447.603 (1974).
54. 269 So. 2d 684 (Fla. 1972).
55. *Id.* at 687.

> The Legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field and, therefore, judicial implementation of the rights in question would be premature at this time. If not, this Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility.[56]

When it did act, the Legislature included in PERA a prohibition on bargaining over pensions. Sections 447.301(2) and 447.309(5) provided that employees have no right to bargain about retirement and that CBAs could not include provisions regarding retirement.[57] The Florida Supreme Court found the exclusions facially unconstitutional.[58]

In *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority*,[59] the Court dealt with a contest for supremacy between a civil service board and the right of collective bargaining. The county reached an agreement with a union for changes to certain terms of employment that necessitated a change of rules by the civil service board, an independent legal entity.[60] The board refused to implement the changes.[61] The Court held that the civil service board's action abridged the fundamental right of collective bargaining.[62]

PERA also once included a provision that it was not a violation if the legislative body of a public employer failed to appropriate sufficient money to fund an executed CBA.[63] Thus, the governing

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56. *Id.* at 688.

57. *See* City of Tallahassee v. Pub. Emps. Relations Comm'n, 410 So. 2d 487, 488 (Fla. 1981) (examining whether these Sections of the Florida Statutes are rendered unconstitutional by Article I, Section 6, of the Florida Constitution).

58. *Id.* at 490.

59. 522 So. 2d 358 (Fla. 1988).

60. *Id.* at 359.

61. *Id.*

62. *Id.* at 363.

63. FLA. STAT. § 447.309(2) (1991). The Section stated:

> Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to

body of a public employer could lawfully abrogate its contract with a union simply by refusing to provide sufficient funds. Of course, the unions challenged such actions, but the actions were upheld by district courts.[64] In *State v. Florida Police Benevolent Ass'n*,[65] the Florida Supreme Court held that the mere execution of a labor contract could not override the appropriations power of the Legislature and, thus, the Legislature's "underfunding" of a CBA signed by state officials did not violate the Florida Constitution.[66]

However, in 1993, the Court decided the landmark case of *Chiles v. United Faculty of Florida*.[67] In *Chiles*, the state executed and ratified a CBA with an employee union that the Legislature first funded, then unilaterally modified, and finally abrogated.[68] The Court recognized the sensitivity of its intrusion into the legislative power of appropriations. However, it also recognized the constitutional issues in play. It stated that the Legislature did have authority to reduce appropriations, even for a ratified contract, but only where it had a "compelling state interest."[69] Further, it stated:

> Before that authority can be exercised, however, the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. *Rather, the legislature must demonstrate that the funds are available from no other possible reasonable source*.[70]

> appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

64. Jack E. Ruby, *Fiscal Problems and Unilateral Changes*, PERC NEWS: FLA. PUB. EMPS. REL. COMMISSION 1 (Apr. 1–June 30, 2007), http://perc.myflorida.com/news/PERC_News_Apr_-_Jun_2007.pdf. (citing Sarasota Classified Teachers Ass'n v. Sarasota Cnty. Sch. Dist., 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993) (finding that underfunding by public employer was permissible under the statute)).

65. 613 So. 2d 415 (Fla. 1992).

66. Ruby, *supra* note 64, at 8–9.

67. 615 So. 2d 671 (Fla. 1993).

68. *Id.* at 672.

69. *Id.* at 673.

70. *Id.* (emphasis added). It must be pointed out (and was, by the City of Miami in its brief to the Florida Supreme Court) that *Chiles* is a plurality decision. The salient language, in both formulations, occurred in a single paragraph of the main opinion, authored by Justice Kogan and joined only by Justices Barkett and Shaw. *Id.* Justices Harding and

In 1995, the Florida Legislature amended Section 447.309, the underfunding section, and created Section 447.4095, entitled Financial Urgency.[71] Section 447.309(2), the underfunding section, was amended to apply only to the State:

> (2)(a) Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement.
>
> (b) If the state is a party to a collective bargaining agreement in which less than the requested amount is appropriated by the Legislature, the collective bargaining agreement shall be administered ~~by the chief executive officer~~ on the basis of the amounts appropriated by the Legislature ~~legislative body~~. The failure of the Legislature ~~legislative body~~ to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice. All collective bargaining agreements entered into by the state are subject to the appropriations powers of the Legislature, and the provisions of this section shall not conflict with the exclusive authority of the Legislature to appropriate funds.[72]

The restoration of the authority to underfund to the Legislature and the explicit reference to the appropriations power suggests that this amendment was a direct response to the *Chiles* decision.[73] The doctrine of separation of powers has, at most, limited application on the local level.[74] The creation of financial urgency, therefore, appears to be the Legislature's effort to roll back *Chiles* for non-state governmental entities.[75]

Grimes concurred in the result with separate opinions that did not address or include this language or anything like it. *Id.* at 674.

71. State Contracts—CBAs—Funding 1995 Fla. Sess. Law Serv. Ch. 95–218 (S.B.888) (codified as amended at FLA. STAT. § 447.4095) (West 1995).

72. *Id.* § 1. Additions are shown by underline and deletions are shown by strikethrough.

73. This provision has been held not to violate the constitutional right of collective bargaining. Police Benevolent Ass'n v. State, 818 So. 2d 584, 586 (Fla. 1st Dist. Ct. App. 2002).

74. Citizens for Reform v. Citizens for Open Gov't, 931 So. 2d 977, 989 (Fla. 3d Dist. Ct. App. 2006).

75. As discussed in later sections, the view of financial urgency as a legislative overruling of *Chiles* is an argument that the *Chiles* standard should not be applied to financial urgency. *Infra* Part VI.B.

A. Interpretation of Financial Urgency Through *Manatee Education Association*

Judicial or administrative interpretation of the financial urgency statute before 2008 was sparse, to say the least. In 2002, the Miami-Dade County School Board apparently declared financial urgency, and one or more of its unions filed suits or challenges, including a facial constitutionality challenge.[76] The matters were settled before any decisions or opinions were issued.[77]

Professional Fire Fighters of Pembroke Pines v. City of Pembroke Pines[78] was an "underfunding" case and a summary dismissal by PERC's General Counsel. The General Counsel wrote in a footnote, "[T]he recent legislative enactment of Section 447.4095, Florida Statutes, suggest[s] that an employer's obligation is limited to bargaining over the impact of its underfunding or failure to fund decision."[79]

The first square-on consideration of the financial urgency statute by an appeals court occurred in 2009 in *Manatee Education Ass'n v. School Board of Manatee County*.[80] Facing an estimated $21.5 million budget deficit, the School Board declared financial urgency in 2008 and invited the union to bargain over pay cuts.[81] The union refused to take part in the bargaining or the subsequent impasse proceedings.[82] When the pay cuts were implemented, the union filed an unfair labor practice charge.[83] It contended that the employer must make some prima facie showing of fiscal crisis to the union before financial urgency may even be declared.[84] Other issues, including the definition of financial urgency, which is not set forth in the Act, were also argued.[85]

The case went before the First District Court of Appeal. The appeals court issued a careful opinion. It declined to define financial urgency, remanding that task to PERC on the basis that the administrative agency with labor law expertise should have

76. Ruby, *supra* note 64, at 10.
77. *Id.*
78. 21 F.P.E.R. ¶ 26192 (1995).
79. *City of Pembroke Pines*, 22 F.P.E.R. ¶ 27032 at n.1 and accompanying text (1995).
80. 62 So. 3d 1176, 1183 (Fla. 1st Dist. Ct. App. 2011), *aff'g in part and rev'g in part*, 35 F.P.E.R. ¶ 46 (2009).
81. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46.
82. *Manatee Educ. Ass'n*, 62 So. 3d at 1179–81.
83. *Id.* at 1180.
84. *Id.* at 1181.
85. *Id.* at 1183.

the first crack at the job.[86] The union had argued in favor of applying the *Chiles* standard; the Court also declined to address that question, finding it not necessary for its decision.[87]

What the First District did definitively hold, however, was that an employer need not somehow prove the existence of a financial urgency before the process was invoked. The Court stated, "Requiring proof of financial urgency before resort to Section 447.4095 could result in substantial delays, *delays which could effectively eliminate the ability to address a financial urgency, frustrating the obvious purpose of the statute*."[88]

Thus, going into the Great Recession, there was precious little administrative or judicial guidance on how to navigate financial urgency.

B. *Headley v. City of Miami*

In 2010, the City of Miami was facing a fiscal crisis. For fiscal year 2008–09, the City had a $50 million deficit on a budget of $500 million.[89] For 2010–11, the projected deficit was $80 million; for 2011–12, $100 million.[90] The City's required contributions to employee pensions were expected to increase by $24 million on October 1, 2010.[91] At the same time, property values were falling and, with them, property tax revenue.[92] At one point, the City estimated that labor costs alone would account for 101 percent of its budget.[93] There would be no money to pay for electricity or fuel, to open City buildings, or essentially anything else.[94] More than 1,300 employees, including hundreds of firefighters and police—amounting to one-third of all employees—would have had to be laid off to close the deficit.[95] The millage was already at 7.6 out of a

86. *Id.*
87. *Id.*
88. *Id.* at 1181 (emphasis added). This statement of the obvious purpose of the statute would eventually ring hollow in the light of the Florida Supreme Court's eventual definitive ruling on financial urgency in the *Headley* case, discussed below.
89. Headley v. City of Miami, 38 F.P.E.R. ¶ 330 (2012).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

maximum legal rate of 10.0.[96] Moreover, unemployment among the City's taxpayers was thirteen percent; in some hard-hit areas it approached twenty-five percent.[97] The City judged that its residents could not sustain tax and fee increases.[98]

The CBA with the police union was due to expire on September 30, 2010. The City urgently sought speedy negotiations to cut labor costs. The union dragged its heels. When it did come to the bargaining table, it proposed large pay increases and adamantly refused to consider any reduction in benefits, especially to pensions.[99] It suggested the City raise more money and gave cost-cutting suggestions; when these were analyzed by the City, they turned out to be illusory. By late summer, the projected deficit for 2010–11 had grown to about $115 million.[100]

The City declared financial urgency pursuant to Section 447.4095 on July 28, 2010. The union essentially boycotted the financial urgency process, but the non-financial urgency bargaining continued. On August 31, 2010, the City Commission adopted a resolution that implemented the pay and benefits cuts, including pension cuts.[101] A special magistrate was appointed to hear the financial urgency impasse proceeding.[102] The union filed an unfair labor practice charge with PERC.

The statute begins, "In the event of a financial urgency requiring modification of an agreement . . . ."[103] There is no statutory definition of "financial urgency." Thus, PERC's first task was to say what, exactly, the term means. PERC settled on:

> A financial urgency is a financial condition requiring immediate attention and demanding prompt and decisive action which requires the modification of an agreement; however, it is not necessarily a financial emergency or bankruptcy.[104]

It found, unsurprisingly, that the City of Miami's dire financial condition qualified.

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* The special magistrate hearing never occurred and impasse proceedings were never carried through to completion.
103. FLA. STAT. § 447.4095.
104. *Headley*, 38 F.P.E.R. ¶ 330.

The union had argued that PERC must apply the *Chiles* standard and determine that there were no possible alternative means of funding the CBA. PERC rejected this contention. PERC reasoned that *Chiles* was aimed at the underfunding provision in effect at that time and, therefore, did not apply to financial urgency.[105] PERC also noted that financial urgency was enacted subsequent to *Chiles* and took its cue from a passage in its *Manatee* opinion:

> We are to assume that the legislature was aware of then existing law, including the *Chiles* decision, when it codified a process which brings the employer and the union back to the table to negotiate the impact of a financial urgency requiring the modification of an existing agreement. Section 447.4095 does not place any preconditions on the right to declare a financial urgency.[106]

Thus, PERC felt the union's reliance on *Chiles* was "misplaced" and that the finding of the existence of a financial urgency was sufficient to satisfy the Florida Constitution.[107]

The union also complained that the City had implemented changes to the CBA before completing the statutory impasse procedure. It argued that the impasse procedures must be completed before changes could be implemented. Therefore, PERC was called on to decide whether the statutory language of "negotiate the impact" meant impact bargaining.[108] PERC found that it did. Foreshadowing its conclusion, it stated, "We presume that the Legislature knew the meaning of the phrase 'negotiate the impact,' relative to Florida public sector labor law, and intended that this meaning be used when applying or interpreting the statute."[109] The decision cited one case in a long line of impact-bargaining cases to explain that the City's action was proper. "[A] public employer need only provide notice and a reasonable opportunity to bargain before implementing its decision concerning a management right, but the employer is not required

105. *Id.*

106. *Id.* (quoting Manatee Educ. Ass'n v. Sch. Bd. of Manatee Cnty., 35 F.P.E.R. ¶ 46 (2009)). While not coming right out and saying so, this passage in PERC's *Headley* decision strongly suggests it was also of the view that financial urgency was a Legislative reaction to *Chiles*.

107. *Id.*

108. *Id.*

109. *Id.*

to submit an impasse in negotiations to the statutory resolution process prior to implementation," PERC wrote.[110]

Significantly, PERC stated, "Application of the FOP's interpretation of the impasse process contained in Section 447.4095 *effectively eliminates the City's ability to address a financial urgency in a prompt and decisive manner*. . . . [T]he FOP's interpretation operates to frustrate the Legislative purpose of an abbreviated bargaining process to resolve a financial urgency."[111]

The union appealed, and the case was heard in the First District Court of Appeal.[112]

VI. THREE MAJOR ISSUES

At this point, the three major issues were queued up: (1) what is the definition of financial urgency; (2) what is the constitutional standard against which the modification of a contract pursuant to financial urgency must be judged; and (3) is financial urgency bargaining impact bargaining?

A. What Is Financial Urgency?

Much initial attention had been paid to the definition. There was nothing to go on in the Act, nothing in the legislative history, and nothing in any decision or other report of the scant interpretation of the law through *Manatee*. The PERC hearing officer had relied on dictionary definitions, and PERC itself had modified his definition only slightly.[113] The First District was satisfied with that. It gave the question two paragraphs of analysis and adopted the PERC definition.[114]

110. *Id.* (quoting Jacksonville Supervisors Ass'n v. City of Jacksonville, 26 F.P.E.R. ¶ 31140 at 255–56 (2000)).

111. *Id.* (citing Manatee Educ. Ass'n v. Sch. Bd. of Manatee Cnty., 62 So. 3d 1176, 1181 (Fla. 1st Dist. Ct. App. 2011) (emphasis added)).

112. Headley v. City of Miami, 118 So. 3d 885 (Fla. 1st Dist. Ct. App. 2013), *quashed*, 215 So. 3d 1 (Fla. 2017).

113. *Headley*, 38 F.P.E.R. ¶ 330.

114. *Headley*, 118 So. 3d at 891.

B. Chiles or Not Chiles?

The second question—*Chiles* or something else—received more attention.

The first argument in favor of *Chiles* was simply that it existed. *Chiles* dealt with the abrogation of a CBA by force of law (the appropriations action of the Legislature), and the Florida Supreme Court had announced a standard.[115] It was easy to argue that *Chiles* had addressed the question and that was that. Unions argued that modifying a CBA under financial urgency was analytically identical to underfunding a CBA, which is what occurred in *Chiles.* Underfunding, the argument went, amounted to modifying the CBA in response to financial reasons. Modifying the CBA in response to financial reasons was an exact description of what happened under financial urgency.

In either case, the outcome was the same: the union and employees did not receive the benefit of the bargain to which they and the employer had validly agreed; in either case, the employer unilaterally changed an otherwise binding contract.

The Florida Supreme Court had judged this situation. It had said the government could change its contract only when it had a compelling reason and there was no other reasonable alternative way to fund the contract.[116] That was *Chiles*, and *Chiles* should apply.

Ranged against this were a number of arguments. First, *Chiles* applied to completely different statutory language and was decided before financial urgency was conceived.[117] It was intended to pertain to the limited situation of the underfunding statute that no longer applied to cities.

Second, financial urgency was apparently enacted to overrule *Chiles.*[118] Therefore, it was nonsensical and contrary to legislative intent to apply the very decision financial urgency was supposed to obviate.

115. Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).
116. *Id.*
117. Manatee Cnty. Educ. Ass'n v. Sch. Dist. of Manatee Cnty., 35 F.P.E.R. ¶ 46 (2009).
118. *Id.*

Third, the First District had already declined to apply *Chiles* in the *Manatee* case.[119] True, it had deferred, but PERC had keyed on that when it, too, declined to apply *Chiles.*[120]

Fourth, the statute itself embodied the *Chiles* standard in the provision that the financial urgency be such that it required the modification of an agreement.[121] Where *Chiles* talked about a lack of alternative reasonable sources of funding, the statute spoke of requiring a "modification." The inclusion of that word subsumes the *Chiles* standard. If so, then the determination of the existence of a financial urgency, combined with a lack of reasonable alternative funding, satisfies the Florida Constitution and *Chiles.*

Alternatively, the determination of whether the financial condition *requires* the modification of a CBA could be seen as a political question into which the courts should not inject themselves. PERC has long refused to intrude into the political decision-making of legislative bodies.[122] This important public policy was embodied in *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*,[123] where the Court required a balancing test weighing the right to bargain against a government's control of its structure and priorities. Where the latter outweighs the former, bargaining rights are subordinated.[124]

On a more fundamental level, employers argued that there were very good reasons that the contract rights of public employee unions could be treated differently in extreme situations. The Florida Supreme Court has several times articulated that the collective bargaining rights of public employees are more limited than those of private employees:

> [W]e do not mean to require that the collective bargaining process in the public sector be identical to that in the private sector. We recognize that differences in the two situations

119. Manatee Cnty. Educ. Ass'n v. Sch. Bd. of Manatee Cnty., 62 So. 3d 1176, 1183 (Fla. 1st Dist. Ct. App. 2011).

120. Headley v. City of Miami, 38 F.P.E.R. ¶ 330 (2012).

121. FLA. STAT. § 447.4095 (2017).

122. *E.g.*, *Headley*, 38 F.P.E.R. ¶ 330 (PERC will not second guess political decisions on specific economic choices made to address financial urgency); Martin Cnty. Educ. Ass'n v. Sch. Bd. of Martin Cnty., 18 F.P.E.R. ¶ 23061 at 101 (1992) (PERC will not intrude into decisions on spending priorities).

123. 609 So. 2d 31, 34 (Fla. 1992).

124. *Id.*; *see also* Teamsters v. Martin Cnty., 37 F.P.E.R. ¶ 57 at 62–63 (2011) (finding furloughs to be an example in which employer interests outweighed employee interests and thus constituted a management right).

> require variations in the procedures followed. [We have] recognized that the collective bargaining process for public employees involves many special considerations [and] that it is not the same as in the private sector.[125]

In the same vein, the Third District Court of Appeal wrote:

> [D]ifferent considerations apply to an analysis of the scope of mandatory collective bargaining in public employment as opposed to private employment. . . . [T]he "employers" in public employment collective bargaining are public officials. These public officials are accountable to the voters who in essence then are the true "employers." As a result, public employment collective bargaining is influenced primarily by political forces as opposed to private employment collective bargaining which is essentially shaped by the market.[126]

> In H. Wellington & R. Winter, *The Unions and the Cities*, 21-32 (1971), . . . the authors conclude that to fully translate private sector collective bargaining rights to the public sector would

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125. City of Tallahassee v. Pub. Emps. Relations Comm'n, 410 So. 2d 487, 490–91 (Fla. 1981). Justice McDonald, dissenting in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), made similar observations. The Court's statement in another case that public employees have the same collective bargaining rights as private employees "does not mean, however, that there are no differences between public and private employee bargaining," he wrote. *Id.* at 675. "Article I, section 6 was 'not intended to alter fundamental constitutional principles, such as the separation of powers doctrine' and does not 'give to public employees the same rights as private employees to require the expenditure of funds to implement the negotiated agreement.'" *Id.* at 676 (quoting State v. Fla. Police Benevolent Ass'n, Inc., 613 So. 2d 415, 419 (Fla. 1992)). Justice McDonald further wrote:

> > The subject of wages is one area where there are major differences between the public and private sectors. In dealing with public, rather than private, employees "[w]ages are a legislative matter, and only bargainable to a limited degree." Daniel P. Sullivan, *Public Employee Labor Law* § 11.11, at 75 (1969). As noted by the Second District Court of Appeal, "a wage agreement with a public employer is obviously subject to the necessary public funding which, in turn, necessarily involves the powers, duties and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government." *Pinellas County Police Benevolent Ass'n v. Hillsborough County Aviation Authority*, 347 So.2d 801, 803 (Fla. 2d DCA 1977).

Chiles, 615 So. 2d at 676. If government had a compelling interest, Justice McDonald reasoned, it had not only the authority, but the duty to subject all appropriations, even those to which it was contractually bound, to possible reduction. *Id.* at 677. "Collective bargaining agreements are subject to the legislature's power to appropriate. . . . Thus, 'the legislature's exclusive control over public funds . . . is not an abridgment of the right to bargain, but an inherent limitation' on that right." *Id.* at 676 (citations omitted).

126. City of Miami v. Fraternal Order of Police, 571 So. 2d 1309, 1328 (Fla. 3d Dist. Ct. App. 1989).

> result in "institutionaliz[ing] the power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage." *Id.* at 30.[127]

Governmental contracts—which, by their nature, impose limits and obligations on governments—must be reconciled with the essential aspects of sovereignty, and one who contracts with a municipality is bound to know the limitations of the City's contracting authority.[128]

This difference in public policy in labor law is illustrated by comparing impasse in the private sector to impasse under PERA. Impasse under the NLRA, like impasse under PERA, permits the employer to impose changes to terms and conditions of employment.[129] In broad strokes, bargaining impasse under the NLRA occurs when good faith, post-contract bargaining has exhausted the chances of reaching an agreement.[130] The employer is then privileged to implement changes reasonably comprehended within its pre-impasse proposals.[131] In practice, a declaration of impasse by an employer can be defeated by a union simply by writing a letter stating it feels compromise is possible.[132] Under PERA, as explained above, all that is necessary is a reasonable period of bargaining and a declaration.[133]

The reason that impasse is easy to reach under PERA and difficult to reach under the NLRA arises from the fundamental

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127. *Id.* at 1328 n.18.

128. *Id.*

129. Town of Indian River Shores v. Coll, 378 So. 2d 53, 55 (Fla. 4th Dist. Ct. App. 1980) (citing Ramsey v. City of Kissimmee, 190 So. 474, 477 (Fla. 1939)). As stated in *Baltimore Teachers Union v. Baltimore*, 6 F.3d 1012, 1021 (4th Cir. 1993):

> Public employees—federal or state—by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice.

130. Atrium of Princeton v. Nat'l Labor Relations Bd., 684 F.3d 1310, 1317 (D.C. Cir. 2012).

131. *E.g.*, *id.*

132. *See* 25 AM. JUR. PROOF OF FACTS 2D *Collective Bargaining Impasse* § 11 (1981) (explaining that impasse is reached only after negotiations in good faith have been exhausted and there is no avenue to compromise). *See* Kreisberg v. HealthBridge Mgt., Case No. 3:12–CV–1299, 2012 WL 6553103, at *4 (D. Conn. Dec. 14, 2012) (showing the union's letter regarding pension compromise was an indication that impasse had not been reached).

133. FLA. STAT. § 447.403 (2017).

differences between the private and public sector.[134] The public employer partakes in the sovereignty of the state and of the people.[135] Public services provided by employees of the public cannot be forever stalemated by manipulation of labor statutes. A decision must ultimately be made, and a decision point must be reasonably reachable.[136]

The First District in *Headley* rejected *Chiles* as not "constitutionally mandated."[137] First, it concluded that the existence of a financial urgency was, *per se*, a compelling state interest.[138] However, that was not enough. The plain language of the statute, the Court wrote, provided that the financial urgency be one that "requir[ed]" that an agreement be modified.[139] It explained:

> Thus, if the financial condition can be adequately addressed by other reasonable means, then a modification of the agreement is not "required." If, however, the other reasonable alternatives available to the local government are not adequate to address the financial condition facing the local government, then section 447.4095 permits the local government to unilaterally modify the CBA.[140]

. . .

134. *See generally* Harry H. Wellington & Ralph K. Winter Jr., *The Limits of Collective Bargaining in Public Employment* 78 YALE L. J. 1107, 1116, 1119–23 (1969) (pointing out that labor relations in the public sector are primarily political, rather than economic, as in the private sector). *See also* City of Tallahassee v. Pub. Emps. Relations Comm'n, 410 So. 2d 487, 490–91 (Fla. 1981) (observing that there are procedural differences between private and public sector collective bargaining); City of Miami v. Fraternal Order of Police, 571 So. 2d 1309, 1328 (Fla. 3d Dist. Ct. App. 1989) (stating that different considerations apply to the scope of public sector bargaining, which is influenced primarily by political forces).

135. *See City of Miami*, 571 So. 2d at 1328 (citing Wellington & Winter, *supra* note 134, in observing that the public employer is, ultimately, the citizenry and public sector political bargaining requires special considerations).

136. *See* City of Hollywood v. Hollywood Mun. Emps. AFSCME, 468 So. 2d 1036, 1040 (Fla. 1st Dist. Ct. App. 1985) (stating that the purpose of Section 447.403 is to bring bargaining to an end at a point certain).

137. Headley v. City of Miami, 118 So. 3d 885, 893 (Fla. 1st Dist. Ct. App. 1981). Such a conclusion was necessary, of course. Otherwise, the First District would have been required to apply *Chiles.* Without saying so, the Court seemed to be construing *Chiles* to be limited to the repealed underfunding section, as PERC had done. The Court did state explicitly that it would not "extend" the *Chiles* standard to Section 447.4095.

138. *Id.*

139. *Id.* at 892.

140. *Id.*

> [U]nder section 447.4095, the local government is not required to demonstrate that funds are not available from any other possible source to preserve the agreement; instead, the local government must only show that other potential cost-saving measures and alternative funding sources are unreasonable or inadequate to address the dire financial condition. . . .[141]

The First District seemed to be applying the argument that the "requiring" language subsumed and satisfied the constitutional standard for abrogating a contract.

C. Impact or No Impact?

One might be forgiven for thinking that the question of impact bargaining would have received the least attention. After all, it seems to be right there in the plain language of the statute: "negotiate the impact." Compared with the undefined central term of "financial urgency," impact bargaining seems crystalline. Not so.

Considering the question a little more deeply, the fierce debate over impact bargaining is understandable. After all, at some point, the existence of a financial urgency will become undeniable.[142] It becomes a matter of numbers and degrees. On the other hand, a determination that financial urgency requires only impact bargaining has immediate, practical results. Impact bargaining means the employer may implement the desired changes to the contract promptly.[143] All that is required is notice and a meaningful opportunity to bargain.[144] A meaningful opportunity is merely one that occurs prior to implementation.[145] Non-impact bargaining,

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141. *Id.* at 893.

142. The unions, of course, wanted to push that point as far toward the end of the spectrum as possible and equate it with statutory financial emergency. Florida's financial emergency law provides for state supervision and assistance of local governments and other public entities when they cannot meet specified financial obligations. FLA. STAT. §§ 218.50–218.504 (2017). Financial emergency is a prerequisite for a local government in Florida to declare bankruptcy. It does not permit the abrogation of contracts. *See id.* Financial emergency can have dire consequences for a government, including a downgrading of credit ratings and loss of local control. Like bankruptcy, it is considered a last resort. Every tribunal from PERC to the Florida Supreme Court found that financial urgency, whatever it was, was something less than financial emergency or bankruptcy.

143. *See* Headley v. City of Miami, 38 F.P.E.R. ¶ 330 (2012) (explaining the doctrine of impact bargaining under the Commission's jurisprudence and holding that financial urgency is a situation requiring immediate action).

144. Leon Cnty. PBA v. City of Tallahassee, 8 F.P.E.R. ¶ 13400 at 726 (1982).

145. *Id.* (stating that it is the period between notification and effectuation of a decision that a union will have a significant chance to have meaningful discussions with the employer to try to mitigate impacts of the decision).

however, would require either agreement or completion of the statutory impasse procedure, either of which would likely take many months. Because an "urgency" means that rapid action is required, and the purpose of the statute is to permit such rapid action, impact bargaining would seem to be the obvious intent. PERC and the First District certainly thought so.[146]

The unions argued otherwise.[147]

First, it was argued that the Legislature could not have intended financial urgency to require only impact bargaining because that concept did not exist in Florida labor law in 1995 when the statute was enacted.[148] In its decision, PERC cited *Jacksonville Supervisors Ass'n* in discussion of impact bargaining.[149] *Jacksonville Supervisors Ass'n* was decided in 2000, five years after financial urgency was enacted.[150] Therefore, it was argued, PERC's legal basis was faulty.

However, PERC had decided *Leon County PBA*[151] in 1982. Therein, PERC stated:

> With respect to "effects" bargaining the union must be afforded a "significant opportunity" to bargain. In this regard early notification of the decision is essential because obviously, it is during the period between notification and effectuation of a decision that the union can have a "significant opportunity" to engage in meaningful collective discussions with the employer

146. *See Headley*, 38 F.P.E.R. ¶ 330 (holding that financial urgency bargaining is impact bargaining and the financial urgency statute was correctly invoked in changing the benefits of bargaining unit employees); Headley v. City of Miami, 118 So. 3d 885, 895 (Fla. 1st Dist. Ct. App. 2013); Headley v. City of Miami, 215 So. 3d 1, 5 (Fla. 2017).

147. Why should the unions care? The employer is the party facing the urgency. Public employers have to meet a payroll, keep the lights burning, collect the garbage, maintain the water and sewer system, and pass a balanced budget every year. The employees just show up for work and collect a paycheck. When they retire, they collect a pension. Why does the timing matter to them and their unions? The answer is that, under non-impact bargaining, the status quo must be maintained until there is an agreement or the months-long impasse procedure is completed. Since the employer is seeking to modify the contract, i.e., to cut pay and benefits, the status quo is preferable to the employees. They will seek to preserve it as long as possible. Further, the longer the delay, the more political pressure can be brought to bear on the elected officials who make the final decisions. Elections can even intervene, possibly resulting in the seating of politicians beholden to the unions who will not cut as much or not cut at all. Thus, the employees and their unions have a very powerful motive to delay the decision.

148. *See Headley*, 38 F.P.E.R. ¶ 330 (noting that interpreting financial bargaining as something other than impact bargaining would frustrate the purpose of the statute).

149. *Id.*

150. Jacksonville Supervisors Ass'n v. City of Jacksonville, 26 F.P.E.R. ¶ 31140 (2000); 1995 Fla. Laws Ch. 95–218.

151. 8 F.P.E.R. ¶ 13400.

> to deliberately consider the impact of the decision on the involved unit employees.[152]

In *Leon County PBA*, PERC discussed and relied on the U.S. Supreme Court's *First National Maintenance* decision, discussed above.[153] In *First National Maintenance*, the Court noted that the employer may need flexibility and speed in making the types of decisions that are subject only to effects bargaining.[154] The employer's ability to implement prior to completion of bargaining is implicit. It is explicit in other cases, all of which were decided before 1995.[155]

The more substantive argument against impact bargaining was over the nature of the subjects of bargaining arising from financial urgency. From the beginning, the unions had asserted that the subjects of bargaining under financial urgency were different from those in regular impact bargaining.[156] Impact bargaining, they asserted, occurred only when the employer decided to exercise a management right (non-negotiable, under *First National Maintenance*).[157] Then there would be bargaining over the indirect effects of that decision on terms and conditions of employment.[158] Financial urgency, on the other hand, involved a decision by the employer to directly affect terms and conditions of employment, i.e., to modify the CBA.[159] Impact bargaining, they argued, arose from a decision about matters external to the

152. *Id.*
153. *Id.*
154. First Nat'l Maint. Corp. v. Nat'l Labor Relations Bd., 452 U.S. 666, 682–83 (1981).
155. Other decisions under the NLRA going back at least to 1984 and discussing effects bargaining also recognize that implementation may occur before bargaining is complete and merely require bargaining—not agreement—occur a "meaningful" time before implementation; *see, e.g.*, Nat'l Labor Relations Bd. v. Oklahoma Fixtures Co., 79 F.3d 1030, 1036 (10th Cir. 1996) (observing that "the window for meaningful effects bargaining . . . does not automatically close upon . . . implementation"); Creasey Co., 268 NLRB 1425, 1426 (1984) (effects bargaining was meaningful even though bargaining continued after the decision to close plant was implemented). Pre-agreement implementation was well-established in labor law by 1995, known to PERC and, by presumption, to the Legislature when it enacted Section 447.4095.
156. Headley v. City of Miami, 38 F.P.E.R. ¶ 330 (2012); *First Nat'l Maint. Corp.*, 452 U.S. at 682–83.
157. *Headley*, 38 F.P.E.R. ¶ 330.
158. *Id.*
159. *Id.*

contract.[160] Financial urgency bargaining, instead, arose from a decision about the contract itself.[161]

One answer to this argument is that the Legislature intended to create a new management right of "financial urgency." The structure of Section 447.4095 suggests this is the case.[162] Impact bargaining ordinarily operates in the case where management exercises a prerogative that is not bargainable.[163] Only the impacts of the decision are bargainable.[164] The Legislature expressly refers to bargaining the impact—of what? Of the financial urgency.[165] What are those impacts? They are the usual impacts when a management prerogative is exercised: terms and conditions of employment.[166] It is well within the Legislature's authority to declare certain subjects to be within management prerogative, and, as discussed above, PERC has acknowledged others in its decisions.[167]

Another is the very purpose of the statute, already touched on above. Requiring the completion of impasse proceedings that routinely take months would defeat "the obvious purpose" of Section 447.4095 to allow an employer to move rapidly to meet the financial urgency before it becomes financial emergency.[168] Similarly, in *Teamsters v. Martin County*,[169] PERC held that the decision to furlough employees without pay was a management right, subject only to impact bargaining, on a similar basis.[170] It stated, "The decision to furlough is based upon current economic conditions and should not be delayed. A delay could result in drastic consequences such as the permanent termination of employees. This would alter the organization and operation of the

160. *Id.*

161. *Id.*

162. *See generally* FLA. STAT. § 447.4095 (2017) (barring an "unfair labor practice charge" while the impact bargaining occurs).

163. *See, e.g.*, Teamsters v. Martin Cnty. Bd. of Cnty. Comm'rs, 37 F.P.E.R. ¶ 57 (2011) (offering an example of when a party would argue about impact bargaining).

164. *See, e.g.*, *id.*

165. FLA. STAT. § 447.4095.

166. *Teamsters*, 37 F.P.E.R. ¶ 57.

167. *See* FLA. STAT. § 447.209 (2017) (offering an example of when the Legislature has declared certain subjects to be within the management's prerogative); *see supra* note 28 and accompanying text.

168. Manatee Educ. Ass'n v. Sch. Bd. of Manatee Cnty., 62 So. 3d 1176, 1181 (Fla. 1st Dist. Ct. App. 2011).

169. 37 F.P.E.R. ¶ 57.

170. *See id.* (explaining that the decision to order furloughs is based on economic necessity and should not be delayed).

public employer, which is also a management prerogative . . . ."[171] There is no conceptual difference between treating a furlough, motivated by economic conditions and to be implemented without delay, and declaring and implementing financial urgency. Financial urgency, declaring it and implementing it, is a management right.

The First District agreed with PERC and the employers on both textual grounds and on the basis of the obvious purpose of the statute.[172] The court observed the structure of the statute and interpreted the declaration of financial urgency as "notice" and the fourteen days of bargaining as the "meaningful opportunity to bargain" required under impact bargaining.[173] It gave the commonsense meaning to the phrase "negotiate the impact," noting prior interpretations to that effect.[174] The First District very clearly summed up:

> It is also consistent with the purpose of the statute in that it allows for a 14-day period of impact bargaining but also allows for the local government to take immediate action toward correcting a financial urgency at the conclusion of the bargaining period rather than requiring such action to be postponed until the completion of the impasse resolution process. This is significant because, as noted above, the impasse resolution process includes 45 days of process *after* the special magistrate hearing is completed. Indeed, as PERC noted in the final order, requiring a public employer to wait to take action until after the completion of the process hinders the employer's ability to take immediate action, which, by the very definition of financial urgency, is required.[175]

The outcome of *Headley* at the First District was an almost unalloyed win for PERC and the City of Miami. There was a little quibbling about *Chiles* and the correct constitutional standard, but it did not affect the outcome.[176] However, there was another case in the pipeline.

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171. *Id.*
172. Headley v. City of Miami, 118 So. 3d 885, 895 (Fla. 1st Dist. Ct. App. 2013).
173. *Id.*
174. *See id.* (quoting a letter from PERC's General Counsel to this effect, which was cited in one of the very few previous financial urgency cases, Commc'ns Workers of Am. v. Indian River Cnty. Sch. Bd., 888 So. 2d 96, 98 (Fla. 4th Dist. Ct. App. 2004)).
175. *Id.* at 895–96.
176. *Id.* at 893–94.

VII. HOLLYWOOD FIRE FIGHTERS V. CITY OF HOLLYWOOD

The City of Hollywood had declared financial urgency on September 1, 2010, for fiscal year 2010–11, but had reached agreements on concessions from all its employee unions in October, so the matters never proceeded to impasse.[177] In Spring 2011, during that same fiscal year, it became apparent that the concessions would be woefully inadequate; projected revenues from property taxes were plummeting, and expenses had been underestimated.[178] By summer, the projected budget deficit was around $8.6 million.[179] Also in Spring 2011, the City realized it was facing a deficit of about $25 million for fiscal year 2011–12.[180] The city declared financial urgency for fiscal year 2011–12 and, for the second time, for fiscal 2010–11.[181]

The police and fire unions subsequently filed unfair labor practice charges. The city proceeded with financial urgency bargaining and then into impasse proceedings. It implemented millions of dollars of pay, pension, and other benefits cuts before the impasse proceedings were completed.[182]

The same issues described above were argued in the *Hollywood* case. The same result was reached by PERC, citing *Headley*.[183] The union appealed. However, it chose the Fourth District Court of Appeal instead of the First.[184] It got a different result.[185] The Fourth District's short opinion focused almost exclusively on the debate over the *Chiles* issue.[186] It accepted PERC's definition of financial urgency and did not even address

177. Hollywood Fire Fighters v. City of Hollywood, 39 F.P.E.R. ¶ 54 (2012).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*; Broward Cnty. Police Benevolent Ass'n v. City of Hollywood, 39 F.P.E.R. ¶ 62 (2012). PERC dismissed the PBA's unfair labor practice and the PBA appealed to the First District Court of Appeal. That case was decided after the First District decided *Headley.* In the PBA case, the First District affirmed PERC—and, thus, the City—*per curiam*. Broward Cnty. Police Benevolent Ass'n v. City of Hollywood, 115 So. 3d 362 (Fla. 1st Dist. Ct. App. 2013).
183. Hollywood Fire Fighters v. City of Hollywood, 133 So. 3d 1042 (Fla. 4th Dist. Ct. App. 2014); *see supra* note 175 (referencing the *Headley* case).
184. *Hollywood Fire Fighters*, 133 So. 3d at 1042.
185. *Id.* at 1046.
186. *Id.* at 1044–46.

the impact bargaining question.[187] It examined the First District's constitutional standard from *Headley* and then stated, in the entirety of its analysis on the point:

> By asserting that the language "the legislature must demonstrate that the funds are available from no other possible reasonable source" is not constitutionally mandated and should not be extended to section 447.4095, it appears to us that the First District adopted a modified *Chiles* test. District courts cannot alter the holding of *Chiles* with respect to the authority of the government to impair a contract and violate the union's right to collectively bargain. *See Hoffman v. Jones*, 280 So.2d 431, 440 (Fla.1973) (holding that a district court does not have the authority to overrule supreme court precedent).
>
> The hearing officer in this case specifically rejected the application of the second prong of the *Chiles* test in deciding whether the City engaged in an unfair labor practice. Although PERC did not specifically state in the final order whether it was applying the second prong, it appears from the language of the order that the second prong was not applied. Thus, we reverse and direct PERC to apply the *Chiles* standard in determining whether the City engaged in an unfair labor practice.[188]

The court also certified conflict with the First District on *Headley*.[189]

VIII. FLORIDA SUPREME COURT: FINANCIAL URGENCY? NOT SO URGENT

The Florida Supreme Court accepted jurisdiction over *Headley*; the Court heard oral arguments in April 2015. Two years later, on March 2, 2017, the Court issued its opinion.[190] As the courts before it had done, the Court adopted PERC's definition of financial urgency with little comment. It said it did so "[b]ecause there are other statutes that apply where the government is facing a financial emergency or bankruptcy . . . ."[191]

187. *Id.*
188. *Id.* at 1046.
189. *Id.*
190. Headley v. City of Miami, 215 So. 3d 1 (Fla. 2017).
191. *Id.* at 6.

The Court signaled its holding on the constitutional question by stating it had already set the standard for judging impairment of a CBA in *Chiles*.[192] By doing so, it silently brushed off what appeared to be attempts by PERC and the First District to limit *Chiles* to its facts. It then stated that the language of Section 447.4095 codified the strict scrutiny standard.[193] This argument had been advocated by the city, but for a different outcome. The city argued that the statute embodied both prongs of the analysis and that a finding that a financial urgency existed satisfied strict scrutiny; the Court, however, kept the two prongs separate.[194] A finding of financial urgency, the Court stated, was tantamount to the first prong of strict scrutiny: a compelling state interest.[195] However, it said, a government might have a compelling interest but still might not be able to meet the least intrusive means or "narrowly tailored" prong; that was the job of "requiring modification of an agreement."[196] The Court said:

> Thus, the term "requiring modification" forces the local government to demonstrate that the only way of addressing its dire financial condition is through modification of the CBA. To do this, the local government must demonstrate that the funds are available from no other reasonable source. This satisfies the second requirement of strict scrutiny, that the law be narrowly tailored to achieve a compelling state interest.[197]

The Court noted the First District's conclusion that *Chiles* was not "constitutionally mandated."[198] As to that, it recited its prior commitment to upholding the right of collective bargaining and of contract free of impairment and immediately stated, throwing the First District's words back at it, "Thus, our conclusions as to this issue 'are compelled by the Florida Constitution.'"[199]

However, in what *may* have been a softening gesture, but couched as another correction to the First District, the Court said:

192. *Id.*
193. *Id.* at 7.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 8 (quoting Chiles v. United Faculty of Florida, 615 So. 2d 671, 673 (Fla. 1993)).

> Moreover, the First District incorrectly stated that *Chiles* requires a local government to demonstrate "that funds are not available from any other possible source." *Headley*, 118 So.3d at 893. Not so. As we stated in *Chiles*, the employer must show that the funds are not available from any other possible reasonable source. Therefore, as the First District held, if the other cost-saving measures are unreasonable, then modification is warranted. However, we do not agree with the First District that if the alternative funding sources are also inadequate then modification is permissible. Instead, the government "must demonstrate no other *reasonable* alternative means of preserving its contract with public workers, *either in whole or in part*." *Chiles*, 615 So.2d at 673 (emphasis added).[200]

The words are a quote from *Chiles*. The emphases are not. The Court did not explain what meaning is to be gleaned from its underlining. It cannot mean it is jettisoning the "possible," since it uses that language immediately above. It states that it disagrees with the First District that modification is permissible only if the alternative funding sources are also inadequate—then gives the quote with the underlining. Does it intend that there could be alternative sources that *are* adequate, and still modification could be permissible *if* using the other sources is not reasonable? That would be a softer standard than what the unions advocated, which called for the employer to spend its last penny and sacrifice all public services to preserve the contract. What, then, of the emphasis on "either in whole or in part"? The concept of partial funding of the CBA was never strongly argued nor deeply examined at any level in any of the financial urgency cases. Is this a hint from the Court that the employer may have to fund only a part of the contract, if it can? Or does it mean that, if the employer can fund even a part of the contract, then financial urgency is off the table altogether? There is nothing to go on here.[201]

The bottom line is that the Court went with *Chiles*, which is, for now, the standard by which impairments of CBAs will be judged.

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200. *Id.* at 7–8.

201. Contrary to the Author's suggestion here that the Supreme Court intended to soften *Chiles*, union attorneys of the Author's acquaintance have argued that the emphasis was intended to convey a strict adherence to *Chiles*.

Finally, the Court came to the impact bargaining question. It asserted that the language of the statute was ambiguous.[202] This was a bad sign for the city. The first argument was that the plain language of the statute required impact bargaining.[203] If the Court right off, without analysis, said the statute was ambiguous, it had to be opening the door to the other interpretation.

So it was. While the city's interpretation was "reasonable," the Court stated, so was the union's.[204] Having now permitted itself access to the canons of statutory interpretation, the Court rejected the one that favored the employer and picked the one that ruled out impact bargaining. While technical words, like "impact," should be given their technical legal meaning, the Court stated, there was another consideration. It skipped to the part of the statute stating that, in the event agreement is not reached, "[t]he parties shall then proceed pursuant to the provisions of s. 447.403 [the section governing impasse proceedings]."[205] "[*E*]*xpressio unius, est exclusion* [sic] *alterius*," it wrote, meaning that the statute required the parties to *complete* impasse proceedings.[206] Impact bargaining does not require completion before implementation. If the Legislature had not intended for impasse to be completed before implementation, the Court wrote, it would have said so in the statute.[207] Therefore, the Court said, because of its regard for the constitutional rights of collective bargaining and of contract, it chose the non-impact bargaining interpretation.[208]

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202. *Headley*, 215 So. 3d at 9.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* A glaring problem with this reasoning is, of course, that the statute does not say what the Court says it does. FLA. STAT. § 447.4095 (2017). The statute says nothing about "completing" impasse procedures. It merely directs the parties to "proceed pursuant to the provisions of s. 447.403." *Id.* Proceeding pursuant to Section 447.403 does not mean completing impasse procedures before implementing changes. If it did, all impact bargaining would violate PERA. When impasse is applied to impact bargaining, it would almost certainly not be complete before implementation. Thus, resort to this language to determine that Section 447.4095 rules out impact bargaining is unavailing. *Id.*

208. *Headley*, 215 So. 3d at 10. The Court spared a paragraph for an additional reason: the argument about the nature of the subject matter of impact bargaining versus non-impact bargaining. *Id.* As argued by the unions, the subject matter of non-impact bargaining is terms and conditions of employment—and so it is for financial urgency bargaining. *Id.* The decision involved in financial urgency is the change to terms and conditions of employment and not, as in impact bargaining, something external that happens to affect terms and conditions. *Id.* As the Court put it, "As noted by Petitioner, impact bargaining results from management making decisions outside of the scope of an agreement which

The Court adopted a definition of financial urgency as a condition "demanding prompt and decisive action."[209] In deciding financial urgency bargaining was not impact bargaining, it removed the employer's ability to take "prompt" action. These two aspects of the Court's decision are irreconcilable.[210]

IX. IS ANYTHING LEFT OF FINANCIAL URGENCY?

Financial urgency is still on the books. We now know what it is—to the extent the language of the PERC definition identifies it. In all fairness, how could such a concept be defined in a way that was not rote and arbitrary, like financial emergency, or completely undefined, as the Legislature had left it? PERC's definition is probably the best possible. We also know that it will have to meet the *Chiles* standard before it can be used.[211]

Most important, however, is the Court's disposition of what seemed, in the beginning, to be the most self-evident part of the controversy: impact bargaining. Not a single source of authority, not PERC, not its general counsel, not any court, from 1995 right up until March 2017, had held or indicated that financial urgency bargaining was not impact bargaining.[212] What was the purpose of a response to an "urgency" if the response could not be equally "urgent"?

In oral argument, the Author compared a city facing financial urgency to a person standing on a railroad track. He sees a train approaching in the distance. There is still time to get off the track—all he has to do is take one step. Is it rational that the law will require him to stand there until he's flattened? Is it good public policy to make a government go bankrupt while it is waiting

affect the agreement in some way. Bargaining under the financial urgency statute, on the other hand, seeks to alter the terms of the agreement itself." *Id.*

209. *Id.* at 6.

210. As PERC had said in its decision. *See supra* note 110 and accompanying text (referencing what PERC had said in its decision).

211. For that matter, does *Chiles* now apply to any impact bargaining at any time? Impact bargaining often occurs when a mid-term contract is being changed, albeit by a decision external to the contract. Nonetheless, it is an example of government unilaterally modifying its own labor contract. How is that to be distinguished under *Headley*? One union had argued, in what then seemed an extreme position, that Florida's impasse resolution procedure as a whole was facially unconstitutional because it impermissibly impaired the right of collective bargaining by allowing the employer to unilaterally change terms of employment. After *Chiles*, is this so extreme anymore?

212. *Headley*, 215 So. 3d at 6.

months for impasse to be completed rather than take less drastic steps earlier on to avoid insolvency?

There is a lesson, a negative one, for government employers going forward. Financial urgency was a tool to give government relief from an unaffordable labor contract when financial circumstances went dreadfully wrong. Dreadful financial circumstances were widespread during the Great Recession. Property tax revenues had been soaring for several years. Public employers were pressured by unions to share the wealth. Labor contracts grew fat and expensive. Then the bubble burst. Residents lost their jobs and many lost their homes. The value of property fell. Revenues plummeted. Public employers were whipsawed by falling revenue and high labor costs that were locked in by multi-year contracts. This was the situation for which financial urgency was designed, or so it seemed. Now we know better.

So, what is the lesson? A public employer should not agree to a labor contract unless it is absolutely sure it will have the money to pay for it, come what may. You cannot count on good times to go on forever. You can't count on the reasonable good will of employees to agree to take pay and benefit cuts.

And you certainly cannot count on financial urgency anymore.