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Florida Public Employer Labor Relations Association

NEWSLETTER

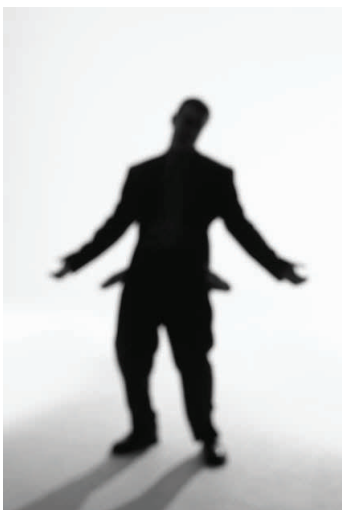
MAY 31, 2009

FINANCIAL URGENCY IN THE FOREFRONT

In a Matter of First Impression, PERC Determines that School District Properly Invoked the Financial Urgency Exception under Section 447.4095 - Manatee Education Association v. School District of Manatee County
Case No. CA-2008-067, 35 FPER ¶ 46

In August 2008, the Manatee Education Association (MEA) filed an unfair labor practices charge against the Manatee County School District related to the School District's invocation of the financial urgency provision of F.S. 447.4095 and resolution of matters related to collective bargaining disputes pursuant to the statute. With more public employers across the State facing similar budget shortfalls and uncertainty, the financial urgency provision of F.S. 447.4095 is getting more attention. Since it is clear from PERC's opinion that the School District properly invoked Section 447.4095 and properly declared impasse after the MEA refused to engage in impact bargaining over the financial urgency, the process followed by the School District should be reviewed closely.

In April 2008, in response to information received from the State regarding budget discussions, the Assistant Superintendent of the Manatee County School District projected a \$21.5 million deficit for the 2008-2009 fiscal year. This projection was later confirmed on May 1, 2008, when the State legislative session ended and the final budget was presented to the Governor. In light of the budgetary shortfall, the School District became concerned with its financial obligations, including existing collective bargaining agreements which provided eligible employees with automatic annual step increases. For the 2008-2009 fiscal year, costs associated with the step increases were \$8 million. After considering a number of alternatives, including layoffs, the School District decided to implement salary reductions.



The School District informed the MEA of the existence of a financial urgency, invoking F.S. 447.4095, and stated it was prepared to bargain. The MEA refused to engage in negotiations, stating only that the School District had prematurely declared financial urgency since the budget had not yet been signed by the Governor. After the running of the fourteen day time limitation set forth in F.S. 447.4095, the School District delivered its proposal to the MEA, a one percent salary deduction for teachers and paraprofessionals. Hearing nothing in response from the Union, the School District then declared impasse. While the 447.4095 process was taking place, the MEA filed a notice of negotiations concerning interest based bargaining (IBB) under the reopener provisions of the existing agreements. The MEA continued to refuse to participate in proceedings under F.S. 447.4095, declining to hear either the recommendations of the special magistrate or to engage in negotiations. The parties engaged in IBB negotiations, reaching a tentative agreement, but the School District continued the process under Section 447.4095. The School District implemented the special magistrate's recommendation for impasse resolution. The School District made clear that if the IBB process produced an acceptable agreement it would implement that agreement. Thereafter, the MEA refused further bargaining.

In support of its assertion that the School District improperly invoked 447.4095, the MEA stated that the Commission must interpret 447.4095 with Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), decided prior to the

enactment of 447.4096. Chiles states that in order for an existing collective bargaining agreement to be abrogated, the employer must demonstrate a compelling state interest and no other possible source for funding the contractual obligations. Noting that Chiles was decided prior to the enacting of Section 447.4095, the Commission stated that Section 447.4095 envisions a process by which both parties will interact to resolve the issue of financial urgency and both parties will therefore have input as to the best alternative in light of the employer's financial status. The Commission noted that while the School District demonstrated its desire to have the MEA participate in deciding which course of action to take, the MEA rebuffed its efforts at every turn. The Commission rebuked the MEA for its refusal to bargain and placement of preconditions on negotiations as inconsistent with the obligation of both parties to engage in good faith negotiations to attempt to resolve the significant funding shortfalls facing the School District.

The Commission further noted that while the MEA asserted that it could unilaterally determine that the School District had other options available to it than salary reductions; it should have, at a minimum, taken the opportunity to negotiate over the matter. Such negotiations would have given the Union the opportunity to discuss with the School District whether there were other avenues for the School District to take. To the extent that the MEA relied upon City of Ocala, 24 FPER ¶ 29327 (1998) for the proposition that an employer must demonstrate that a financial urgency actually exists before invoking Section 447.4095, its reliance was misplaced as City of Ocala did not involve an employer's invocation of Section 447.4095, but rather an employer's unilateral change to its pay period. The Commission further noted that the School District's determination that the MEA waived its right to protest the decrease in wages when it failed to effectively make a demand to bargain by its inaction was not improper. The Commission agreed that the MEA was informed of a proposed salary change and rather than engage in negotiations under 447.4095, it simply disputed 447.4095's applicability. The School District was therefore correct in interpreting the MEA's inaction as a refusal to bargain and consequently the School District committed no unfair labor practice.

The most significant piece of guidance provided to public employers in this case is that contrary to the Union's assertion that a public employer must demonstrate that a financial urgency exists before it can invoke Section 447.4095, the opinion clarifies that "Section 447.4095 does not place any preconditions on the right to declare a financial urgency". However, a union that contests the validity of an alleged financial urgency is not left without a remedy; it may file a ULP after the parties have negotiated for the required period of time, alleging a failure to bargain in good faith because a financial urgency was declared by the employer where none existed.

Mark Levitt and Shannon Kelly are attorneys with Allen, Norton & Blue, P.A. in Orlando, Florida.



PRESIDENT'S MESSAGE

Greetings from a very, very wet City of Daytona Beach. We received so much rainfall that we had to activate the Emergency Operations Center. At least this was a more manageable circumstance than what I imagine a hurricane would bring!

Understanding that everything is very tight all over, I still wanted to take this opportunity to ask you to submit your budget requests now for our 2010 Annual Training Conference from February 7-10, 2010. FPELRA is doing much to keep the costs down. We are maintaining for the second year the same pre-conference and conference registration fees. If you remember, the 2009 ATC registration fees were reduced by \$30. These fees represent a tremendous bargain for the information received by any comparison. And, we're lowering your hotel bill by securing the going government rate! So you might even realize a reduction in overall attendance costs!

Your board is also hard at work building the 2010 agenda. We polled the 2009 conferees right after the ATC, with a separate emphasis on first-time attendees. Using their feedback, and also recognizing that we've set some high standards in previous years, we think you'll be very pleased that you acted now to reserve the dates and pre-plan your attendance!



Two 'Grant Holmes Memorial' Professional Development Scholarships Awarded

FPELRA was pleased to award two 'Grant Holmes Memorial' Professional Development Scholarships, in the amount of \$500 each, at the 2009 Annual Training Conference. The award recipients were announced during the Tuesday business meeting.

Hearty congratulations are extended to the following individuals:

Katherine Lopez is currently a Human Resources Analyst in Labor Relations with the City of Hollywood where she serves as a "key contributor on the City's negotiation team. She is pursuing a Masters in Public Administration (MPA) at Nova Southeastern University, where she's in her fourth semester of study. Carrying a 3.94 cumulative grade point average at Nova Southeastern, Katherine is building on a Bachelor of Science in International Business and Marketing awarded by Florida Atlantic University.

Katherine started her public sector service in September, 2006 with the City of Hollywood. She has been involved with numerous city-led events, such as parades and picnics, and has previously volunteered with Habitat for Humanity on projects in the Miami and Coconut Grove, Florida areas.

As noted in her application, Katherine indicates that she wishes to address uncivil workplaces as they are a major cause of absenteeism, poor morale, low productivity and bad customer service. "As employees become stagnant, they develop a sense of entitlement and slowly poison entire divisions." She would also like to focus on employee financial responsibilities through training and education to give employees the tools to plan for their own retirement.

Congratulations, Katherine!



Linda Skelton is currently the Human Resources Director for the City of Stuart where her duties include employee and labor relations, classification and compensation, EEO and workforce diversity planning, recruitment and selection, organization training and development, and policy and procedure management. A long-time member of both FPELRA and the Florida Public Personnel Association (FPPA), Linda had previous public-sector experience with Charlotte and Martin Counties and The Villages prior to arriving at the City of Stuart.

Linda is pursuing a Bachelor of Science in Human Resources Development at Barry University which will build on her Bachelor of Arts in Liberal Studies from Florida Southern College. She is carrying a 4.0 cumulative grade point average in her current pursuit.

She has previously held leadership positions with FPPA and the Martin County SHRM chapter and received the 2006 Schoonover Professional of the Year designation as Outstanding Professional in Human Resources.

Congratulations, Linda!

UPCOMING LABOR RELATIONS PROFESSIONAL TRAINING MODULES

This is the calendar year 2009 schedule leading to Professional Certification. For registration forms and additional information, please go to <http://www.fpelra.org/trainingseminars.htm>

"Collective Bargaining Simulation"

Thursday, June 11, 2009

A follow-up to the "Introduction" module, participants role-play both sides during a simulated bargaining session. Trained coaches assist the participants through the process.

"Impasse Hearing Simulation"

Tuesday, August 11, 2009

This module provides participants "hands on" experience in a simulated impasse hearing between the parties. Experience a Special Magistrate hearing and the final award. This module, will be conducted by professional trainers/educators and attorneys specializing in labor law.

"Grievance Handling & Arbitration Simulation"

Thursday, September 24, 2009

This module focuses on maintenance issues of the collective bargaining agreement. It focuses on how to handle grievances and prepare for arbitration. Role-play your presentation and rebut opposing witnesses during a mock Arbitration Hearing! Finish the day receiving the Arbitrator's award and debriefing the case. FPELRA's Grievance Manual is included in the registration fee for this segment.

BILL COTTERELL:

IN CUTTING STATE WORKER SALARIES, AGE BIAS REARS ITS HEAD

Tallahassee Democrat

May 25, 2009

For full article and reader comments go to: [http://](http://www.tallahassee.com/article/20090525/COLUMNIST03/905250303/Bill+Cotterell++In+cutting+state+worker+salaries++age+bias+rears+its+head)

[www.tallahassee.com/article/20090525/](http://www.tallahassee.com/article/20090525/COLUMNIST03/905250303/)

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Showing supreme confidence in their positions on various issues, a legislator or lobbyist will sometimes say, "Don't take my word for it, do the math — you'll see."

Well, John Portera knows numbers. He's a 14-year state employee who stands to lose 2 percent of his salary, due to the reduction that the Legislature has imposed on workers earning above \$45,000.

Like a lot of other state employees, Portera is hoping — against all available evidence — that Gov. Charlie Crist will veto the pay cut this week. But in a letter to the governor, he does the math and lays out fairly convincing circumstantial evidence that the numbers add up to age discrimination.

Portera is not a lawyer. If challenged, the state no doubt has lawyers who can crank out dismissal motions, or argue in court if they have to, contending that the salary reduction was passed without regard to age, race, gender or any of the other protected-class categories covered by equal-opportunity law.

And it's true that a 21-year-old employee earning more than \$45,000 stands to lose just as much as a near-retiree with the same salary.

But surely there are some other lawyers out there who might make a case of "disparate impact." That is, if an action has a disproportionate impact on a protected class of citizens, it can be challenged — whether the employer taking such action meant to discriminate or not.

In a letter to the governor, Portera said the 1967 age-discrimination act protects people over 40. "I believe the Florida Legislature failed to consider the disproportionate negative effect of the above-mentioned salary reduction" on those employees, he said.

On a hunch, Portera e-mailed me a while ago and asked if the pay cut wouldn't be discriminatory. I was skeptical but he was persistent.

Portera has a math degree and specializes in statistics. In response to his public-records request, DMS data-warehouse manager Toni Estes ran the numbers and provided a spread sheet showing how many employees are

FOCUS ON MEMBER BENEFITS

Networking

Connect with other professional colleagues in public sector labor relations and human resources throughout the State of Florida. This is invaluable as you connect with a mentor, tutor, sounding board, or just a listener! In any case, we'll help you carry the load.

Annual Training Conference

Nowadays, it's imperative to maintain your cutting-edge knowledge in labor relations and human resources. In an ever-changing regulatory environment, FPELRA provides you a cost-effective way to receive timely and sage information on changes that occur with sometimes blinding speed. The conference also provides you with HRCI recertification hours.

Labor Relations Training & Certification

Our four-module labor relations professional certification series provides an efficient way to glean Florida Public Sector specific knowledge that has been building since 1974. Each day-long module covers a different part of the labor relations process - the law, negotiations, impasse, grievance-handling & arbitration - all geared to the adult learner.

FREE Arbitrator Award Histories

Offered free of charge on an as-needed basis. The Arbitrator's awards history assists you in determining your ranking prior to striking. E-mail your arbitration panel to jsexton@ircgov.com Please provide the type of case pending.

FREE Job Postings in our Online Career Center

Our career center area allows any member's agency to post career opportunities in Labor Relations, general Human Resources and Executive Administration at no cost to the agency. The career opportunities reach a membership base with proven knowledge of Florida-centric issues.

affected by the pay cut and how old they are.

Based on DMS data for 104,946 state employees, Portera wrote to Crist that 68,731 are over 40. That's 65.5 percent.

Portera found that 22,107 state employees earn above \$45,000 and therefore stand to lose 2 percent of their paychecks, starting July 1. *And out of that number*, he calculated, 18,720 are over 40. That's 84.7 percent.

"This is an increase of 19.2 percent," Portera told the governor. "The population of state employees earning more than \$45,000 captures a significantly larger percentage of individuals above age 40, when compared to all individuals above age 40 as a percentage of the total population of state employees on the spreadsheet."

And so, faster than you can say "prima facie," Portera reasons that state employees older than 40 "are disproportionately affected" by the pay cut. Ergo, sum, propter hoc, and all them other Latin words thereunto appertaining, the bottom line is that Crist really might want to veto the salary cut if he wants Florida to stay on the safe side of the federal age-discrimination act.

But he probably won't. Crist tried to prevent pay cuts and layoffs during the legislative session. When the House and Senate made it clear they were going to cut, the governor tried to make it as little as possible, eventually saying a pay cut is better than having employees laid off.

Math and legal arguments don't make allowances for politics. This is an election year (if you consider 18 to 24 months to be a year, as candidates do) and there's no gain for Crist in vetoing a state employee pay cut, when a lot of the Florida taxpayers — the folks he wants to vote him into the U.S. Senate — are worried about keeping their own jobs.

It probably won't prevent the pay cut but Portera, 58, has rendered a useful public service by running the numbers. He spoke logically, respectfully and briefly on an issue that, admittedly, concerns his own job and salary — and he did his homework.

Several state legislators, especially the ones from around here, voted against the pay cut and have asked Crist to find the \$30 million in budget savings somewhere else. They have argued, correctly, that it amounts to a state income tax on state employees — and more precisely, a tax on only a select group of state employees.

A whole lot of employees, even those not taking the cut, have sort of sighed and said, well, what do you expect — one more insult for the handiest scapegoats when things get tough. Probably, if a math whiz like Portera did a statistical analysis of the Legislature, it would show that about 90 percent of the House and Senate — and 99 percent of the Republicans — have little or no state-employee constituencies.

FOCUS ON MEMBER BENEFITS

Publications

FPELRA offers "How to Bargain for Management in the Public Sector: Strategies and Tactics," "Managing the Grievance Procedure," and "A Supervisor's Labor Relations Guide" at a discount to our membership. These are structured in an easy to read, logical step-by-step format to quickly educate your newest onboarding in Florida Labor Relations.

Contract Language Database

Our contract language database gives members access to labor contracts throughout the state. Research best language and innovative provisions in contracts covering law enforcement, fire rescue, white and blue collar, education and other career fields. Our contract database covers constitutional employers, taxing districts, municipalities, counties, and educational institutions of all levels.

Forum

Our member-only, password protected forum provides a secure area for our membership to freely post their questions, thoughts, ideas, recommendations and respond to those posed by others. Neatly organized in themed discussion threads, the forum allows our members to securely discuss day-to-day issues.

FPELRA Newsletter

A bi-monthly roundup of interesting PERC cases and select media articles along with timely information on upcoming events and member news. Members are encouraged to submit arbitration decisions and media articles for inclusion. Submit arbitration decisions electronically in either Adobe PDF or MS Word format. The link to web-published media articles can be forwarded to webmaster@fpelra.org. The newsletter benefits the membership by keeping our members abreast with developing issues throughout Florida and the nation.





So it's easy for them to yap about "bureaucrats." If they cared, they could get another DMS document — the Annual Workforce Report — which shows that Florida ranks last in its per-capita ratio of employees and per-citizen cost of state employment.

Sometimes statistics just prove what you already suspect, intuitively — like, the longest-serving employees tend to be over 40 and also tend to be in the upper 20 percent of wage earners. But it's nice to have someone like John Portera do the math.

Contact Senior Political Writer Bill Cotterell at (850) 671-6545 or bcotterell@tallahassee.com.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

NO NEED TO ASK FOR OR TAKE FMLA LEAVE TO BE PROTECTED UNDER THE LAW. (James D. Dotson v. Pfizer, Inc., Docket No. 07-1920 (March 2009))

The United States Court of Appeals for the Fourth Circuit ruled in the case that an employee who took leave for the purpose of adopting a child from Russia was protected under the interference and retaliation provisions of the FMLA despite the fact that the leave was never requested, nor designated FMLA-qualifying. The court indicated the company cannot benefit from its lapse.

Pfizer terminated Dotson shortly after he and his wife returned from Russia with their newly-adopted child. Prior to his termination, Dotson had worked at Pfizer for approximately 15 years. In early 2003, Dotson and his family began working with an adoption agency to adopt a child from Russia. Dotson called a Pfizer third-party benefits contractor to inquire about adoption benefits provided by the company. Later that year, Dotson and his wife learned that they could adopt a baby girl but would have to make at least two trips to Russia to complete the adoption. Dotson spoke with a Pfizer human resources ("HR") representative about taking leave during the adoption process.

On appeal for punitive damages the Court of Appeals ruled that Pfizer's decision-makers, the company contends, did not know that Dotson had inquired about FMLA leave, and so the district court punished Pfizer for not knowing the statutory implications of Dotson's adoption-related leave. The court stated that this argument ignores Pfizer's statutory burden of seeking out further information and complying with the FMLA when an employee indicates that he or she is seeking leave for a protected reason. Pfizer also had affirmative obligations it did not meet. The district court was well within its discretion to find that Pfizer did not make a showing of good faith.

For the full article please go to: <http://pacer.ca4.uscourts.gov/opinion.pdf/071920.P.pdf>

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