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## Labor Relations in Florida's Public Sector: Visiting the State's Past and Present to Find a Future Solution to the Fight Over the Public Purse Under Florida's Financial Urgency Statute

Jennifer L. Rosinski\*

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# LABOR RELATIONS IN FLORIDA'S PUBLIC SECTOR: VISITING THE STATE'S PAST AND PRESENT TO FIND A FUTURE SOLUTION TO THE FIGHT OVER THE PUBLIC PURSE UNDER FLORIDA'S FINANCIAL URGENCY STATUTE<sup>+</sup>

JENNIFER L. ROSINSKI\*

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+ When cited as part of a party name, "Police Benevolent Association" will be abbreviated "PBA."

\* J.D. Candidate 2010, Nova Southeastern University, Shepard Broad Law Center. The author wishes to thank her husband Nick and their two rays of sunshine—Kyle and Hailey—for their endurance, patience, and love; and her dear friend Dani Moschella for sharing her incredible optimism. She would like to recognize the counsel and encouragement of Christine Cautocy, Professor Michael Flynn, Dean Catherine Arcabascio, and Dean Leslie Cooney. Finally, to the talented 2010–2011 staff of the *Nova Law Review*, the author extends her sincere appreciation and gratitude, especially to Jeremy Singer, Ashley Dutko, Janelle Mason, and Brandon Chase; and of course, to the junior staffers for their humor, support, and entertainment.

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## I. INTRODUCTION

In public sector bargaining it is often hard to distinguish between an employer's contended *inability* to fund a collective bargaining agreement with its *unwillingness* to pay.<sup>1</sup> Undoubtedly governments do experience periods of fiscal concern, but claiming "inability to pay" as frequently as they do renders those claims about as effective as "crying wolf."<sup>2</sup> The notion of underfunding a bargained-for labor agreement in the public sector is not simply a problem of economics; rather, such a decision is driven largely by political pressures inherent to the public domain.<sup>3</sup> It is that political feature that distinguishes collective bargaining in the public sector from that in the private.<sup>4</sup>

The political habits of Florida's public sector are no less intrusive. The state's collective bargaining scheme is riddled with concessions, exceptions, limitations, and conditions, all in the name of striking a balance among competing legal powers and political decision-making.<sup>5</sup> For instance, the process requires reconciliation of labor bargaining laws with non-labor laws,<sup>6</sup> with the legislature's law-making and appropriation powers,<sup>7</sup> and with public em-

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1. See RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, *LABOR RELATIONS IN THE PUBLIC SECTOR* 153 (3d ed. 2001).

2. See *id.*

3. See *id.* at 122–24.

4. See *id.* at 113.

5. See Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1234 (1984–1985).

6. See *id.* at 1252.

7. *Id.* at 1243, 1245.

employers' struggle to maintain flexibility in cases of bona fide fiscal crises.<sup>8</sup> The latter example is especially relevant today as Florida governments struggle to maintain integrity in their enterprises amidst the state's historically weak economy.<sup>9</sup>

Within the state's statutory regulations for bargaining in the public sector, public employers will find the Financial Urgency Statute in section 447.4095 of the *Florida Statutes* quite appealing.<sup>10</sup> Passed in 1995, the law seemingly allows a public employer to avoid its collective bargaining responsibility and abridge the collective bargaining contract in cases of "financial urgency."<sup>11</sup> But despite the legislature's good intentions when crafting the statute, its language poses more questions than answers.<sup>12</sup> Even now, fifteen years after its enactment, the statute remains a mystery.<sup>13</sup> Outside of a single decision granted by Florida's Public Employees Relations Commission (PERC)<sup>14</sup> in 2009,<sup>15</sup> there is not much guidance for those seeking to in-

8. See *id.* at 1250.

9. See Michael C. Bender & Dara Kam, *Citing Brighter Florida Economy, Crist Seeks 4 Percent Budget Hike*, PALM BEACH POST, Jan. 30, 2010, at A1.

10. FLA. STAT. § 447.4095 (2010).

11. Act effective July 1, 1995, ch. 95-218, §§ 2-3, 1995 Fla. Laws. 1943, 1943-44 (codified as amended at FLA. STAT. § 447.4095 (1995)).

12. See *id.* For instance, what does "financial urgency" mean? Why does the language call for "impact" bargaining instead of "collective" bargaining? When can this statute be used—during the life of an existing contract, during the status quo, or both? And finally, how, or even can, this statute be interpreted to make it compatible with the Florida Constitution?

13. Two Florida school districts in 2002 challenged the constitutionality of section 447.4095. Jack E. Ruby, *Fiscal Problems and Unilateral Change*, PERC NEWS (Fla. Pub. Emps. Relations Comm'n, Tallahassee, Fla.), Apr. 1-Jun. 30, 2007, at 10. Both cases, however, settled out of court, precluding any judicial analysis. *Id.* The first time the statute came before PERC for interpretation was in 2009 in *Manatee Education Ass'n*, 35 F.P.E.R. ¶ 46, at 86 (2009). In terms of state court, the Eleventh Judicial Circuit had the opportunity to review the constitutionality of the statute in 2010, in which it found for the defendant. See Final Judgment Declaring Section 447.4095 *Florida Statutes* to be Constitutional and Denying Declaratory and Injunctive Relief at 1 Miami Ass'n of Firefighters Local 587 v. City of Miami, No. 10-27577-CA20, (Fla. 11th Cir. Ct. May 26, 2010) [hereinafter Final Judgment].

14. PERC is the commission created by the Florida Legislature to oversee and regulate the provisions of part II, chapter 447. FLA. STAT. §§ 447.205, .207 (2010). The commission falls under the direction of the Department of Management Services, see *id.* § 447.205(3)-(4), and is "composed of a chair and two full-time members." *Id.* § 447.205(1). It conducts hearings and resolves disputes concerning alleged unfair labor practices and the composition of bargaining units. *Id.* § 447.207(6). PERC decisions are subject to judicial review. *Id.* § 447.504. For more information about PERC, visit its website at <http://perc.myflorida.com>.

15. See *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 87.

voke the statute. Nonetheless, public employers are declaring “financial urgency” more frequently now than ever before.<sup>16</sup>

The City of Miami’s fiscal condition in late 2010, as it was displayed by the media, painted a good portrait of the conflict between public spending and collective bargaining.<sup>17</sup> Purportedly facing a \$100 million budget deficit in 2011, the city contemplated layoffs for more than 1000 of its employees.<sup>18</sup> A large part of its financial woes, claimed the city, was attributed to growing pension costs promised to city firefighters through its existing labor agreement with the group’s powerful union.<sup>19</sup> The bargaining agreement carried with it a \$101 million price tag for the 2011 fiscal year.<sup>20</sup> The city’s desperation to avoid that price led it to invoke a “financial urgency” under *Florida Statutes* section 447.4095.<sup>21</sup>

There was, however, a large chunk of information missing from the media’s story. The city’s obligation to pay the pension costs was imposed by a *mutually agreed to* collective bargaining agreement.<sup>22</sup> At some point prior to the dispute, Miami officials bargained over the terms contained therein, a process that envisions a give and take relationship, where concessions are made in exchange for giving by the other side.<sup>23</sup> That suggests the firefighter union forfeited something in return for its sought-after pension.<sup>24</sup> Allowing the city to unilaterally change the terms of that bargained-for-benefit based on an unverified assertion of inability to pay—and without returning to the collective bargaining process to remedy the problem—essentially renders the bargaining process null.<sup>25</sup>

PERC, in 2009, issued the first and most recent interpretation of the Financial Urgency Statute whose surprising decision lends support to the city’s actions.<sup>26</sup> But adhering to PERC’s decision would cause the city to abridge

17. See Ruby, *supra* note 13, at 10 (recognizing that 2002 was the first year in which any public entity and employee union commenced litigation over the statute); see, e.g., Julie Brown, *City Weighs Layoffs, Event Cuts*, MIAMI HERALD, Sept. 17, 2010, at 3B (“Following in the steps of the city of Miami, [the] Hollywood City Commission earlier this month declared a ‘financial urgency,’ a legal maneuver that allows city officials to unilaterally reopen labor contracts when in a dire financial crisis.”).

17. See Charles Rabin, *Miami Commission Focuses on Averting Budget Calamity*, MIAMI HERALD, June 11, 2010, at B1.

18. *Id.*

19. *Id.*

20. *Id.*

21. See *id.*; FLA. STAT. § 447.4095 (2010).

22. See Rabin, *supra* note 17.

23. See Befort, *supra* note 5, at 1266.

24. See *id.*

25. See *id.*

26. See Manatee Educ. Ass’n, 35 F.P.E.R. ¶ 46, at 86 (2009).

two fundamental rights that its employees enjoy under the Florida Constitution. Article I, section 6 of the Florida Constitution grants public employees the right to collectively bargain over terms and conditions of employment.<sup>27</sup> And article I, section 10 of the Florida Constitution that protects public employees' vested right to collectively bargain.<sup>28</sup> The Supreme Court of Florida has held that in a situation in which the government seeks to violate those rights, it must first prove a compelling state interest and show no viable alternatives to its proposed action.<sup>29</sup> When the imposition of a fundamental right is involved, Florida's highest court does not approve the application of any less-stringent standard, particularly in this context.<sup>30</sup>

The Financial Urgency Statute is not the first of its kind in Florida. Section 447.309(2) of the *Florida Statutes*, commonly referred to as the Underfunding Statute, serves a similar purpose.<sup>31</sup> The Supreme Court of Florida interpreted and applied the Underfunding Statute in two significant cases just a few years prior to that statute's major amendment; the amendment to section 447.309(2) was part of the same bill in which the legislature adopted section 447.4095.<sup>32</sup> The Court, in *State v. Florida Police Benevolent Association (Florida PBA)*<sup>33</sup> and *Chiles v. United Faculty of Florida*,<sup>34</sup> set the standards for when and how a public employer can abridge its employees' fundamental rights by making unilateral changes to the collective bargaining agreement in times of a financial crisis.<sup>35</sup> Accordingly, there is no need, and no justification, for Florida courts to start from scratch in deciding how to interpret and apply the new Financial Urgency Statute since *Florida PBA* and *Chiles* have established the relevant precedent.<sup>36</sup> Any interpretation or appli-

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27. FLA. CONST. art. I, § 6. Article I, section 6 is known as the "Right to work" provision. *Id.* It reads:

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.

*Id.*

28. FLA. CONST. art. I, § 10. Article I, section 10, the contracts clause, reads: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." *Id.*

29. *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

30. *See, e.g., Hillsborough Cnty. Govtl. Emps. Ass'n v. Hillsborough Cnty. Aviation Auth.*, 522 So. 2d 358, 362 (Fla. 1988).

31. *See* FLA. STAT. § 447.309(2) (2010).

32. *See Chiles*, 615 So. 2d at 673; *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 419 (Fla. 1992).

33. 613 So. 2d 415 (Fla. 1992).

34. 615 So. 2d 671 (Fla. 1993).

35. *See Chiles*, 615 So. 2d at 673; *Fla. PBA*, 613 So. 2d at 421.

36. *Chiles*, 615 So. 2d at 673; *Fla. PBA*, 613 So. 2d at 421.

cation of the Financial Urgency Statute incongruent with those cases would render it unconstitutional, and therefore void.

This paper offers insight into how Florida has dealt with the conflict between control of the public purse and collective bargaining, and how it should proceed in the future to ease those conflicts under the Financial Urgency Statute. Part II will provide an overview of the history of collective bargaining in Florida's public sector and lead into a framework of how the collective bargaining process works today. That discussion will make the important distinction between impact and collective bargaining, and how each relates to the statutory impasse procedure. The next section will review the regulations that guide the relationship between a public employer's fiscal control and its permissive unilateral change to the terms of a labor contract. Part V will discuss the Florida Public Employees Relations Commission (PERC) as well as court decisions on the Underfunding Statute and how those interpretations provide examples of how the Financial Urgency Statute should be applied today. Part VI will attempt to unravel the Financial Urgency Statute by interpreting its legislative history and its existing case law, and will be followed by a discussion of its constitutional implications. Ultimately, that part will demonstrate how the statute can—and should be—interpreted in order to make it compatible with the Florida Constitution, the rights of public employers, and the rights of public employees.

Finally, the paper will conclude with an outlook of the Financial Urgency Statute with an interpretation that makes it compliant with the state Constitution and common law. In that form, it has the potential to provide each side of the bargaining table with the protection it deserves: a solution for a public employer that needs to avoid its contractual labor obligations to preserve its financial integrity, while congruently preserving the bargaining process and fundamental rights of public employees under Florida's Constitution.

## II. THE DEVELOPMENT OF BARGAINING RIGHTS FOR FLORIDA'S PUBLIC EMPLOYEES<sup>37</sup>

Congress paved the way for union activity in the private sector with the passing of the 1935 National Labor Relations Act (NLRA).<sup>38</sup> Eight years

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37. For a comprehensive review of the progression of collective bargaining rights for Florida's public employees, see Raymond G. McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future*, 1 FLA. ST. U. L. REV. 26 (1973).

38. Curtis L. Mack & Ezra D. Singer, *Florida Public Employees: Is the Solution to the Free Rider Problem Worse than the Problem Itself?*, 6 FLA. ST. U. L. REV. 1347, 1347 (1978).

later, the Florida Legislature crafted its own law, Chapter 447 of the *Florida Statutes*, to recognize the rights of employees within the state to self-organize and collectively bargain with their employers.<sup>39</sup> But the term “employee” as used in chapter 447 was ambiguous.<sup>40</sup> Unlike the language in the NLRA, which specifically excluded public employees from its application,<sup>41</sup> the Florida legislation was silent as to whether the term “employee” included public workers.<sup>42</sup>

Also in 1943, the year it adopted chapter 447, Florida amended section 12 of the Declaration of Rights of its 1885 Constitution to include a “right to work” provision, thereby designating itself a “right to work” state.<sup>43</sup> Under that provision, the state prohibited employers from requiring their employees to join unions as conditions of employment.<sup>44</sup> It gave public employees the right to make independent decisions about their participation in organized labor.<sup>45</sup> But again, the legislature left section 12 ambiguous in regard to its application to public employees.<sup>46</sup> The ambiguity in section 12 and chapter 447 left no choice for public employees but to return to the common law rule, which imposed no obligation on their employers to collectively bargain with them.<sup>47</sup>

Then in 1946, in *Miami Water Works Local No. 654 v. City of Miami*,<sup>48</sup> the Supreme Court of Florida resolved the ambiguities by ruling that chapter

Congress passed the NLRA to protect the rights of employees to organize and bargain collectively, to encourage the collective bargaining process and to protect employers from work disruptions caused by bargaining issues. See 29 U.S.C. §151 (2006).

39. See FLA. STAT. §§ 447.01–.15 (2010). Chapter 447 is currently split in two parts—the first relates to private employees, *Id.* §§ 447.01–.17, and the second to public employees. *Id.* §§ 447.201–.609. The second part was not adopted until 1973. Public Employee Relations Act (PERA), ch. 74-100, § 3, 1974 Fla. Laws 134, 134–54 (codified as amended at FLA. STAT. §§ 447.201–.609 (1975)).

40. See FLA. STAT. § 447.02 (2010) (missing a definition of “employee”).

41. 29 U.S.C. § 152. “The term ‘employer’ includes any person acting as an agent of an employer . . . but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . .” *Id.*

42. See FLA. STAT. § 447.02 (missing a definition of “employee”).

43. H.R.J. Res. 13, 29th Leg., Reg. Sess. (Fla. 1943) (enacted).

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; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

*Id.*

44. *Schermerhorn v. Local 1625 of Retail Clerks Int’l Ass’n*, 141 So. 2d 269, 272–73 (Fla. 1962), *aff’d* 375 U.S. 96 (1963).

45. *Id.*

46. See Fla. H.R.J. Res. 13.

47. McGuire, *supra* note 37, at 34.

48. 26 So. 2d 194 (Fla. 1946) (en banc).



447 and section 12 applied to only the private sector.<sup>49</sup> It based part of its reasoning on the fact that chapter 447 afforded those covered under its provisions a right to strike, the act of which was adverse to the theory of government.<sup>50</sup> Logically then, the Court concluded that the legislature must not have intended for the statute to apply to public labor affairs.<sup>51</sup>

The aftermath of the *Miami Water Works Local No. 654* decision, paired with the common law regulation of collective bargaining, stripped public employees' access to any meaningful union activity in Florida.<sup>52</sup> But with the onset of the sixties, their pent-up frustration emerged aimed at state lawmakers.<sup>53</sup>

Between 1960 and 1969, the state experienced twenty-five public employee strikes that caused public agencies significant losses in manpower and services.<sup>54</sup> Their hostility peaked in 1968 when 35,000 public school teachers gathered to protest their lack of bargaining rights—the first protest of its kind in the nation.<sup>55</sup> The statewide teachers' strike caught the interest of state lawmakers, who were otherwise distracted by the 1968 revision of the Florida Constitution.<sup>56</sup> Their inattentiveness contributed to the death of every bill submitted in response to the teachers' protest.<sup>57</sup> But their efforts were not entirely in vain.<sup>58</sup> Floridians approved the new constitution that year, which did away with section 12 and replaced it with a new "right to work" provision found in article I, section 6.<sup>59</sup> The language in the new section was almost identical to that in section 12,<sup>60</sup> but nonetheless would be

49. *Id.* at 197.

50. *Id.*

51. *Id.*

52. McGuire, *supra* note 37, at 34, 38.

53. *Id.* at 29–30.

54. David M. Orta, *Public Employee Collective Bargaining in Florida: Collective Bargaining or Collective Begging?*, 23 STETSON L. REV. 269, 276 (1993) (citing McGuire, *supra* note 37, at 28).

55. McGuire, *supra* note 37, at 28–29.

56. *Id.* at 30.

57. *See id.* at 30–31.

58. *See* John-Edward Alley & Joseph W. Carvin, *Collective Bargaining for Public Employees in Florida—in Need of a Popular Vote?*, 56 FLA. B.J. 715, 717 (1982). The 1968 Constitutional Revision Commission made two recommendations affecting collective bargaining: 1) to specify that public employees do not have the right to strike, and 2) to include "in the collective bargaining provision an extension of collective bargaining rights to 'employees, public and private.'" *Id.*

59. McGuire, *supra* note 37, at 40.

60. *Id.* For the language of Florida's post-1968 "Right to work" provision, see *supra* text accompanying note 27.

interpreted to provide public sector employees the rights for which they had been fighting.<sup>61</sup>

A. *The Turning Point: Dade County Classroom Teachers' Ass'n v. Ryan*

In 1969, the Supreme Court of Florida, in *Dade County Classroom Teachers' Ass'n v. Ryan*,<sup>62</sup> interpreted the new "right to work" provision as it related to public employees' right to collectively bargain with their employers.<sup>63</sup> With an opinion written by Chief Justice Ervin, a unanimous Court held that "with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted [to] private employees by [s]ection 6."<sup>64</sup> The Court then sent a clear message to the legislature pushing it to enact regulations that would allow its decision to have effect.<sup>65</sup> To that regard, Chief Justice Ervin noted:

A delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process.<sup>66</sup>

Following the landmark decision in *Ryan*, Florida became the first state to provide public employees a constitutional right to collectively bargain.<sup>67</sup> The case also signified the beginning of a judicial pledge to protect the those rights for public employees in Florida.<sup>68</sup>

The opinion in *Ryan* was significant, but like the provision in article I, section 6, not self-executing.<sup>69</sup> As Chief Justice Ervin so urged, the legislature needed to adopt guidelines before public employees could fully enjoy

61. McGuire, *supra* note 37, at 40 nn.55–58.

62. 225 So. 2d 903 (Fla. 1969).

63. *Id.* at 905.

64. *Id.*

65. *Id.* at 906.

66. *Id.*

67. David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 723 (1990); see also William F. McHugh, *The Florida Experience in Public Employee Collective Bargaining, 1974–1978: Bellwether for the South*, 6 FLA. ST. U. L. REV. 263, 264–65 (1978) (finding the Florida experience unique since its grant of bargaining rights to public employees was adopted by state residents through a Constitutional revision).

68. Orta, *supra* note 54, at 277.

69. See *Ryan*, 225 So. 2d at 906.

their new constitutional right.<sup>70</sup> After two years of waiting for the Court's mandate to be obeyed, public employees again grew frustrated by the ignorance of lawmakers at all levels of government.<sup>71</sup>

Then, three years post the *Ryan* decision, a Dade County teacher's union filed suit against the Florida Legislature in an effort to compel it to adopt the necessary guidelines.<sup>72</sup> In *Dade County Classroom Teachers Ass'n v. Legislature*,<sup>73</sup> the Supreme Court of Florida reiterated its decision that public employees enjoy the same right to collectively bargain as do private employees under the Florida Constitution.<sup>74</sup> Nonetheless, on balance, the Court decided that it was premature to certify judicial enactment of the rights.<sup>75</sup> But it noted that if the legislature did not act within a reasonable amount of time, then the Court would be forced to create the guidelines by judicial decree.<sup>76</sup>

Heeding the Court's warning, the 1973 Florida Legislature passed the comprehensive Public Employees Relations Act (PERA),<sup>77</sup> making Florida the first southern state to grant all its public workers the right to collectively bargain with their employers.<sup>78</sup> PERA essentially provided public employees with the right to join and participate in labor unions, required public employers to negotiate with their employees' bargaining agents, and authorized the

70. *Id.*

71. See McGuire, *supra* note 37, at 49 (In 1971, a local of the International Association of Firefighters in Broward County sought from the court a writ of mandamus to compel its employer to collectively bargain, per the *Ryan* decision. The Fraternal Order of Police took the same action against its employer in Orlando). "[L]ocal governments refused to bargain absent statutory guidelines." McHugh, *supra* note 67, at 267.

75. *Dade Cnty. Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684, 685 (Fla. 1972).

73. 269 So. 2d 684 (Fla. 1972).

74. *Id.* at 685.

75. *Id.* at 688.

76. *Id.*

77. Public Employee Relations Act (PERA), ch. 74-100, § 3, 1974 Fla. Laws 134 (codified as amended at FLA. STAT. §§ 447.201-.609 (1975)). For a comprehensive review of PERA, see generally McHugh, *supra* note 67. The statement of policy for PERA as it reads today is:

The public policy of this state, and the purpose of this part, is to provide statutory implementation of [article I, section 6] of the State Constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. Nothing herein shall be construed either to encourage or discourage organization of public employees.

FLA. STAT. § 447.201 (2010).

78. McHugh, *supra* note 67, at 264.

creation of PERC to oversee public labor relations in the state.<sup>79</sup> The legislature constructed the provisions of PERA to resemble the rights afforded to private employees under the NLRA.<sup>80</sup> But, unlike its private sector counterpart, PERA prohibited public employees from striking.<sup>81</sup>

### III. FLORIDA'S FRAMEWORK OF THE COLLECTIVE BARGAINING PROCESS UNDER PERA

The provisions contained in part II, chapter 447 of the *Florida Statutes* implement the article I, section 6 guarantee of collective bargaining for public employees.<sup>82</sup> Collective bargaining means a process of mutual obligations in which a public employer<sup>83</sup> and a bargaining agent have to meet at reasonable times, “negotiate in good faith”,<sup>84</sup> and effect a written contract encompassing agreements reached concerning the “wages, hours, and terms and conditions of employment”<sup>85</sup>—otherwise known as mandatory subjects of bargaining.<sup>86</sup> Neither party is compelled to agree to an offer or yield to a

79. FLA. STAT. § 447.201(1)–(3). PERC is “the ultimate authority to *administratively* interpret chapter 447 and article I, section 6, of the Florida Constitution.” *Pub. Emps. Relations Comm’n v. Dade Cnty. Police Benevolent Ass’n (Dade Cnty. PBA)*, 467 So. 2d 987, 989 (Fla. 1985).

80. McHugh, *supra* note 67, at 270.

81. FLA. STAT. § 447.201(4).

82. *Id.* § 447.201.

83. The term “public employer”—like “legislative body”—is a term of art used by PERC. *See id.* § 447.203(2) (stating that “[p]ublic employer” . . . means the state or any county, municipality, or special district or any subdivision or agency thereof which the commission determines has sufficient legal distinctiveness properly to carry out the functions of a public employer”).

84. *Id.* § 447.203(14). The Florida Legislature defines good faith bargaining as:

[T]he willingness of both parties to meet at reasonable times and places, as mutually agreed upon, in order to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord. It shall include an obligation for both parties to participate actively in the negotiations with an open mind and a sincere desire, as well as making a sincere effort, to resolve differences and come to an agreement.

*Id.* § 447.203(17).

85. FLA. STAT. §§ 447.309(1), .203(14); *see also* *Sch. Bd. of Orange Cnty. v. Palowitch*, 367 So. 2d 730, 732 (Fla. 4th Dist. Ct. App. 1979) (holding that the bargaining table is the legislatively mandated forum to determine wages, hours, and terms and conditions of employment).

86. Chapter 447 does not provide a list of subjects to be treated as mandatory in terms of bargaining. *See* FLA. STAT. § 447.309(1) (requiring only that the certified employee union and the public employer “bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit”). As such, PERC is tasked to make that decision on a case-by-case basis. *PUB. EMPs. RELATIONS COMM’N, SCOPE OF BARGAINING 2* (2d ed. 2005), *available at* [http://perc.myflorida.com/pubs/Scope\\_of\\_Bargaining.pdf](http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf) [hereinafter PERC SCOPE OF

concession, unless otherwise provided by PERC.<sup>87</sup> Florida law also requires that the negotiation process be *effective* and *meaningful* for public employees.<sup>88</sup> That means the negotiations process cannot lead to a result that renders that right empty or hollow, and agreed upon contract provisions should not be subject to unilateral change at the whim of the public employer.<sup>89</sup> In support of that reasoning, PERC established through its case law that public employers may not unilaterally change a *mandatory subject of bargaining* until the parties bargain to impasse or in two other limited circumstances: 1) where the bargaining agent is found to have unmistakably waived its right to bargain,<sup>90</sup> or 2) when the employer has a valid defense of “exigent circumstances,”<sup>91</sup> which will be discussed at greater length in section IV below. Otherwise, unilateral change of a collective bargaining contract by a public employer results in a per se unfair labor practice charge for the employer.<sup>92</sup> In addition to the three exceptions established by PERC, there are two statutory exceptions to when a public employer may act unilaterally to change a mandatory subject of bargaining encompassed in a collective bargaining agreement—the Underfunding Statute, which applies to only state-level government,<sup>93</sup> and the Financial Urgency Statute.<sup>94</sup> The particulars of

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BARGAINING]. However, PERC allows a broad scope of topics to be included as “mandatory” in an attempt to balance the power between employers and unions. Palm Beach Junior Coll. Bd. of Trustees v. United Faculty of Palm Beach Junior Coll., 425 So. 2d 133, 139, 140 (Fla. 1st Dist. Ct. App. 1982) *approved in part* by Palm Beach Junior Coll. Bd. of Trustees v. United Faculty of Palm Beach Junior Coll., 475 So. 2d 1221 (Fla. 1985) (stating that “[t]he courts of Florida in numerous instances have noted that [s]ection 447.309(1), *Florida Statutes*, requires a relatively broad scope of negotiations to help counter-balance the absence of the right to strike by public employees,” and further stating that “PERC has concluded, rightly we believe, that the stability to be encouraged in the bargaining relationship between public employer and employee requires the parties to conduct negotiations over a broad range of subjects”). See *supra* PERC SCOPE OF BARGAINING for a comprehensive look at PERC’s decisions regarding which subjects are and are not mandatory.

87. FLA. STAT. § 447.203(14).

88. Hillsborough Cnty. Govtl. Emps. Ass’n v. Hillsborough Cnty. Aviation Auth., 522 So. 2d 358, 363 (Fla. 1988).

89. *Id.* (finding that the right of employees to collectively bargain “is not an empty or hollow right subject to unilateral denial,” but “is one [that] may not be abridged except upon the showing of a compelling state interest”).

90. Fraternal Order of Police, Fort Lauderdale Lodge 31, 14 F.P.E.R. ¶ 19150, at 394 (1988) (“To meet this burden of proof an employer must make a clear and unmistakable showing that the certified employee organization consciously yielded its right to negotiate with respect to the particular subject of bargaining in question.”).

91. Fla. Sch. for the Deaf & the Blind v. Fla. Sch. for the Deaf & the Blind Teachers United (*Fla. Sch. for the Deaf & the Blind Teachers United II*), 483 So. 2d 58, 59 (Fla. 1st Dist. Ct. App. 1986).

92. *Id.*

93. FLA. STAT. § 447.309(2)(b) (2010).

those two statutes are at issue in this paper and will be discussed below at great length.

#### A. *The Bargaining Process*

Sometimes, there is a very thin line between a mandatory subject and a permissive subject of bargaining.<sup>95</sup> Normally, a public employer is permitted to make a unilateral change to conduct or action that escapes the statutory definition of a mandatory subject, or if the subject of that action falls within a right of management.<sup>96</sup> In those two instances, the subject is considered a *permissive* subject of bargaining.<sup>97</sup>

The legislature defined “management rights” in section 447.209 of the *Florida Statutes*.<sup>98</sup> But, generally, management rights are those rights that allow employers to exercise control over decisions that have significant impacts on the functioning of their enterprises.<sup>99</sup> But, there is an important caveat to that rule that makes management rights more of a hybrid between permissive and mandatory subjects: if the modification of a subject classified as a management right would have an effect on the employees’ terms and conditions of employment, then the public employer is required to give those employees’ bargaining agent an opportunity to bargain the *impact* of that modification, which is known as impact bargaining.<sup>100</sup>

Impact bargaining, unlike collective bargaining, restricts negotiations only to the *effect* of the change and not the change itself.<sup>101</sup> Also, unlike collective bargaining, the employer that impact bargains does not need to

94. *Id.* § 447.4095.

95. *See Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31, 33–34 (Fla. 1992).

96. *Id.* at 33.

97. *Id.*

98. *See* FLA. STAT. § 447.209. The Florida Legislature defines public employers’ rights as:

[T]he right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons.

*Id.*

99. *See Fraternal Order of Police, Miami Lodge 20*, 609 So. 2d at 34.

100. *City of Jacksonville v. Jacksonville Supervisor’s Ass’n*, 791 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 2001) (holding that section 447.209 does not require a public employer to negotiate good faith changes in its organization and operations “unless those [changes] impact the determination of wages, hours, and terms and conditions of employment of employees within the bargaining unit”).

101. *See id.* at 511.

complete negotiations before it implements its changes.<sup>102</sup> The employer must, however, provide adequate notice to the bargaining unit of its intention to implement the change, and if the bargaining unit requests to bargain the impact of the management rights, the employer must do so for a reasonable period of time before implementing its decision.<sup>103</sup>

Public sector collective bargaining agreements that are accepted and ratified by the parties become legally enforceable contracts.<sup>104</sup> Based on the law of contracts, the parties must abide by the provisions of a collective bargaining agreement during its life.<sup>105</sup> But unlike contract law, in which parties' obligations expire along with the contract, the terms of a collective bargaining contract survive its death.<sup>106</sup> The time following expiration of the contract is known as the "status quo" period.<sup>107</sup> The status quo encompasses the terms and conditions of employment that employees covered under the previous contract have reasonable expectations to continue, and it mandates that the employer actually continues implementation of those terms until a new agreement is reached.<sup>108</sup> The "reasonable expectation" can stem from an established past practice or from an explicit provision in the collective bargaining contract.<sup>109</sup>

### 1. Resolving Bargaining Conflict Through Impasse

Whether engaged in collective or impact bargaining, parties are never forced to reach an agreement.<sup>110</sup> In situations where the parties cannot agree to a term, each has the option to declare an impasse.<sup>111</sup> The impasse procedure specifies an intricate procedure an employer must follow before unilate-

102. *Id.* at 510.

103. *Id.* (noting that an employer can satisfy its obligation to impact bargain by providing to the bargaining agent "notice and a reasonable opportunity to bargain").

104. R. Theodore Clark, Jr., *Public Sector Collective Bargaining Agreements: Contents and Enforcement*, in *THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 407, 413 (Robert D. Helsby et al. eds., 1985).

105. See Palowitch, 2 F.P.E.R. ¶ 280, at 282 (1977) (holding that a public employer's unilateral change to any mandatory subject of bargaining is a "per se violation of the duty to bargain collectively and constitutes an unfair labor practice").

106. Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 CORNELL L. REV. 194, 195 (1997).

107. *City of Delray Beach v. Prof'l Firefighters of Delray Beach, Local 1842*, 636 So. 2d 157, 159 n.3 (Fla. 4th Dist. Ct. App. 1994).

108. *Id.* at 162–63.

109. *Id.* at 159 n.3, 162.

110. See FLA. STAT. § 447.403(1) (2010).

111. *Id.*

rally implementing its own terms.<sup>112</sup> The procedure allows for optional mediation between the parties before they proceed to a special magistrate hearing.<sup>113</sup> The special magistrate will recommend a non-binding resolution.<sup>114</sup> If the special magistrate's proposal for settlement of the contract is rejected by either party, the matter is referred to the designated legislative body for final disposition.<sup>115</sup>

#### IV. UNILATERAL CHANGE AND FISCAL CONTROL

Espousing a general principle of bargaining in the private arena, Chief Justice Burger, speaking for the Supreme Court of the United States, once stated, "Having had the music, he must pay the piper."<sup>116</sup> He directed his words at a private employer who sought to reap the benefits of a bargained-for labor contract without paying its cost.<sup>117</sup> Therein lies one of the major differences between collective bargaining in the two sectors.<sup>118</sup> For private actors, collective bargaining is all about the economics, while those in the public sphere act according to not only economics, but to politics, as well.<sup>119</sup>

Public employees bargain over public money, the control of which is a legislative function.<sup>120</sup> Bargaining in the public sector is largely intertwined with politics; public employees are not the only ones fighting for a piece of the budget—citizens, interest groups, and politicians each have a perspective

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112. Orta, *supra* note 54, at 279. The impasse process acts as a substitute for public employees' right to strike. *Id.*

113. *Id.* at 279–80; FLA. STAT. § 447.403(1)–(2)(a).

114. FLA. STAT. § 447.403(3).

115. *Id.* § 447.403(4); *see also id.* § 447.203(10) (defining "legislative body" in the context of the impasse procedure). The legislative body should determine a resolution based on the best interests of the public and the employees. *Id.* § 447.403(4)(d). Once its decision is issued, the provisions of the contract are reduced to writing, signed by the parties, and submitted to the union for ratification. *Id.* § 447.403(4)(e). If the union ratifies the contract, it becomes binding for the mutually agreed-to term. FLA. STAT. § 447.403(4)(e). If it is not ratified, the contract takes effect on the date of the legislative action and is binding only through "the remainder of the first fiscal year which was the subject of negotiations." *Id.*

116. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983).

117. *Id.* at 270–71.

118. *See KEARNEY WITH CARNEVALE, supra* note 1, at 113.

119. *Id.*

120. *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 418–19 (Fla. 1992) (noting that public and private sector collective bargaining will never be the same when it comes to funding negotiated agreements); *see also* David H. Allshouse, *The Role of the Appropriations Process in Public Sector Bargaining*, 17 URB. LAW. 165, 165 (1985) ("[T]he appropriations process [at all levels of government] has become a major factor in public sector employee relations.").



on how the money should be spent.<sup>121</sup> The political context in which those funding decisions are made place great limitations on the abilities of employers and bargaining agents to cut deals.<sup>122</sup> This is especially true when money is tight—making decisions on what to fund gets harder and pressure from outside groups stronger.<sup>123</sup>

In the spirit of relieving that pressure on governments, the trend in Florida law is to allow public agencies leeway to deal with financial emergencies by expanding the instances in which they may take unilateral action to modify a term of the contract.<sup>124</sup> Besides the three aforementioned instances when, pursuant the PERC, a public employer may unilaterally change a mandatory subject of bargaining, public agencies too have options to act under statutory provisions.<sup>125</sup>

#### A. *Unilateral Action Allowed by PERC*

As pronounced by the legislature in part II, chapter 447 of the *Florida Statutes*, the provisions therein are implemented to ensure employees the rights they are promised under article I, section 6 of the Florida Constitution.<sup>126</sup> To that end, the legislature granted PERC the power to “adopt, promulgate, amend, or rescind such rules and regulations as it deems necessary . . . to carry out the provisions of [chapter 447].”<sup>127</sup> Under that authority, PERC forbids unilateral action by an employer concerning a mandatory subject of bargaining absent an explicit waiver or in situations in which it can prove exigent circumstances, or after the parties bargain to impasse and the employer enacts the legislative body’s recommendation.<sup>128</sup> The only excep-

121. See KEARNEY WITH CARNEVALE, *supra* note 1, at 113.

122. Jean J. Couturier, *Public Sector Bargaining Civil Service, Politics, and the Rule of Law*, in THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 55, 59–60 (Robert D. Helsby et al. eds., 1985).

123. See *id.* at 60.

124. *Compare* Dade Cnty. Classroom Teachers’ Ass’n v. Ryan, 225 So. 2d 903, 905 (Fla. 1969) (holding that “with the exception of the right to strike, public employees have the same rights [as private employees in terms] of collective bargaining”), *with* Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993) (recognizing “the legislature must be given some leeway to deal with bona fide [financial] emergencies”) and *Fla. PBA*, 613 So. 2d. at 418 (holding public and private employees’ rights to collectively bargain are inherently different since a negotiated agreement is always subject to funding by the legislature).

125. See FLA. STAT. § 447.403(1) (2010).

126. *Id.* § 447.201.

127. *Id.* § 447.207(1).

128. *City of Winter Springs v. Winter Springs Prof’l*, 885 So. 2d 494, 498 (Fla. 1st Dist. Ct. App. 2004).

tion addressed in this paper is exigent circumstances, because it is the exception pled by employers facing financial distress.<sup>129</sup>

The exigent circumstances exception is an affirmative defense to unilateral change available to public employers.<sup>130</sup> Its purpose is to "provide relief to an employer who is forced by an emergency to quickly and immediately modify the wages, hours, or terms and conditions of employment of its employees."<sup>131</sup> Ultimately, it allows the employer to modify the terms or conditions of a mandatory subject of bargaining without first negotiating the change.<sup>132</sup> Unilateral action based on this exception is proper only in response to an urgent need,<sup>133</sup> and only when the employer can prove there is no viable alternative to its action.<sup>134</sup> The defense of waiver will not be discussed in this paper, because it is not an applicable defense to a public employer's financial distress.<sup>135</sup>

In the context of financial emergencies, an employer can claim exigent circumstances in defense to a complaint by a union for the employer's unilateral change to a mandatory subject of bargaining.<sup>136</sup> But PERC has been reluctant over the years to allow employers to use the defense based on assertions that they cannot afford to abide by their contract terms.<sup>137</sup> For instance, PERC has recognized that a shortfall of funds in one budget is not a per se emergency because of the availability of funds in *other* budgets that can be

129. See *Sarasota Classified-Teachers Ass'n (Sarasota Classified-Teachers Ass'n I)*, 18 F.P.E.R. ¶ 23069, at 122 (1992), *rev'd*, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993).

130. See *id.*

131. *Id.* (quoting *Fla. Sch. for the Deaf & the Blind Teachers United (Fla. Sch. for the Deaf & the Blind Teachers United I)*, 11 F.P.E.R. ¶ 16080, at 263 (1985), *aff'd*, 483 So. 2d 58 (Fla. 1st Dist. Ct. App. 1986)).

132. See *id.*

133. See *Fla. Sch. for the Deaf & the Blind Teachers United I*, 11 F.P.E.R. ¶ 16080, at 263-64.

134. See *Volusia Cnty. Fire Fighters Ass'n, Local 3574*, 32 F.P.E.R. ¶ 89, at 218 (2006) (finding that an inability to reach an agreement is not an exigent circumstance because, the employer has an alternative solution in impasse procedures); *Fla. Classified Emp's. Ass'n*, 7 F.P.E.R. ¶ 12100, at 236 (1981) (declaring the exigent circumstances defense requires a showing of no viable alternative to taking immediate action).

135. *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 122 (finding that the appropriate defense is exigent circumstances for public employer financial distress).

136. See *id.*

137. See *id.* at 123; *Tarpon Springs Fire Fighters Ass'n, Local 3140*, 19 F.P.E.R. ¶ 24013, at 48 (1992); *Martin Cnty. Educ. Ass'n (Martin Cnty. I)*, 18 F.P.E.R. ¶ 23061, at 101 (1992), *rev'd*, 613 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993) (per curiam); *Pensacola Junior Coll. Faculty Ass'n*, 13 F.P.E.R. ¶ 18150, at 369 (1987).

transferred to remedy the shortfall.<sup>138</sup> Moreover, the Commission has held that even if there is a known problem of decreased revenue for the employer, that fact alone is not enough to show a financial emergency.<sup>139</sup>

A good example of PERC's position on that issue is found in *Martin County Education Ass'n (Martin County I)*.<sup>140</sup> In that case, the Martin County School Board, contrary to the terms of the collective bargaining agreement, unilaterally froze salaries for the upcoming year because of an anticipated shortfall in the budget.<sup>141</sup> But PERC declined to find that the school board faced an exigent circumstance, which would excuse its unilateral action.<sup>142</sup> It noted that while it could "not intrude into the political decision-making process of local school boards as they decide how to prioritize spending," it did have the authority to determine whether a true emergency existed.<sup>143</sup> In that case, the school board failed to show proof of a real emergency that justified its action to bypass the bargaining process, because its financial records showed a pool of unallocated funds large enough to cover the cost of the contractual pay raises.<sup>144</sup> It did not matter that those funds were from a budget *other* than the one from which they usually distributed the pay raises.<sup>145</sup>

#### B. *Unilateral Action Allowed by Florida Statutes*

Currently there are two Florida laws that create statutory exceptions to the prohibition of unilateral action by a public employer over mandatory subjects of bargaining: section 447.309(2), the Underfunding Statute, and section 447.4095, the Financial Urgency Statute.<sup>146</sup> The latter was born from the amendment of the first.<sup>147</sup> In that context, it is important to understand

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138. *Tarpon Springs Fire Fighters Ass'n, Local 3140*, 19 F.P.E.R. ¶ 24013, at 48 (finding that funds available from other budget sources, regardless of whether the city wanted to use those funds, negated the existence of a financial exigency).

139. *Id.*

140. 18 F.P.E.R. ¶ 23061, at 99 (1992), *rev'd*, 613 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993) (*per curiam*).

141. *Id.*

142. *Id.* at 101.

143. *Id.*

144. *Id.*

145. *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 101.

146. See FLA. STAT. §§ 447.309(2), .4095 (2010).

147. See *generally* Act effective July 1, 1995, ch. 95-218, §§ 1-2, 1995 Fla. Laws 1943, 1943-44 (codified as amended at FLA. STAT. §§ 447.309(2)(a)-(b), .4095 (1995)).

how governments used—or misused—the Underfunding Statute prior to its amendment in 1995.<sup>148</sup>

### 1. The Underfunding Statute Prior to 1995

In an effort to resolve the inherent conflict<sup>149</sup> between the constitutional right to bargain granted by Florida Constitution, article I, section 6, and the legislature's power to appropriate funds granted by Florida Constitution, article VII, section 1(c),<sup>150</sup> the legislature included the language codified in section 447.309(2) in the Public Employment Relations Act (PERA).<sup>151</sup> As originally adopted, the statute read:

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 appropriate funds sufficient to fund the collective bargaining agreement shall not constitute nor be evidence of any unfair labor practice.<sup>152</sup>

The Underfunding Statute, as it was interpreted and applied prior to 1995, allowed a “legislative body”<sup>153</sup> to disregard the amount of funding pre-

148. See *Sarasota Cnty. Sch. Dist. v. Sarasota Classified-Teachers Ass'n (Sarasota Classified-Teachers Ass'n II)*, 614 So. 2d 1143, 1148 (Fla. 2d Dist. Ct. App. 1993).

149. *Id.*

150. *Id.* “No money shall be drawn from the treasury except in pursuance of appropriation made by law.” FLA. CONST. art. 7, § 1(c). “That provision, and the vesting of ‘the legislative powers of the state’ in the Florida Legislature by [a]rticle III, [s]ection 1, renders the appropriation of State funds the exclusive constitutional prerogative of the Legislature.” *United Faculty of Fla. v. Bd. of Regents*, 365 So. 2d 1073, 1074 (Fla. 1st Dist. Ct. App. 1979).

151. Public Employee Relations Act (PERA), ch. 74-100, § 3, 1974 Fla. Laws 134, 144 (codified as amended at FLA. STAT. §§ 447.201–.609 (1975)).

152. *Id.*

153. “Legislative body” is a term of art as used in Chapter 447 of the *Florida Statutes*. The legislature defines the term in section 447.203:

“Legislative body” means the State Legislature, the board of county commissioners, the district school board, the governing body of a municipality, or the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment and which, as the case may be, is the appropriate legislative body for the bargaining unit.

viously agreed to in a collective bargaining agreement between the public employer and the public employee, on the theory that a “legislative body” could not be charged by the executive branch with an order to spend money.<sup>154</sup> The First District Court of Appeal first interpreted the Underfunding Statute in *United Faculty of Florida v. Board of Regents*<sup>155</sup> in 1979 as it applied to the state government, creating a limitation on the constitutional right of public employees to collectively bargain.<sup>156</sup>

a. United Faculty of Florida v. Board of Regents

In *Board of Regents*, the First District held that a collective bargaining agreement between the Board of Regents (BOR) and United Faculty of Florida (UFF)<sup>157</sup> does not strip the legislature of its appropriations power, but instead, that agreement is subject to legislative funding.<sup>158</sup> Here, after extensive negotiations and just before an impasse hearing, the parties reached an agreement over pay increases.<sup>159</sup> Pursuant to statutory duty, the governor amended his budget to request appropriations from the legislature sufficient to fund the parties’ recent agreement.<sup>160</sup> But instead of funding the requested \$6.6 million, the legislature appropriated only \$5.1 million.<sup>161</sup> UFF thereafter brought a charge against the State claiming that there was enough money contained in the aggregate appropriations to fund the amount negotiated in the contract.<sup>162</sup> BOR countered that the legislature had chosen to appropriate

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FLA. STAT. § 447.203(10) (2010). So, by using that phrase in the Underfunding Statute, the legislature—whether knowingly or not—essentially allowed that statute to apply to any of the bodies named in section 447.203(10). See *Bd. of Regents*, 365 So. 2d at 1075.

154. See, e.g., *Holmes Cnty. Teachers’ Ass’n, 9 F.P.E.R. ¶ 14207*, at 401 (1983) (“The collective bargaining agreement to which the petitioner is a party did not divest the [l]egislature of its constitutional powers in the appropriation of public monies” pursuant to section 447.309(2).)

155. 365 So. 2d 1073 (Fla. 1st Dist. Ct. App. 1979).

156. *Id.* at 1077–79; Orta, *supra* note 54, at 281.

157. “The UFF is the certified bargaining agent [that] represents approximately 5,000 faculty and professional employees of the BOR.” *Bd. of Regents*, 365 So. 2d at 1074.

158. *Id.* at 1078–79.

159. See *id.* at 1076.

160. *Id.* The governor was acting pursuant to his statutory duty under section 447.309(2), which, prior to its 1995 amendment, read: “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.” *Id.* at 1075–76 n.4 (quoting FLA. STAT. § 447.309(2) (1993) (amended 1995)).

161. *Bd. of Regents*, 365 So. 2d at 1077.

162. *Id.* at 1074.

only a specific amount for use in implementing the contract from which it could not stray.<sup>163</sup>

The opinion began by noting that article VII, section 1(c) of the Florida Constitution grants to the Florida Legislature exclusive control over state monies.<sup>164</sup> Acting under that power, the legislature “explicitly and unmistakably” chose to underfund the negotiated agreement by \$1.5 million, which it had a constitutional right to do.<sup>165</sup> The court held that collective bargaining agreements do “not divest the [l]egislature of its constitutional powers” to appropriate public funds;<sup>166</sup> they do not make “the exercise of legislative discretion a simple ministerial function.”<sup>167</sup> Instead, collective bargaining agreements are always made subject to the legislature's appropriations authority.<sup>168</sup> Any attempt by BOR to fund the contract at any other amount would be a “blatant disregard” of that legislative power.<sup>169</sup> Moreover, the district court commented that even if the appropriations to fund the collective bargaining agreement in question were free of restrictions, the court could not demand that BOR pull funds from other appropriations to supplement that agreement's funding.<sup>170</sup> It reasoned that such a ruling would cause irreconcilable conflict among other funded agreements.<sup>171</sup> Lastly, the court held that the legislature's underfunding was not an impairment of the contracts clause<sup>172</sup> since collective bargaining agreements are always contingent on legislative appropriations, a fact well-known by both parties before they began negotiations.<sup>173</sup>

The district court's holding was not explicitly limited to the state government,<sup>174</sup> but at the same time, its language did not contemplate application of the same theory to local government entities—especially those whose

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163. *Id.*

164. *Id.* See *infra* accompanying text note 233 for the language of article VII, section 1(c).

165. *Bd. of Regents*, 365 So. 2d at 1077.

166. *Id.* at 1078–79.

167. *Id.* at 1079.

168. *Id.* at 1078.

169. *Id.*

170. *Bd. of Regents*, 365 So. 2d at 1078.

171. *Id.*

172. *Id.*; see FLA. CONST. art. I, § 10. See *supra* note 28 and accompanying text for the language of article I, section 10.

173. *Bd. of Regents*, 365 So. 2d at 1078.

174. See *id.* at 1079. The court concluded that “the collective bargaining agreement in question incorporated the Constitution and laws of this State, the provisions of which commit to the Florida Legislature the final say in the appropriation of State monies.” *Id.*

“public employer”<sup>175</sup> and “legislative body,” pursuant to section 447.203 of the *Florida Statutes*, are one in the same.<sup>176</sup> Nonetheless, the language of the Underfunding Statute, prior to its 1995 amendment, provided the power to underfund collective bargaining agreements to a “legislative body” and not the “Legislature”—the latter implicating the state legislature.<sup>177</sup> “Legislative body” is a term of art as it is used in PERA, with a precise definition that includes several local governing bodies and those entities that can appropriate funds and establish policy to regulate terms and conditions of employment.<sup>178</sup> The combination of that statutory language with the *United Faculty of Florida* decision paved the way for both state and local public bodies to underfund or unilaterally change collective bargaining agreements under section 447.309(2) of the *Florida Statutes*.<sup>179</sup>

#### b. PERC Cases

In 1983, in a case of first impression, PERC found that a local school board had underfunded a collective bargaining agreement in bad faith, and thereby, in essence, had committed an unfair labor practice.<sup>180</sup> But, the commission declined to award damages because the holding in *Board of Regents* and section 447.309(2) prohibited it from using the evidence of the underfunding to support an unfair labor practice charge against the board.<sup>181</sup> In its opinion, PERC struggled with applying the Underfunding Statute to the situation because the school board assumed both the role of public employer and legislative body, especially because *Board of Regents* was decided on the premise of the public employer and legislative body being independent

175. See *supra* note 83 for the language of section 447.203(2), which defines “public employer” as it is used under PERA.

176. For instance, a county commission is both the *public employer* and *legislative body* within the meaning of section 447.203. See FLA. STAT. § 447.203(2), (10). On the other hand, a county sheriff’s office only meets the definition of *public employer* and does not have the authority under statute to act as the *legislative body*—the county commission typically will serve as the sheriff’s *legislative body*. See *id.*

177. See FLA. STAT. § 447.309(2) (1993) (amended 1995).

178. FLA. STAT. § 447.203(10) (2010). See *supra* note 153 for the text of section 447.203(10).

179. See, e.g., *Sarasota Classified-Teachers Ass’n II*, 614 So. 2d 1143, 1146 (Fla. 2d Dist. Ct. App. 1993); *Sch. Bd. of Martin Cnty. v. Martin Cnty. Educ. Ass’n (Martin Cnty. II)*, 613 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 1993) (per curiam); *Holmes Cnty. Teachers’ Ass’n*, 9 F.P.E.R. ¶ 14207, at 397–98 (1983).

180. *Holmes Cnty. Teachers’ Ass’n*, 9 F.P.E.R. ¶ 14207, at 400.

181. *Id.* at 401; FLA. STAT. § 447.309(2) (1993) (amended 1995) (“The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.”).

identities.<sup>182</sup> Nonetheless, PERC found no evidence of legislative intent surrounding section 447.309(2) to support an alternate funding procedure for those agencies with independent identities, such as the State, and those agencies that assume binary roles, like the school board, and so felt bound by the holding in *Board of Regents*.<sup>183</sup>

The commission, however, did express its discontent with how the Underfunding Statute was being applied.<sup>184</sup> It noted its holding conflicted with the notion of good faith bargaining because it allowed a public employer who is also the legislative body to agree to a salary provision and then refuse to fund it.<sup>185</sup> Moreover, it found the application of the Underfunding Statute in this regard to be adverse to public employees' constitutional rights under article I, section 6:

[T]he ability to require a public employer to live up to its economic contractual commitments [is] an important right that Florida's public employees should have, as do its private employees. Employees of a private sector employer in Florida . . . can force their employer to implement negotiated monetary provisions of a contract. However, similarly situated public employees apparently possess no similar right, due to a legislative body's prerogative, granted by [s]ection 447.309(2), to underfund a contract. . . . The stability of labor relations is enhanced if negotiated contracts voluntarily entered into must be fully implemented.<sup>186</sup>

PERC's finding that the Underfunding Statute, as it was being applied, constituted an abridgment of public employees' rights under article I, section 6, carried over to 1992 when it again had an opportunity to deal with the application of the Underfunding Statute.<sup>187</sup> That year, two local school boards came before PERC to defend their unilateral actions, claiming their actions were justified under section 447.309(2) and under the exigent circumstances exception.<sup>188</sup> In both *Martin County I* and *Sarasota Classified-Teachers Ass'n v. Sarasota County School District (Sarasota Classified-*

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182. *Holmes Cnty. Teachers' Ass'n*, 9 F.P.E.R. ¶ 14207, at 400–01.

183. *Id.* at 401.

184. *See id.*

185. *Id.*

186. *Id.* at 402–03 n.8 (citations omitted).

187. *See Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100 (1992), *rev'd*, 613 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993) (per curiam); *see generally Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123 (1992), *rev'd*, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993).

188. *See Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100–01; *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123.



*Teachers Ass'n I*),<sup>189</sup> PERC applied a very narrow construction to the statute, resulting in decisions that section 447.309(2) did not apply in either situation.<sup>190</sup> Both cases, however, were reversed—arguably mistakenly—by Florida Courts of Appeal.<sup>191</sup>

In *Martin County I*, the school board unilaterally decided to freeze teachers' salaries while the parties were engaged in reopener negotiations over wages.<sup>192</sup> The freeze eliminated teachers' annual experience salary increases, which they had been receiving since 1982.<sup>193</sup> The school board defended the union's unfair labor practice charge on the grounds that its action was permissible under section 447.309(2).<sup>194</sup> PERC—noting the statute's potential interference with the teachers' constitutional rights to collectively bargain—strictly limited its application of the statute to the narrow facts of the case.<sup>195</sup> Under that standard, PERC decided the statute applied to only bargaining agreements that had been executed by both parties.<sup>196</sup> And since the parties in this case were still negotiating the issue of wages under the reopener provision, they had not yet *executed* an agreement.<sup>197</sup> The school board appealed to the Fourth District Court of Appeal.<sup>198</sup>

The district court disagreed with PERC and declared that the Underfunding Statute applied to *any* collective bargaining agreement, so long as that agreement had *at one point* been executed by both parties.<sup>199</sup> In the case at hand, since the parties had executed the original agreement well before the reopener negotiations, section 447.309(2) applied, and the union could not use underfunding as evidence of an unfair labor practice against the school board.<sup>200</sup>

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189. 18 F.P.E.R. ¶ 23069, at 121 (1992), *rev'd*, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993).

190. *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100; *Sarasota Classified-Teachers' Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123.

191. *Martin Cnty. II*, 613 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 1993) (per curiam); *Sarasota Classified-Teachers Ass'n II*, 614 So. 2d 1143, 1149 (Fla. 2d Dist. Ct. App. 1993).

192. *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 99.

193. *Id.* at 99, 101.

194. *Id.* at 99.

195. *Id.* at 100.

196. *See id.*

197. *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100.

198. *Martin Cnty. II*, 613 So. 2d 521, 522 (Fla. 4th Dist. Ct. App. 1993) (per curiam).

199. *Id.* at 523. (“After a collective bargaining agreement is negotiated and concluded in good faith, section 447.309(2) prevents any subsequent legislative underfunding from being used as evidence of an unfair labor practice against the public employer.”).

200. *Id.*

PERC's review of *Sarasota Classified-Teachers Association I* followed soon after.<sup>201</sup> There, the school board and the union entered into a three-year agreement, and each year the school board appropriated funds sufficient to fund the step increases contained within the provisions of the contract.<sup>202</sup> But, after the contract expired—during the status quo period—the school board decided to eliminate the increases.<sup>203</sup> When the union filed an unfair labor practice charge against the school board, it defended its unilateral action as permissible under section 447.309(2).<sup>204</sup>

Similar to its decision in *Martin County I*, PERC declared that the Underfunding statute impaired the constitutional right of public employees to collectively bargain and so gave the statute a strict construction.<sup>205</sup> Since the language in statute referred repeatedly to the application of a *collective bargaining agreement*, PERC determined it did not apply to the status quo period while the parties were engaged in negotiations.<sup>206</sup> Therefore, the school board could not use section 447.309(2) to defend its action and was subject to an unfair labor practice.<sup>207</sup> The school board appealed to the Second District Court of Appeal.<sup>208</sup>

The district court disapproved of PERC's narrow construction of section 447.309(2) and instead interpreted it broadly.<sup>209</sup> It held that a legislative body may choose to underfund a collective bargaining agreement in *any* circumstance so long as the circumstance deals with a collective bargaining situation in which the employer is requested to appropriate funds.<sup>210</sup> Its holding thereby extended the application of the underfunding statute to the status quo period, and the school board successfully defended its unilateral change to the status quo under section 447.309(2).<sup>211</sup>

Obvious distinctions appear when comparing PERC's reasoning to the district courts' reasoning in the *Martin County I* and *Sarasota Classified-*

201. *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 121 (1992), *rev'd*, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993).

202. *Id.* at 125 (recommendation of Cheatham, Hearing Officer).

203. *Id.* at 122.

204. *Id.* at 123.

205. *Id.*

206. *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123.

207. *Id.*

208. *Sarasota Classified-Teachers Ass'n II*, 614 So. 2d 1143, 1146 (Fla. 2d Dist. Ct. App. 1993).

209. *See id.* at 1146.

210. *Id.* at 1149.

211. *See id.*

*Teachers Ass'n I* cases.<sup>212</sup> PERC maintained that the Underfunding Statute as it applied to local governments abridged public employees' rights under article I, section 6, and thus required a strict interpretation.<sup>213</sup> And interestingly enough, it was PERC, and not the appellate courts, that applied the Supreme Court of Florida's standard that requires a compelling state interest in order to destroy an employee's right to effective collective bargaining.<sup>214</sup>

On the other hand, the district courts applied broad, generous interpretations, thereby expanding the rights of public employers under section 447.309(2) without ever considering the interference with public employees' constitutional rights.<sup>215</sup> The courts also explicitly approved the application of the statute to local public agencies.<sup>216</sup> The cumulative effect of the courts' decisions permitted section 447.309(2) to be applied in a way that rendered *ineffective* public employees' constitutional right to collectively bargain—holdings contrary to Supreme Court of Florida's precedent.<sup>217</sup> A public employer that both negotiates *and* funds a collective bargaining contract could now unilaterally underfund it at any time, and for any reason, and would be protected from an unfair labor charge pursuant to the Underfunding Statute.<sup>218</sup>

### C. *Application to State Government*

Right around the same time as the decisions in *Martin County I* and *Sarasota Classified-Teachers Ass'n I*, the Supreme Court of Florida was pondering the same statute as it applied to the state government.<sup>219</sup> The court's

212. Compare *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123 with *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100 (1992), *rev'd*, 613 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993) (per curiam).

213. *Id.*; see also *Holmes Cnty. Teachers' Ass'n*, 9 F.P.E.R. ¶ 14207, at 401 (1983).

214. *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100 (remembering the Supreme Court of Florida's decision "that the constitutional right of public employees to collectively bargain is not to be abrogated absent a compelling state interest") (citation omitted).

215. See *Martin Cnty. II*, 613 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 1993) (per curiam); *Sarasota Classified-Teachers Ass'n II*, 614 So. 2d 1143, 1146 (Fla. 2d Dist. Ct. App. 1993).

216. See *Martin Cnty. II*, 613 So. 2d at 523 ("This statute makes no exception for the situation involved herein where the public employer wears two hats, one as the public employer, and the other as the legislative body.").

217. *Hillsborough Cnty. Govtl. Emps. Ass'n v. Hillsborough Cnty. Aviation Auth.*, 522 So. 2d 358, 363 (Fla. 1988) ("The Florida Constitution guarantees public employees the right of effective collective bargaining.").

218. See *id.*

219. See, e.g., *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 416 (Fla. 1992).

holdings in two cases during late 1992 and 1993 called into question the holdings of the two 1993 school board cases.<sup>220</sup>

### 1. *State v. Florida PBA*

The PBA ratified a three-year collective bargaining agreement with the state, effective from 1987–1990.<sup>221</sup> In 1988, the legislature passed an appropriations act that did not underfund the agreement, but instead, modified the leave bank provisions of the contract.<sup>222</sup> The Court decided, however, that this presented a unique situation because the legislature had used its appropriations power unilaterally to change the terms of the contract and not to underfund it, as seen in previous cases.<sup>223</sup>

The PBA brought an action against the State claiming that it had abridged its members' constitutional rights to collectively bargain under the Florida Constitution because the legislature did not show a compelling state interest before acting.<sup>224</sup> Both the trial court and the district court agreed with the PBA that the State, by unilaterally modifying the terms of the collective bargaining agreement, abrogated the PBA members' fundamental rights under article I, section 6.<sup>225</sup> The State appealed to the Supreme Court of Florida, which reversed and remanded the district court's decision.<sup>226</sup>

The majority opinion in this case spent a great deal of time making distinctions between the rights of private and public employees under article I, section 6—particularly in the area of funding collective bargaining agreements.<sup>227</sup> It stated that unlike the private sector, a public employees' union

220. *See id.* at 415–16; *see* *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672–73 (Fla. 1993).

221. *Fla. PBA*, 613 So. 2d at 416; *see generally* Orta, *supra* note 54 (comprehensively analyzing this case).

222. *Fla. PBA*, 613 So. 2d at 416. The legislature reduced the hours of personal leave and increased the hours of sick leave that employees accumulated on a monthly basis. *Id.* It also eliminated accrued sick leave that totaled more than 240 hours and eliminated the requirement that employees submit doctors' notes when using sick time. *Id.*

223. *Id.* at 420.

224. *Id.* at 416, 419 n.6. The PBA depended on the Court's holding in *Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Authority*, 522 So. 2d 358, 362 (Fla. 1988), that a public agency must show a compelling state interest in order to abridge employees' fundamental right to collectively bargain. *Fla. PBA*, 613 So. 2d at 419 n.6; *Hillsborough Cnty. Govtl. Emps. Ass'n*, 522 So. 2d at 362.

225. *Fla. PBA*, 613 So. 2d at 416.

226. *Id.* at 421.

227. *See id.* at 416–19.

The fact that public employee bargaining is protected under Florida's Constitution does not require us to ignore universally recognized distinctions between public and private employees. The constitutional right to bargain must be construed in accordance with all provi-

could never require the legislature to fund a collective bargaining agreement because that would involve the executive branch invading legislative territory—an act forbidden by the separation of powers doctrine.<sup>228</sup> In order to maintain the integrity of that doctrine,<sup>229</sup> the Court reasoned that collective bargaining agreements must be subject to the legislature’s constitutional right to appropriate public funds.<sup>230</sup>

The Court reconciled its holding in *Florida PBA* with its previous holding in *Hillsborough County Governmental Employees Ass’n*,<sup>231</sup> in which it necessitated a public employer to show a compelling state interest before abridging employees’ constitutional rights to collectively bargain.<sup>232</sup> The Court explained that the public agency in this case did not act contrary to that standard “because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation,” and, so, the *Hillsborough County Governmental Employees Ass’n* holding did not ap-

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sions of the constitution. Surely it was not intended to alter fundamental constitutional principles, such as the separation of powers doctrine. . . . This fact in and of itself necessitates a realization that public and private bargaining is inherently different.

*Id.* at 418. The decision was split 4–3. *See id.* at 421–22. Justice Grimes wrote the majority opinion; Justices Overton, McDonald, and Harding concurred. *Fla. PBA*, 613 So. 2d at 416, 421. Justice Kogan wrote the dissent, joined by Justices Barkett and Shaw. *Id.* at 422.

228. *Id.* at 418–19. Florida’s separation of powers doctrine is encompassed in article II, section 3 of its constitution, which reads: “The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” FLA. CONST. art. II, § 3.

229. In *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991), the Court opined the significance of preserving the separation of powers doctrine: “The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty.” *Id.* at 263.

230. *Fla. PBA*, 613 So. 2d at 418–19. Article VII, section 1(c) of the Florida Constitution reads: “No money shall be drawn from the treasury except in pursuance of appropriation made by law.” FLA. CONST. art. VII, § 1(c). The Court explained section 1(c) in a 1935 opinion, finding that:

[t]he object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. Such a provision secures to the [legislature] . . . the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.

*Children*, 589 So. 2d at 265 (quoting *State ex rel. Kurz v. Lee*, 163 So. 859, 868 (Fla. 1935) (en banc)).

231. 522 So. 2d 358 (Fla. 1988).

232. *Id.* at 362.

ply.<sup>233</sup> The Court, however, added one caveat to its conclusion: “[S]hould the legislatively mandated change fall outside the appropriations power, it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test [under *Hillsborough County Governmental Employees Ass’n*].”<sup>234</sup>

Having no precedent to follow on the legislature’s unilateral modification of a mandatory subject of bargaining, the Court looked to a Supreme Court of New Jersey case for guidance.<sup>235</sup> From there it adopted a funding test that purportedly offered “a reasonable accommodation of both the right to collectively bargain and the legislature’s exclusive control over the public purse.”<sup>236</sup> The test is: if the legislature appropriates enough money to fund the benefit as negotiated then, it may not unilaterally alter the benefit; but, if it does not appropriate enough funds—which is within its right to do—then the legislature may unilaterally change the negotiated benefit, even to the extent that it becomes contrary to the original intent of the parties.<sup>237</sup>

Three months after the *Florida PBA* decision, the Court in *Chiles* would adopt yet another test in an attempt to balance the legislature’s appropriations power with the collective bargaining rights of public employees.<sup>238</sup>

## 2. The *Chiles* Case

The State and one of its unions, United Faculty of Florida (UFF), reached an impasse over their collective bargaining agreement for fiscal year 1991–1992.<sup>239</sup> In resolving the impasse, the legislature authorized a three percent pay raise for UFF employees effective the first of January 1992.<sup>240</sup> The decision was reduced to writing and inserted into the collective bargaining agreement, which UFF members soon ratified.<sup>241</sup> Following its resolution of the impasse, however, the legislature delayed the effective date of the

233. *Fla. PBA*, 613 So. 2d at 419 n.6. Justice Kogan disagreed with the majority’s reconciliation with *Hillsborough County Governmental Employees Ass’n*. *Id.* at 423 (Kogan, J., dissenting). Kogan reminded the Court of its decision that “[t]he right to bargain collectively is, as a part of the state constitution’s declaration of rights, a fundamental right. As such it is subject to official abridgement only upon a showing of a compelling state interest . . . .” *Id.* (quoting *Hillsborough Cnty. Govtl. Emps. Ass’n*, 522 So. 2d at 362).

234. *Id.* at 419 n.6 (majority opinion).

235. *Id.* at 420–21 (citing *State v. State Troopers Fraternal Ass’n*, 453 A.2d 176 (N.J. 1982)).

236. *Fla. PBA*, 613 So. 2d at 421.

237. *Id.*

238. See *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

239. *Id.* at 672.

240. *Id.*

241. *Id.*

pay raises until February 1992, in response to new information concerning an expected shortfall in revenue.<sup>242</sup> When the fiscal problems continued to escalate, the legislature unilaterally decided to eliminate the pay raises altogether.<sup>243</sup>

UFF filed suit claiming that the legislature's action was unconstitutional as an abridgment of article I, sections 6 and 10 of the Florida Constitution.<sup>244</sup> The trial court ruled in the union's favor finding that the legislature's act "violated the right to collectively bargain and constituted an impermissible impairment of contract."<sup>245</sup> The State appealed to the district court, which certified the case for immediate review by the Supreme Court of Florida.<sup>246</sup>

Before proceeding with its decision, the Court noted that the situation at hand was different from *Florida PBA*, because, unlike that case, the newer case dealt with a collective bargaining agreement that had already been funded before being unilaterally changed and eventually "unilaterally abrogated by the legislature."<sup>247</sup>

Justice Kogan refused to acknowledge the State's argument that collective bargaining agreements never reach the level of fully binding contracts.<sup>248</sup> Instead, he announced that "[o]nce the executive has negotiated and the legislature has accepted *and* funded an agreement, the state and all its organs are bound by that agreement under the principles on contract law."<sup>249</sup> On that note, he accentuated the importance of the right to contract in Florida, finding it "one of the most sacrosanct rights guaranteed by our fundamental law" and confirming that the legislature was severely limited in its ability "to eliminate a contractual obligation it has itself created."<sup>250</sup> But on the other side of that argument, Justice Kogan expressed concern that the legislature, in its continuing obligation to fund collective bargaining contracts, would be unable "to deal with bona fide [fiscal] emergencies."<sup>251</sup>

Balancing these competing interests, the Court held that the legislature could choose to underfund a collective bargaining contract that was *already funded*, but only in situations in which it could justify its action by a compelling state interest and prove that no reasonable alternative was available—in other words, the funds must not be obtainable from any other possible

242. *Id.*

243. *Chiles*, 615 So. 2d at 672.

244. *Id.* See *supra* note 28 for the language of article I, section 10.

245. *Chiles*, 615 So. 2d at 672.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 672–73.

250. *Chiles*, 615 So. 2d at 673 (citing FLA. CONST. art. I, § 10).

251. *Id.*

source.<sup>252</sup> Otherwise, the abrogation of a collective bargaining contract is not permitted.<sup>253</sup> In applying such a test to the facts of the case, the Court did not find a compelling state interest that required the legislature to modify the existing collective bargaining contract.<sup>254</sup> The majority did not give a reason for that decision, but Justice Grimes in his concurring opinion shed some light by noting that the collective bargaining contract needed only \$35.4 million for implementation—a small amount compared to the state's more than \$28 billion budget.<sup>255</sup> That situation, he reasoned, did not give rise to a compelling state interest requiring the repudiation of a binding contract.<sup>256</sup>

### 3. The Standards of the *Chiles* & *Florida PBA* Tests

The Court's decisions from the *Chiles* and *Florida PBA* cases clarify the statutory method, pursuant to section 447.309(2), for public entities to unilaterally—and constitutionally—underfund a collective bargaining agreement or underfund or alter the terms of a collective bargaining agreement once it has become a binding contract.<sup>257</sup> Basically, the *Florida PBA* test regulates a situation in which the legislature's appropriations power, granted in article VII, section 1(c) of the Florida Constitution,<sup>258</sup> acts as an inherent limitation to a collective bargaining agreement to preserve the separation of powers doctrine.<sup>259</sup> Alternatively, the *Chiles* test deals with a situation in which the legislature is *not* acting according to its appropriations power, in which case, the separation of powers doctrine is not threatened.<sup>260</sup> Both of these tests apply to the state level of government because the state government follows a strong separation of powers doctrine where the executive, judicial, and legislative branches function independently of one another.<sup>261</sup>

Essentially, local governments—which do not experience the same separation of powers issues as state governments—do not have the authority to

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252. *Id.*

253. *Id.*

254. *See id.*

255. *Chiles*, 615 So. 2d at 674 (Grimes, J., concurring).

256. *Id.*

257. *See id.* at 673 (majority opinion); *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 419 (Fla. 1992); *see also* FLA. STAT. § 447.309(2) (2010).

258. FLA. CONST. art. VII, § 1(c). *See supra* note 230 for the text of article VII, section 1(c).

259. *See Fla. PBA*, 613 So. 2d at 419 n.6.

260. *Chiles*, 615 So. 2d at 673.

261. *See id.*; *Fla. PBA*, 613 So. 2d at 419.



act under *Florida PBA*.<sup>262</sup> The *Chiles* test, however, applies to both local and state governments since the state government has the option to act outside of its appropriations power.<sup>263</sup>

The *Florida PBA* test is based on the idea that the separation of powers doctrine imposes an inherent limitation on a collective bargaining agreement—restricting its ability to become a binding contract until the legislature has exercised its appropriations power.<sup>264</sup> Accordingly, if the legislature chooses to underfund a collective bargaining agreement it may do so without violating fundamental rights to collectively bargain or contract.<sup>265</sup> Similarly, in cases in which it has underfunded a collective bargaining contract it may impose conditions on the use of that funding even if the conditions conflict with the original terms of the agreement—resulting in a permissible unilateral change to that agreement.<sup>266</sup>

Reflecting a standard opposite of that in *Florida PBA*, the *Chiles* test applies to situations that *do not* involve the separation of powers doctrine—when the legislature’s appropriations power is not at issue.<sup>267</sup> In those instances, the Court affords a clear preference to employees’ constitutional rights to contract and collectively bargain.<sup>268</sup> Once the legislature appropriates funds sufficient to support the negotiated agreement, the agreement

262. *Citizens for Reform v. Citizens for Open Gov’t, Inc.*, 931 So. 2d 977, 989–90 (Fla. 3d Dist. Ct. App. 2006). The district court based its holding on the concept that the “Constitutional separation of powers simply does not exist at the local government level.” *Id.* at 989. It concluded that a mayor and a county commission are not “mutually exclusive” entities; rather, both act as the “governing body.” *Id.* at 990. The court supported its holding with multiple decisions from other jurisdictions. *Id.* at 989–90; *see also* 2A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 10:3 (West 3d ed. 2006) (internal footnotes omitted) (“Historically, the constitutional principle of the separation of powers has not been applied to the government of cities. The rationale is that separation of powers reduces the threat of an unchecked governing body, but that threat is slight where the governing body is subordinated to the powers of a higher level of government.”) (footnotes omitted).

263. *See Chiles*, 615 So. 2d at 672–73.

264. *Fla. PBA*, 613 So. 2d at 421.

265. *Id.*

266. *Id.*

267. *Chiles*, 615 So. 2d at 673. Although enumerated in *Chiles*, the *Chiles* test is also supported by the holding in *Florida PBA*. The *Hillsborough County Governmental Employees Ass’n* holding that a public agency must show a compelling state interest before abridging employees’ right to collectively bargain

is inapplicable here, because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation. Of course, should the legislatively mandated change fall outside the appropriations power, it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test.

*Fla. PBA*, 613 So. 2d at 419 n.6.

268. *See Chiles*, 615 So. 2d at 673–74.

becomes a binding contract that is enforceable under article I, section 10, as would be any other contract formed in the state.<sup>269</sup>

Once the agreement is funded and becomes a binding contract, the only way the legislature can unilaterally alter its provisions or rescind monies already provided is by demonstrating a compelling state interest and no viable alternative to abrogating the contract.<sup>270</sup> Justice Kogan noted the Court's commitment to such a standard:

The present case does not itself present a violation of separation of powers, nor are we attempting a judicial appropriation of public money. Here, the legislature acted pursuant to its powers, appropriated funds for collective bargaining agreements, and thereby created a binding contract. Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason. Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.<sup>271</sup>

The Court's decisions in *Florida PBA* and *Chiles* are significant because they draw distinctions between the two levels of government and how and when each may underfund or unilaterally change a collective bargaining agreement or contract.<sup>272</sup> Two years following those decisions, the Florida Legislature amended the Underfunding Statute to apply to only the state government.<sup>273</sup> The same bill proposed a new statute, section 447.4095—the Financial Urgency Statute—which seemingly provided local government flexibility in dealing with labor contracts during times of “financial urgency,” perhaps to compensate for its loss of access to the Underfunding Statute.<sup>274</sup>

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269. *Id.* at 673.

270. *Id.*

271. *Id.*

272. *Id.*; *Fla. PBA*, 613 So. 2d at 421.

273. Act effective July 1, 1995, ch. 95-218, § 1(2)(b), 1995 Fla. Laws 1943, 1943 (codified as amended at FLA. STAT. § 447.309(2)(b) (1995)).

274. *Id.* § 2 at 1943–44 (codified as amended at FLA. STAT. § 447.4095 (1995)).

## V. THE FINANCIAL URGENCY STATUTE

A. *How It Was Created*

The 1995 Legislature considered two bills, House Bill 1267<sup>275</sup> and Senate Bill 888,<sup>276</sup> which proposed amendments to the Underfunding Statute in section 447.309(2) and recommended the creation of the Financial Urgency Statute in section 447.4095.<sup>277</sup> The effect of either bill, in part, restricted application of the Underfunding Statute to only local-level government.<sup>278</sup> Essentially, the modification would remove a local government's ability under the statute to bypass the impasse procedure by engaging in a bargaining process façade with the union, "agreeing" to a collective bargaining agreement, and then simply underfunding or unilaterally changing anything in that agreement with which it did not agree.<sup>279</sup> Additionally, the bills' effects would remove from local governments the protection against unions' unfair labor practice charges for governments' conduct pursuant to the statute.<sup>280</sup>

Teachers' unions and public safety unions like the PBA supported the bills and applauded the legislature's recognition of local government's misuse of the Underfunding Statute.<sup>281</sup> On the other hand, non-supporters like the Florida League of Cities, Florida Public Employer Labor Relations Association, and the Florida Association of Counties<sup>282</sup> complained that the proposed changes would expose local public employers to unfair labor practice charges if they underfunded their collective bargaining agreements for *any*

275. Fla. HR Comm. on Govtl. Ops., H.B. 1267 (1995) Staff Analysis (Mar. 23, 1995) (on file with State Archives) [hereinafter Govtl. Ops. Comm. HB 1267 Staff Analysis].

276. Fla. S. Comm. on Govtl. Ops., SB 888 (1995) Staff Analysis (Mar. 27, 1995) (on file with State Archives) [hereinafter Govtl. Ops. Comm. SB 888 Staff Analysis].

277. Act effective July 1, 1995, ch. 95-218, §§ 1-3, 1995 Fla. Laws 1943, 1943-44 (codified as amended at FLA. STAT. §§ 447.309(2)(a)-(b), .4095 (1995)).

278. See *id.*; Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1.

279. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1. See, e.g., Holmes Cnty. Teachers' Ass'n, 9 F.P.E.R. ¶ 14207, at 397 (1983). In *Holmes County Teachers' Ass'n*, the employer and legislative body had an understanding that pursuant to section 447.309(2), it would not have to pay a contracted pay raise if the legislative body determined at the time the pay raise was due that there was not adequate funding. *Id.* Based on the understanding, the employer agreed with the bargaining agent to provide teachers with a contractual pay raise. *Id.* But when the time came to pass the respective budget, the legislative body failed to appropriate an amount necessary to fund the contractual pay raise. *Id.*

280. See Act effective July 1, 1995, ch. 95-218, §§ 1(2)(b), 2, 1995 Fla. Laws at 1943-44; Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1.

281. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 4.

282. *Id.*

reason.<sup>283</sup> That could result in an independent third-party forcing a public employer to fund the contract by raising taxes or cutting services.<sup>284</sup> For example, some local governments, like sheriffs' departments, have independent entities acting as their "public employers" and "legislative bodies," similar to the state.<sup>285</sup> Those public employers have no control over how their legislative bodies appropriate funds, and so changing the Underfunding Statute to apply to only state-level government would make those employers liable to the union for decisions made by separate entities.<sup>286</sup>

The proposed bills also ruffled some practicing labor attorneys—unexpectedly from the union side—who were wary of the bills' practical implications. Up until then, some labor attorneys had figured out how to bypass the local government's misuse of the Underfunding Statute: Under section 447.309(2), the union could not use evidence of underfunding to support an unfair labor practice charge against the employer, but the statute's silence as to grievances presupposed permission to proceed to arbitration.<sup>287</sup>

283. Issue Statement, Fla. League of Cities et al., *A Complicated Process: HB 47 (Healey) and SB 888 (Gutman)* (on file with State Archives) [hereinafter *A Complicated Process*].

284. *Id.*

285. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 2; see generally *A Complicated Process*, *supra* note 286.

286. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 3. This problem was not remedied in the final version of the adopted Financial Urgency statute. As such, constitutional officers like a sheriff fall through the cracks in the statute's language, as is common with several of the statutes found in chapter 447. For instance, a sheriff's department is granted its budget from the county commission, yet the sheriff is the "public employer" that negotiates and enters into contracts with its employees, not the commissioners. Under the Financial Urgency statute, then, is a sheriff authorized to declare a "financial urgency" when it is not the body with the power to increase or decrease its budget? This topic is addressed here only in a footnote because the issues and questions created therefrom are too many to list and discuss here.

287. See Palm Beach Cnty. Police Benevolent Ass'n (*Palm Beach Cnty. PBA*), 101 Lab. Arb. Rep. (BNA) 78, 85 (1993) (Abrams, Arb.). In his award, Arbitrator Roger Abrams addressed section 447.309(2) as it related to arbitrations:

None of the opinions addressing on [s]ection 447.309(2) offer a definitive reading of the legislative intent, in particular with regard to contract liability as determined in arbitration. The last sentence in the [s]ection 447.309(2) paragraph does clarify the purpose of the provision, however. . . . [It] appears to have been designed to keep . . . [PERC] out of the business of second guessing the legislative judgments of local municipalities. It does not free the [c]ity from its contract obligations that might be perfected in another forum, such as arbitration.

The [c]ity argues that [s]ection 447.309(2) cannot be limited to unfair labor practice cases because otherwise it would be a nullity. . . . The argument ignores issues of institutional competence, allocation of decisional power, and the intent of the negotiating parties. The [l]egislature might have wanted to keep PERC out of intragovernmental funding disputes. It might have thought that arbitrators were better able to resolve these types of disputes. It might have allowed the parties' intentions to control with regard to the appropriate forum for resolution. In any case, the [s]ection talks about unfair labor practice liability. That was the

That silence, paired with the fact that arbitration awards are very difficult to overturn,<sup>288</sup> resulted in a successful arbitration strategy: an arbitrator who had occasion to decide whether a legislative body could legally underfund a collective bargaining agreement issued decisions overwhelmingly in favor of bargaining agents.<sup>289</sup>

The proposed bills would ultimately put that strategy in jeopardy and force labor attorneys back to their drawing boards.<sup>290</sup>

Despite the negative attention, the legislature passed Senate Bill 888 effective as of July 1, 1995.<sup>291</sup> The bill includes two sections and encompasses two statutes, each granting a different level of government the opportunity to make unilateral changes to collective bargaining agreements or contracts—and each under a different set of standards.<sup>292</sup>

Section 1 of the bill split the Underfunding Statute, section 447.309(2), into two parts.<sup>293</sup> The first part, now designated as subsection (2)(a), kept the language that required the chief executive officer to request funds from the designated legislative body sufficient to implement the negotiated agreement.<sup>294</sup> Subsection (2)(a) still applies to both levels of government.<sup>295</sup> Subsection (2)(b) also kept the general language of the original statute but made it applicable to *only* the Florida Legislature.<sup>296</sup> Subsection (2)(b) concludes with a statutory adoption of the Court's holding in *Florida PBA*, mandating that “[a]ll collective bargaining agreements entered into by the state are subject to the appropriations powers of the Legislature.”<sup>297</sup>

In section 2 of the Bill, the Legislature created section 447.4095—the Financial Urgency Statute—in order to provide local governments a similar opportunity to make unilateral changes to a collective bargaining contract in

[l]egislature's plain intention, even if it did not totally free municipalities from fulfilling their promises.

*Id.* Mr. Abrams is a highly respected arbitrator in the Florida labor community.

288. See *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1328 (Fla. 1989).

289. See, e.g., *Palm Beach Cnty. PBA*, 101 Lab. Arb. Rep. (BNA) at 88; *Deerfield Beach Firefighters, Local 1673*, 98 Lab. Arb. Rep. (BNA) 1189, 1191 (1992) (Frost, Arb.).

290. See Govt. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 3.

291. See Act effective July 1, 1995, ch. 95-218, § 1-3, 1995 Fla. Laws 1943, 1943 (codified as amended at FLA. STAT. §§ 447.309(2)(a)-(b), .4095 (1995)).

292. See *id.* §§ 1-2, 1995 Fla. Laws at 1943-44.

293. See *id.* § 1, 1995 Fla. Laws at 1943.

294. See *id.*

295. See *id.* § 1, 1995 Fla. Laws at 1943.

296. Act effective July 1, 1995, ch. 95-218, § 2(b), 1995 Fla. Laws at 1943. Compare FLA. STAT. § 447.309(2)(b) (1993) (amended 1995) (using the term “legislative body”), with FLA. STAT. § 447.309(2)(b) (1995) (amended 1997) (using the term “legislature”).

297. Act effective July 1, 1995, ch. 95-218, § 1(2)(b), 1995 Fla. Laws at 1943; *State v. Fla. Police Benevolent Ass’n (Fla. PBA)*, 613 So. 2d. 415, 418 (Fla. 1992).

cases of financial emergencies.<sup>298</sup> The language of the Financial Urgency Statute, as adopted in 1995, remains the same today:

In the event of a financial urgency requiring modification of an agreement, the chief executive officer . . . and the bargaining agent . . . 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 [fourteen] 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[ection] 447.403 [which regulates the procedures of impasse]. An unfair labor practice charge shall not be filed during the [fourteen] days during which negotiations are occurring pursuant to this section.<sup>299</sup>

The language in that statute is vague, particularly in the expression “financial urgency”—a problem identified by a senate committee for Senate Bill 888 prior to its enactment.<sup>300</sup> The committee considered the term so vague that it could not clarify whether it applied to employers, employees, the Florida Legislature, legislative bodies—or to them all.<sup>301</sup> Additionally, if it did apply to employers, could the committee unilaterally declare it did without the support of its legislative body?<sup>302</sup> Furthermore, the committee struggled with whether “urgency” meant an employer could use it when facing an adverse emergency situation, or whether “urgency” envisioned a situation in which a bargaining agent could act in response to an unexpected windfall to the public employer.<sup>303</sup> Regardless of the identified flaws, the legislature passed Senate Bill 888 without correction or clarification and

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298. See Act effective July 1, 1995, ch. 95-218, § 2, 1995 Fla. Laws at 1943–44.

299. Compare FLA. STAT. § 447.4095 (1995) (amended 1997), with FLA. STAT. § 447.4095 (2010). See generally FLA. STAT. § 447.403 (2010) (regulating the proceedings of impasse).

300. Fla. S. Comm. on Govtl. Ops. Comm., SB 888 (1995) Staff Analysis 3 (Mar. 27, 1995) (on file with State Archives) [hereinafter Govtl. Ops. Comm. SB 888 Staff Analysis]. Compare *id.* (declaring the term “financial urgency,” as used in the statute, vague), with FLA. STAT. § 447.4095 (2010) (using the vague term “financial urgency” without providing a definition).

301. Govtl. Ops. Comm. SB 888 Staff Analysis, *supra* note 300, at 3.

302. *Id.*

303. *Id.*

explicitly left the interpretation of the statute “to practice.”<sup>304</sup> After several years of lying dormant, “in practice” is just where the statute is today.<sup>305</sup>

**B. Case One: Communications Workers of America v. Indian River School Board**

Several years went by after the passage of Senate Bill 888 without much attention to the new Financial Urgency Statute.<sup>306</sup> Then, in 2002, the statute popped up before the Fourth District Court of Appeal in *Communications Workers of America v. Indian River County School Board*.<sup>307</sup> This case centered on an arbitrator’s award that opined the school board violated the terms of an existing collective bargaining agreement by unilaterally changing its employees’ health insurance benefits.<sup>308</sup> The school board argued that its action was permissible under section 447.4095 of the *Florida Statutes* and appealed the lower court’s finding that the arbitrator exceeded his authority.<sup>309</sup> The district court agreed, reasoning that the board’s reliance on the Financial Urgency Statute removed the issue from the arbitrator’s jurisdiction and into PERC’s.<sup>310</sup>

*Communications Workers* did not discuss the merits of the Financial Urgency Statute, but instead proposed that a union’s remedy for a public employer’s action, pursuant to the Financial Urgency Statute, is through PERC as an unfair labor practice and not through the courts as a contract violation.<sup>311</sup> The decision essentially terminated the potential for labor attorneys to treat the Financial Urgency Statute as they used to treat the Underfunding Statute.<sup>312</sup> An attorney would not be able to resurrect his or her once successful strategy of treating unilateral action as a contract violation settled

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304. *Id.*

305. *Id.*; see generally *Comm’ns Workers v. Indian River Cnty. Sch. Bd.*, 888 So. 2d 96 (Fla. 4th Dist. Ct. App. 2004) (citing FLA. STAT. § 447.4095 (2005), but failing to define “urgency”).

306. See Ruby, *supra* note 13, at 10.

307. 888 So. 2d 96 (Fla. 4th Dist. Ct. App. 2004).

308. *Id.* at 98.

309. *Id.* at 99.

310. *Id.* at 100. Here, the court based its decision largely on a 1976 Fourth District Court of Appeal decision that conferred upon PERC preemptive jurisdiction if the activities alleged in the complaint “are ‘arguably’ covered by the provisions of Part II, Chapter 447,” *Florida Statutes*. *Id.*; *Maxwell v. Sch. Bd. of Broward Cnty.*, 330 So. 2d 177, 179 (Fla. 4th Dist. Ct. App. 1976) (interpreting part II, chapter 447, *Florida Statutes*).

311. *Comm’ns Workers*, 888 So. 2d at 101.

312. *Id.* (holding that “PERC has preemptive authority, retains jurisdiction and has the exclusive decision-making power to defer to arbitration”).

through arbitration, but would now have to face the risk of an unfavorable statutory interpretation by PERC.<sup>313</sup>

C. *Case Two, PERC's Interpretation: Manatee Education Ass'n v. School District of Manatee County*

1. Facts

The case of *Manatee Education Ass'n v. School District of Manatee County*<sup>314</sup> came before PERC in 2009, presenting the opportunity to issue a decision of first impression regarding the Financial Urgency Statute.<sup>315</sup> The union in this case, Manatee Education Ass'n (MEA), represented teachers and paraprofessionals working within the Manatee County School District (the District).<sup>316</sup> In 2007, those parties entered into a three year collective bargaining agreement set to expire in 2010.<sup>317</sup> The contract contained a "reopener clause for salary issues effective on or before June 1 of each year."<sup>318</sup> At the beginning of 2008, the District learned that it would face a severe revenue deficit for the 2008–09 fiscal year.<sup>319</sup> To make matters worse, in order to meet its contract obligations for the current fiscal year, the District had to withdraw money from its reserve fund, which left the fund unlawfully inadequate.<sup>320</sup> Ultimately, the District faced a \$21.5 million dollar deficit for the 2008–09 fiscal year.<sup>321</sup>

The provisions of the collective bargaining contract between the parties obliged the District to provide those represented employees pay steps for the 2008–09 fiscal year at a cost of \$8 million dollars, which it could not afford.<sup>322</sup> The District concluded that in lieu of layoffs it would implement an across-the-board salary reduction in order to maintain its level of service and balance its budget, and it wanted to do so quickly before the new school year began.<sup>323</sup> Otherwise, the pay steps would automatically take place and the pursuing retroactive salary reduction would result in loss of paychecks for

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313. *See id.*

314. 35 F.P.E.R. ¶ 46, at 86 (2009).

315. *Id.*

316. *Id.* at 87.

317. Initial Brief of Appellant at 4, *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46 (2009) (No. ID09-1435).

318. *Id.*

319. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 91.

320. *Id.* at 92.

321. *Id.*

322. *Id.*

323. *Id.*



many teachers—a disruption the District sought to avoid.<sup>324</sup> Accordingly, the District sent a notification to MEA declaring a financial urgency under section 447.4095 of the *Florida Statutes* and requested a date to begin the fourteen day bargaining process.<sup>325</sup>

The MEA declined to bargain under the Financial Urgency statute.<sup>326</sup> It opined that the District's act was premature since the governor had yet to sign the budget and because it presented no proof to the union that it was in such a dire state.<sup>327</sup> After fourteen days passed, the District put in writing its proposal to eliminate the teachers' pay raises and notified the MEA that it was moving forward with the impasse procedure, pursuant to the terms of the statute.<sup>328</sup> MEA continued to oppose the District's actions and refused to attend the special magistrate hearing.<sup>329</sup> On July 1, 2008, the special magistrate recommended that the District's proposal be accepted.<sup>330</sup> But the District rejected the special magistrate's decision, citing that it wanted to give MEA one more chance to make its argument before the legislative body at the impasse hearing.<sup>331</sup>

Meanwhile, MEA and the District began Interest Based Bargaining (IBB) under the contract reopener clause, for issues other than the elimination of pay raises.<sup>332</sup> Before the process began, the District made clear the fact that negotiations under the reopener were separate and did not replace the necessary bargaining under the Financial Urgency statute.<sup>333</sup> Nonetheless, during IBB negotiations, MEA ended up proposing a "quick fix" solution that would save the District the necessary amount of money without having to eliminate pay raises.<sup>334</sup> The District then petitioned the superintendent to delay the financial urgency impasse so that it could have a chance to present its solution to its member-employees for ratification in a contract.<sup>335</sup>

324. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 92.

325. *Id.*; see generally FLA. STAT. § 447.4095 (2010). The District also notified the American Federation of State, County and Municipal Employees (AFSCME)—a union representing other school board employees—of the declared financial urgency. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 92. The AFSCME immediately agreed to negotiations, which led to an agreement with the District within the fourteen-day period. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 93.

329. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 93.

330. *Id.*

331. *Id.* at 93–94.

332. *Id.* at 94.

333. *Id.*

334. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 94.

335. *Id.*

By this point, however, the District felt it was too risky to wait for ratification of the “quick fix” provisions because if the MEA members failed to ratify that contract, it would be too late for the District to impose the changes before the start of the school year.<sup>336</sup> The District continued with the impasse hearing in which it adopted its own proposals.<sup>337</sup> However, the District agreed that it would nullify the agreement adopted at impasse and consider MEA's solution if submitted in a timely manner and in a ratified contract.<sup>338</sup>

On August 7, 2008, MEA filed an unfair labor practice charge against the District and refused to continue the IBB negotiations.<sup>339</sup> MEA's charge included several allegations.<sup>340</sup> Most notably, though, MEA asserted that the District improperly invoked the Financial Urgency statute by failing to meet the standards set forth by the Supreme Court of Florida in *Chiles*; it should have demonstrated a compelling state interest with no viable alternatives to abrogating the contract before demanding to bargain under section 447.4095.<sup>341</sup> In his recommended order, the hearing officer found that the District did not commit an unfair labor practice.<sup>342</sup> Both parties filed timely exceptions to PERC.<sup>343</sup>

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336. *Id.*

337. *Id.*

338. *Id.*

339. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46 at 86, 94. The charge was based on FLA. STAT. § 447.501(a) (2008) and FLA. STAT. § 447.501(c) (2008). “Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part.” FLA. STAT. § 447.501(a) (2010). “Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.” *Id.* § 447.501(c).

340. *See generally* Charge Against Employer, *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46 (2009).

341. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 89.

342. *Id.* at 87. Hearing Officer Ruby found that the MEA had waived its right to bargain over changes to the salary by failing to engage in bargaining once the District notified it of its proposed change. *Id.* at 96 (recommendation of Ruby, Hearing Officer).

343. *Id.* at 87.

## 2. PERC's Holding

PERC's decision hinged on whether the District properly invoked and employed the Financial Urgency Statute.<sup>344</sup> In its unusually short analysis, the majority of the commission opined that the District's actions complied with its interpretation of the statute.<sup>345</sup> Based on its express language, PERC found that the statute functioned simply to "provide public employers and bargaining agents an opportunity to engage in abbreviated impact bargaining when faced with a financial urgency requiring modification of an agreement."<sup>346</sup> Here, the District notified MEA that it was declaring a financial urgency under section 447.4095 and MEA thereafter was required to engage in negotiations over the impact of the District's financial urgency.<sup>347</sup> The District then, after fourteen days, was entitled to declare an impasse and modify the collective bargaining agreement based on the impasse resolution.<sup>348</sup> In concluding, PERC struck down MEA's argument that there were prerequisites to acting under the statute.<sup>349</sup> Instead, it decided that a public employer was not required to demonstrate a compelling state interest or the absence of viable alternatives before proceeding under the statute to the fourteen-day negotiation period.<sup>350</sup>

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344. *Id.* at 89–90.

345. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 89.

346. *Id.*

347. *Id.*

348. *Id.* at 87, 89.

349. *Id.* at 89.

350. *See Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 89.

### 3. Analysis

PERC's reasoning in *Manatee Education Ass'n* was a clear deviation from its past decisions, in which it heavily scrutinized employers' abilities to unilaterally change mandatory subjects of bargaining.<sup>351</sup> Most notably, PERC failed to apply its usual strict interpretation to a statute that has the potential to abridge public employees' rights to collectively bargain or to contract.<sup>352</sup> For instance, in *Sarasota Classified-Teachers Ass'n I*, PERC explicitly found the Underfunding Statute to be an abrogation of a public employee's constitutional right to collectively bargain, because it allowed the employer to bypass the statutory collective bargaining process and instead unilaterally change a mandatory subject of bargaining.<sup>353</sup> The Financial Urgency Statute functions in the same way in that it, too, allows an employer to avoid its obligation to collectively bargain over a mandatory subject of bargaining.<sup>354</sup> But PERC obviously disregarded that discussion and, in fact, failed to mention the rights of public employees even once in its opinion.<sup>355</sup> And, if that decision was not strange enough, the commission in closing declared that the Financial Urgency Statute functioned to "promote harmonious and cooperative relationships between public employers and their employees"—a remark that, arguably, misses the point completely.<sup>356</sup>

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351. See, e.g., *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 122–23 (1992), *rev'd*, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993); *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100 (1992), *rev'd*, 613 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993) (*per curiam*); *Tarpon Springs Fire Fighters Ass'n, Local 3140*, 19 F.P.E.R. ¶ 24013, at 48 (1992); *Pensacola Junior Coll. Faculty Ass'n*, 13 F.P.E.R. ¶ 18150, at 369 (1987); *Holmes Cnty. Teachers' Ass'n*, 9 F.P.E.R. ¶ 14207, at 401–02 (1983).

352. See, e.g., *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123; *Martin Cnty. I*, 18 F.P.E.R. ¶ 23061, at 100.

353. *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123.

354. See generally FLA. STAT. § 447.4095 (2010).

355. See *Sarasota Classified-Teachers Ass'n I*, 18 F.P.E.R. ¶ 23069, at 123.

356. *Manatee Educ. Ass'n*, 35 F.P.E.R. ¶ 46, at 89 (2009) (citing FLA. STAT. § 447.201 (2010)).

Amidst the vagueness of PERC's interpretation of the Financial Urgency Statute was its disapproval for MEA's contention that the *Chiles* test should apply to situations in which a public employer seeks to justify its abridgment of a fundamental right under the statute.<sup>357</sup> According to PERC, an employer acting under section 447.4095 is not required to show a compelling state interest, or prove a lack of viable alternatives to breaking the contract.<sup>358</sup> The commission reasoned that since the *Chiles* decision pre-dated the execution of section 447.4095, the Florida Legislature must have known of and considered the *Chiles* principles when it created the statute.<sup>359</sup> And since the commission's interpretation of the statute revealed no sign of *Chiles*, the legislature must have purposely left out the Court's holding.<sup>360</sup> But that simply cannot be the case.

#### D. *The Constitutional Interpretation: Reconciling Financial Urgency with Chiles*

##### 1. The Problem

If a public employer were allowed to proceed under the Financial Urgency Statute, as it was interpreted by PERC in *Manatee Education Ass'n*, an employer would be permitted to abridge a binding contract and undermine employees' rights to collectively bargain under article I, section 6, simply by *declaring* that a "financial urgency" existed and then engaging in abbreviated impact bargaining. However, the Supreme Court of Florida has already ruled that a public entity can abridge those rights only in cases where it can demonstrate a compelling state interest and no viable alternatives to breaking the contract.<sup>361</sup> Any interpretation of section 447.4095 that removes it from the command of *Chiles* would create two different standards for state and local governments. It would render the statute unconstitutional.<sup>362</sup> Therefore, the statute would be unenforceable—a result that the legislature certainly did not intend.

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357. *Id.*

358. *See id.*

359. *Id.*

360. *See id.*

361. *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993); *see also State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004). The Court's holding in *J.P.* lent significant support to its holding in *Chiles*, finding:

When a statute or ordinance operates to . . . impair[] the exercise of a fundamental right, then the law must pass strict scrutiny. . . . It is settled law that each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right. . . . To

Fortunately for the legislature, the law in Florida relating to statutory interpretation supports a reading of section 447.4095 that rectifies it with the *Chiles* holding.<sup>363</sup> Florida looks to the plain meaning of a statute, “unless this leads to an unreasonable result or a result contrary to legislative intent.”<sup>364</sup> The long standing rule is that courts should always construe a statute as constitutional, when possible.<sup>365</sup> A statute should not be interpreted on its face alone, but in the context of its history and purpose, and in a way that makes the law meaningful.<sup>366</sup>

## 2. The Context

As noted earlier, the legislature pondered at least two potential bills to facilitate those changes.<sup>367</sup> Even though it passed only Senate Bill 888, House Bill 1267, too, had been subject to analysis by legislative committees.<sup>368</sup> But it was the Supreme Court of Florida's opinion in *Florida PBA* that first prompted the legislature to create those bills,<sup>369</sup> and the language from its staff analyses aids in understanding the legislature's intention for the financial urgency statute.<sup>370</sup>

First, the staff analysis for Senate Bill 888 makes a direct reference to its reconciliation with the Court's holding in *Florida PBA*, which evidences

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withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest.

*J.P.*, 907 So. 2d at 1109–10 (citations omitted).

362. See *J.P.*, 907 So. 2d at 1108–10.

363. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007) (per curiam) (citing *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64–65 (Fla. 2005)).

364. *Id.*

365. *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 207 (Fla. 2007).

366. *Matrix Emp. Leasing v. Hernandez*, 975 So. 2d 1217, 1219 (Fla. 1st Dist. Ct. App. 2008).

This court must interpret statutes by the well-established norms of statutory construction which require rendering the statutory provision meaningful. To properly determine the scope of a statutory term, it is necessary to consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence on the subject.

*Id.* (citation omitted).

367. See Act effective July 1, 1995, ch. 95-218, § 1–3, 1995 Fla. Laws 1943–44 (codified as amended at FLA. STAT. §§ 447.309(2)(a)–(b), .4095 (1995)); see also FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 288, CS for HB 1267.

368. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1.

369. See *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 420 n.8 (Fla. 1992).

370. See Govtl. Ops. Comm. SB 888 Staff Analysis, *supra* note 276, at 2.

that the legislature created the Bill at least partly in response to that case.<sup>371</sup> But the legislature incorporated more principles from that case than just the holding—it also included the Court’s reasoning that the parties should renegotiate the contract provisions at issue instead of allowing the legislature to unilaterally change them.<sup>372</sup> The Court noted in a footnote that:

While such a solution would certainly be preferable to unilateral changes, we refuse to impose renegotiation on our own prerogative. Although some courts have ordered renewed negotiations after a legislature fails to fund a provision, this remedy has only been imposed where the legislature itself mandated it. Accordingly, such a solution would be completely without precedent as a judicially-imposed remedy, in addition to being administratively untenable.<sup>373</sup>

In that sense, the *Florida PBA* opinion acts as the foundation of the Financial Urgency Statute. And, since that case and *Chiles* go hand-in-hand to provide precedent for public agencies’ conflicts between fiscal emergencies and collective bargaining obligations, it is essentially the law from *each* of those cases that underlies the functioning of that statute.<sup>374</sup>

Besides that case law, the staff analysis of Bill 1267 is particularly helpful.<sup>375</sup> In the staff analysis, the House Governmental Operations Committee addressed the impact of Bill 1267 on government costs: “If local governments *underfund an existing contract* then some costs will be incurred *to provide evidence regarding financial urgency* and negotiate the impact of the

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371. *Id.* (“The effect of this change is to provide that it is not an unfair labor practice for the [s]tate [l]egislature to fail to appropriate funds sufficient to meet its contractual obligations in the bargaining agreement. This change would be consistent with . . . [the *Florida PBA* case].”) (internal citations omitted); *see also* Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 3–4 (noting that per the *Florida PBA* case the Florida Legislature, in contrast to local governments, has the authority “to determine the level of funding for a collective bargaining agreement”). The House Committee analyzing Bill 1267 explained well how the proposed amendment would affect local governments:

This bill amends [the Underfunding Statute] to effectively repeal, as to local legislative bodies the requirement that if insufficient funds are appropriated to fund a collective bargaining agreement, then the agreement must be administered on the basis of the amount appropriated, and the protection provided that failure to fully fund a collective bargaining agreement shall not constitute an unfair labor practice. Accordingly, if this bill passes, local legislative bodies that fail to fully fund a collective bargaining agreement will be subject to charges of unfair labor practice.

HB 1267 Staff Analysis, *supra* note 275, at 3.

372. *Id.* at 4 (citing *Fla. PBA*, 613 So. 2d at 418–19).

373. *Fla. PBA*, 613 So. 2d at 420 n.8 (citations omitted).

374. *See generally id.*; *Chiles v. United Faculty of Fla.*, 615 So. 2d 671 (Fla. 1993).

375. *See generally* Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275.

financial urgency or defend any unfair labor practice complaint filed by the employees with [PERC].”<sup>376</sup> This description provides two major impressions of legislative intent to make the financial urgency statute compliant with the law from *Florida PBA* and *Chiles*.<sup>377</sup>

First, the committee’s language suggests that at least one purpose of the statute is to provide local governments an alternative to the Underfunding Statute in which they can underfund collective bargaining contracts in cases of “financial urgency”—but only after *providing evidence of a financial urgency*.<sup>378</sup> The requirement of that showing is not applied to the state government pursuant to the Underfunding Statute; the legislature imposed it only on local governments based on the fact that those governments cannot depend on alternate sources of constitutional power with which to justify unilateral changes to collective bargaining contracts.<sup>379</sup> Instead, it is the required proof of a financial urgency that justifies their unilateral changes to collective bargaining contracts—unlike the state legislature, which can justify its action pursuant to its power to appropriate public funds.<sup>380</sup> Thus, since a local government, acting under this statute, is not acting pursuant to a constitutional power, and will be attempting to abrogate one or more fundamental rights of its employees, it must abide by the guidelines set forth in *Chiles*.<sup>381</sup>

Second, the legislature did not condition the showing of the proof of a financial urgency on any affirmative acts by the union.<sup>382</sup> For example, it did not specify that “some costs will be incurred [to the employer] to provide evidence regarding financial urgency” in response to an unfair labor practice.<sup>383</sup> Instead, the legislature’s inclusion that a public employer show proof of a financial urgency independent of any conditions implies that a public employer must make that showing in *any* circumstance in which it seeks to act under the Financial Urgency Statute, and not only when mandated to do so by a hearing officer or judicial body.<sup>384</sup> The static nature of that requirement strengthens the idea that the showing of proof is the justification through which a local government can underfund or unilaterally change a

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376. *Id.* at 1 (emphasis added).

377. See generally Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275; *Chiles*, 615 So. 2d 671; *Fla. PBA*, 613 So. 2d. 415.

378. Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1–2.

379. See Govtl. Ops. Comm. SB 888 Staff Analysis, *supra* note 276, at 1–2.

380. *Fla. PBA*, 613 So. 2d at 419–20.

381. See generally *Chiles*, 615 So. 2d at 671.

382. See Govtl. Ops. Comm. HB 1267 Staff Analysis, *supra* note 275, at 1.

383. *Id.*

384. See *id.*



collective bargaining contract—similar to the state’s justification to do the same through its appropriations power.<sup>385</sup>

Reading the *Chiles* and *Florida PBA* cases along with the legislative history of Bills 888 and 1267 illustrates that the legislature created the Financial Urgency Statute to provide local governments a statutory means to deal with financial emergencies in the face of collective bargaining obligations, but that would not protect them from unfair labor practice charges if their actions do not comply with Florida law.<sup>386</sup> It is local government’s substitute for the Underfunding Statute and should be interpreted and applied pursuant to the same standards.<sup>387</sup>

### 3. The Language of Section 447.4095

Because a public employer acting under section 447.4095 of the *Florida Statutes* has the potential to impair two fundamental rights enjoyed by public employees, the statute must be given a strict construction.<sup>388</sup> The statute can be split in two parts for easier analysis: the first phrase in part one, “[i]n the event of a financial urgency requiring modification of an agreement,” and the remainder of the statute, which governs the impact bargaining procedure.<sup>389</sup> This section will analyze the statutory language step-by-step, beginning with part two and then moving along to part one.

#### a. *First, Part Two*

Underlying the *Chiles* test is the idea that once a government entity has agreed to and funded a collective bargaining agreement, it cannot then change its mind and breach the contract it created absent a sufficient reason.<sup>390</sup> That sufficient reason, the Court held, is a compelling state interest with no viable alternatives.<sup>391</sup> However, the Financial Urgency Statute mandates only that the parties bargain the *impact* of the financial urgency even though that topic would be considered a mandatory subject of bargaining under Florida law, which requires *collective bargaining*.<sup>392</sup> In the context of

385. *See id.* at 3.

386. *See generally* *Chiles*, 615 So. 2d at 671; *State v. Fla. Police Benevolent Ass’n (Fla. PBA)*, 613 So. 2d. 415 (Fla. 1992).

387. *See generally* Act effective July 1, 1995, ch. 95-218, §§ 1-2, 1995 Fla. Laws 1943, 1943-44 (codified as amended at FLA. STAT. §§ 447.309(2)(a)-(b), .4095 (1995)).

388. *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004).

389. *See* FLA. STAT. § 447.4095 (2010).

390. *See Chiles*, 615 So. 2d at 673.

391. *Id.*

392. *See* FLA. STAT. § 447.309(1).

the Financial Urgency Statute, impact bargaining essentially allows public employers to unilaterally implement their changes after the fourteen-day session—a statutorily set “reasonable” period—of negotiating with their employees over only the *impact* of the changes.<sup>393</sup> And after the fourteen-day “reasonable” period, the employer can unilaterally enact its changes without proceeding to impasse.<sup>394</sup>

One additional consequence of the requirement to impact bargain under the statute instead of collective bargain pertains to time limits.<sup>395</sup> Under section 447.309 of the *Florida Statutes*, there is no time imposition on the parties to reach an agreement over a mandatory subject of bargaining.<sup>396</sup> But in the case of the Financial Urgency Statute, the parties are required to reach an agreement within fourteen days over an otherwise mandatory subject of bargaining in order to prevent the employer’s unilateral action.<sup>397</sup>

It is true that under the *Florida PBA* case, the court contemplated a situation in which parties to a collective bargaining agreement could renegotiate one of its provisions in lieu of the employer’s unilateral change to it.<sup>398</sup> But that reasoning was based on the parties return to the table to *collectively bargain* changes to mandatory subjects.<sup>399</sup> However, this deprives public em-

393. See *City of Jacksonville v. Jacksonville Supervisor’s Ass’n*, 791 So. 2d 508, 510 (Fla. 1st Dist. Ct. App. 2001). In *Jacksonville Supervisor’s Ass’n*, the court notes that impact bargaining requires the employer to give “notice and a reasonable opportunity to bargain [with the bargaining agent] before implementing its decision,” but . . . “does not require the employer to submit to an impasse in negotiations . . . prior to implementation” as collective bargaining does. *Id.* at 510 (quoting *Jacksonville Supervisor’s Ass’n*, 26 F.P.E.R. ¶ 31140 at 246, 255 (2000) *aff’d and rev’d in part* by 791 So. 2d 508 (Fla. 1st Dist. Ct. App. 2001)). The court makes the distinction that impact bargaining is triggered only in cases that involve managerial rights and not for mandatory subjects of bargaining that require collective bargaining under section 447.309(1). *Id.* at 511.

394. See generally *City of Jacksonville v. Jacksonville Supervisor’s Ass’n*, 791 So. 2d 508 (Fla. 1st Dist. Ct. App. 2001).

395. See FLA. STAT. § 447.309(5) (2010).

396. See §§ 447.309(1), 403(1). Parties are required to negotiate only for a “reasonable” period of time, with the “reasonable” standard to be determined by the parties and not by statute, before proceeding through the impasse procedure to resolve the dispute. *Id.* § 447.403(1).

397. See *id.* § 447.4095.

398. *State v. Fla. Police Benevolent Ass’n (Fla. PBA)*, 613 So. 2d 415, 420 n.8 (Fla. 1992).

399. *Fla. PBA*, 613 So. 2d at 420 n.8. The Court in *Florida PBA* offered that reasoning based on the renegotiation of annual leave times, which is a mandatory subject of bargaining under Florida law. *Id.*; *St. Petersburg Ass’n of Fire Fighters, Local 747*, 5 F.P.E.R. ¶ 10381, at 392 (1979) (finding that a public employer’s vacation leave policies are required subjects of bargaining). Moreover, the Court based its reasoning on cases from two other jurisdictions, both of which supported the mandate for the parties to *collectively bargain* over the mandatory subjects in dispute. *Fla. PBA*, 613 So. 2d at 420 n.8.

ployees the right to *collectively* bargain under article I, section 6 of the Florida Constitution.<sup>400</sup> It also acts to abridge their rights to contract under article I, section 10, since impact bargaining allows the public employer to implement its changes after bargaining for a “reasonable” period.<sup>401</sup>

The sham bargaining process enumerated in the statute does not replace the *Chiles* standard.<sup>402</sup> Only the collective bargaining process assures public employees the right to effective negotiations under article I, section 6.<sup>403</sup> At the most, the impact bargaining merely supplements the *Chiles* procedures, perhaps reasoning that *some* negotiating was better than none at all.<sup>404</sup>

#### b. *Next, Part One*

First, we know some things from the language used in the statute. We know that the term “modification” means to alter or change. We also know that the phrase “an agreement,” in its strictest sense, could refer to a collective bargaining agreement that has not yet been funded, one that has been funded, or both.<sup>405</sup> In *Chiles*, the Court held that a negotiated agreement does not become a binding contract until the legislature has accepted and funded it.<sup>406</sup> But that decision was premised on the Court’s holding in *Florida PBA* that collective bargaining agreements on the state level are inherently limited by and thus always subject to the legislature’s appropriations power.<sup>407</sup> But the legislature, by amending the Underfunding Statute to apply only to states, has put an end to the question of whether the separation of powers argument restricts a local government’s ability to collectively bargain with their employees.<sup>408</sup>

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400. *Fla. PBA*, 613 So. 2d at 416.

401. *See id.* at 416–19.

402. *See Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

403. *See id.*

404. *Compare id. with* FLA. STAT. § 447.4095 (2010).

405. FLA. STAT. § 447.4095. In chapter 447 of the *Florida Statutes*, the legislature uses the terms “collective bargaining agreement” and “agreement” interchangeably to depict both funded and unfunded negotiated agreements. *See* § 447.309(1). *Compare* § 447.309(2)(a) (“Upon execution of the *collective bargaining agreement*, the chief executive shall . . . request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the *collective bargaining agreement*.”) (emphasis added) and § 447.309(4) (“If the *agreement* is not ratified by the public employer . . . [it] shall be returned to the chief executive officer and the employee organization for further negotiations.”) (emphasis added), *with* § 447.401 (“[A]n arbiter . . . shall not have the power to add to, subtract from, modify, or alter the terms of a[n] [existing] *collective bargaining agreement*.”) (emphasis added).

406. *Chiles*, 615 So. 2d at 672–73.

407. *Id.*

408. *See* FLA. STAT. § 447.4095 (2010).

The alternative, and more suitable, option regarding the time a negotiated agreement becomes a binding contract at the local level has been declared by PERC, pursuant to section 447.309(1), to be the time when an agreement's terms are approved by the parties, reduced to writing, and then ratified by the bargaining unit members and the public employer.<sup>409</sup> This timing can also be inferred from section 447.403(4)(e), which states that if the bargaining unit fails to ratify an agreement reached by way of impasse, then that agreement never reaches the status of a contract—even though it has been funded.<sup>410</sup> This is the better position. In that context, a public employer may invoke the Financial Urgency Statute when it seeks to modify a collective bargaining agreement that has been ratified by both parties and thus made a binding contract, whether or not funded.<sup>411</sup>

Applying a strict interpretation to the statute contemplates the term “an agreement” to relate to a contract that is presently in force.<sup>412</sup> But the clear language of the statute fails to address whether the public employer can depend on it during the status quo period.<sup>413</sup> While the status quo period is technically not regulated by the terms of an *existing* contract, the terms of the old contract remain “alive in spite of its expiration date” and regulate the parties until a new agreement is ratified.<sup>414</sup> Interpreting the language of the statute to include the status quo period may seem like a stretch, but that distance is made up for with legislative intent.<sup>415</sup>

In the absence of the Underfunding Statute, the legislature sought to provide public employers with an alternate means of relief for their fiscal emergencies.<sup>416</sup> Public employers are not immune from those emergencies during the status quo period.<sup>417</sup> In fact, employers arguably are even more vulnerable during that period because the terms of the old contract require funding not provided for in the new budget.<sup>418</sup> Consequently, it would be illogical to conclude that the Legislature meant to restrict use of the statute to

409. Volusia Cnty. Pub. Empls. Ass'n, 9 F.P.E.R. ¶ 14187, at 356 (1983).

410. See FLA. STAT. § 447.403(4)(e) (“If [the] agreement is not ratified by all parties . . . the legislative body's action shall not take effect with respect to those disputed impasse issues [that] establish the language of contractual provisions [that] could have no effect in the absence of a ratified agreement, including, but not limited to, preambles, recognition clauses, and duration clauses.”).

411. See *id.*

412. See *Sarasota Classified-Teachers Ass'n II*, 614 So. 2d 1143, 1147 (Fla. 2d Dist. Ct. App. 1993).

413. See *id.*

414. *Id.*

415. See *id.*

416. *Id.* at 1149.

417. See *Sarasota Classified-Teachers Ass'n II*, 614 So. 2d at 1148.

418. See *id.*

only the life of the contract, but instead intended to provide relief to employers during *any* time in which they are struggling to balance finances with bargaining obligations.<sup>419</sup> Thus, “an agreement” applies to both the time under an existing contract and the time during the status quo period.<sup>420</sup>

Moving on to the term “require.” There are three definitions for that word: 1) “to claim or ask for by right and authority;”<sup>421</sup> 2) “to call for as suitable or appropriate;”<sup>422</sup> and 3) “to demand as necessary or essential: have a compelling need for.”<sup>423</sup> Since the Financial Urgency statute is provided for times of financial emergency, the most suitable definition would be the third.<sup>424</sup> Before invoking the statute, the employer should have a *compelling*, *essential*, or *necessary* need to modify an agreement.<sup>425</sup> This term naturally goes along with the “financial urgency” phrase.<sup>426</sup> For example, an employer may have a financial urgency, but if there are viable alternatives available that could defray its breaking of the contract, then the employer is not *required* to modify an agreement—his need is not compelling, essential, or necessary.<sup>427</sup> On the other hand, the employer may have a compelling, essential, or necessary need to modify an agreement, but if it cannot prove the existence of a “financial urgency,” it will not qualify to use the statute.<sup>428</sup> Therefore, the term “require” as used in the statute implies that the employer will only have a compelling, essential, or necessary need to modify an agreement if it can prove there is no viable alternative to its action.<sup>429</sup>

This brings us to the last term, “financial urgency.”<sup>430</sup> The legislature left this term “to practice” for interpretation.<sup>431</sup> A financial urgency could mean a situation in which an employer cannot afford to fund both the labor contract and an essential service or function of its enterprise.<sup>432</sup> For example, if a sheriff’s office is faced with the decision to either eliminate pay raises or layoff several hundred of its public safety employees, or if the school board is forced to either close down several schools or cut teachers’ pay, could

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419. *See id.* at 1149.

420. *See id.*

421. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1058 (11th ed. 2008).

422. *Id.*

423. *Id.*

424. *See* FLA. STAT. § 447.4095 (2010).

425. *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

426. *See id.* at 672.

427. *See id.* at 673.

428. *See id.*

429. *See id.*

430. FLA. STAT. § 447.4095 (2010).

431. Govtl. Ops. Comm. SB 888 Staff Analysis, *supra* note 276, at 3.

432. *Id.*

constitute financial urgency.<sup>433</sup> In either instance, the employer's dire financial situation puts the public interest at risk. A public employer's inability to comply with a statute could give rise to a financial urgency, such as where a school board is required to maintain a certain balance in reserve or the requirement of a balanced budget. This term, however, is something to be left to the courts to decide—perhaps even on a case-by-case basis.

## VI. CONCLUSION

In whole, a *financial urgency requiring modification of an agreement* contemplates a situation in which the employer has a compelling state interest. It is in an emergency situation with no viable alternative to act under the statute. The employer faces such dire financial conditions that it has no choice but to underfund the labor contract or else risk a much more adverse result. That interpretation complies with legislative intent, *Chiles* and the Constitution.<sup>434</sup>

Interpreting the statute in a way that makes it enforceable is beneficial to both public employers and public employees. With any other interpretation, the statute may be thrown out, leaving public employees no statutory relief from labor contract obligations in times of financial emergency. Public employees will have their constitutional rights kept safe, a promise—at the very least—to which they are entitled after the drawn out and frustrating process they endured to achieve them.

The respected arbitrator Roger L. Abrams said it best in one of his opinions:

The term “to bargain collectively” has a well understood meaning. It means to give-and-take across the negotiation table, reach agreement—if you can, *and then keep your promises*. To read [the Financial Urgency Statute] to allow the public employer to escape from its promises in the absence of the most compelling circumstances would make a mockery of collective bargaining. As Lewis Carroll wrote in *Alice in Wonderland*: “Everything's got a moral, if you can only find it.” Here, the moral is: “When you make a deal, you live by it.”<sup>435</sup>

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433. Sarasota Classified Teachers Ass'n II, 614 So. 2d 1143, 1145 (Fla. 2d Dist. Ct. App. 1993); *State v. Fla. Police Benevolent Ass'n (Fla. PBA)*, 613 So. 2d 415, 416 (Fla. 1992).

434. See FLA. CONST. art. I § 6; FLA. STAT. § 447.4095 (2010); *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

435. Palm Beach Cnty. Police Benevolent Ass'n (*Palm Beach Cnty. PBA*) 101 Lab. Arb. Rep. (BNA) 78, 88 (1993) (Abrams, Arb.).