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Note

UNENFORCED CONTRACTS AND THE ILLUSION OF BARGAINING: THE BROKEN STATE OF FLORIDA PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS

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Introduction

The first U.S. statewide teachers' strike happened in 1968. Thousands of teachers walked off the job, in some cases closing schools for months. This display of civil disobedience did not happen in a bedrock union state like Illinois or Michigan. It happened in Florida. [1]

Facing overcrowded schools, teachers demanded more money for public education. In 1967, Governor Claude Kirk vetoed a property tax hike aimed at providing more funds to public schools, despite campaigning heavily on a platform to improve them. [2] Outraged, more ***296** than 40% of Florida teachers walked out. Schools closed, teachers forwent salaries, children stayed at home, and Florida's governor became enraged. [3]

In the end, the strike mostly achieved the teachers' goals. As a consequence of their actions, they secured a rapid increase in education funding to meet the needs of the children in their care. [4]

The teachers were hardly alone. From 1960 to 1969 more than 25 groups of Florida employees participated in labor strikes. [5] During this tumultuous time, workers in Florida had no guaranteed collective bargaining rights. [6] That soon changed.

In 1968, Floridians approved a new state Constitution. In it were provisions guaranteeing the right of all employees to organize into unions, or not, and to collectively bargain and enter into contracts. [7]

Today, Floridians still enjoy a Constitutional right to bargain with their employers over issues concerning wages, hours and working conditions. [8] However, the current rights of public employees to collectively bargain have become a sham. Legislation currently renders public employees' bargaining positions moot and their labor contracts illusory.

This Note demonstrates how the Florida Legislature's bias against public-sector collectively bargained contracts amounts to an improper intrusion of public law into what is a constitutionally supported private law matter between workers and their

employers. It opens (Part I) with background into the Florida Constitution's unique provision guaranteeing private-sector collective bargaining rights. Part II explores ***297** how, in spite of that guarantee, public employees spanning the state from Miami [9] to "the happiest place on Earth" (Walt Disney World's Reedy Creek Improvement District) [10] are repeatedly denied a meaningful right to bargain with their employers. Part III examines the private law and public law tension within collective bargaining law. Finally, Part IV concludes that collectively bargained contracts between public employees and their employers are private law matters and must be protected from an improper public law intrusion into the fundamental bargaining rights of Floridians.

I. The Right to Bargain in Florida

The Florida Constitution provides for both a general right to enter into and enforce contracts, and a specific right for employees to enter into collectively bargained contracts with their employers. [11] Collective bargaining agreements are binding, enforceable contracts. [12] The Florida Constitution itself reads: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." [13]

The term "employees," as used in the Florida Constitution, "applies in its broadest sense to include all Florida employees, public and private." [14] All employees are, on the face of Article I, Section 6, equally entitled to collectively bargain with their employers as their private counterparts. [15]

Article I, Section 6, holds a vaunted placement in the Florida Constitution in the Declaration of Rights, among other fundamental rights like religious freedom [16] and the right to bear arms. [17] Yet unlike other fundamental rights, it is not self-effectuating. In fact, the Florida Legislature did not create a statute to enforce the right to collectively bargain until a 1972 mandate from the Florida Supreme Court. [18] Even ***298** that was not enough for the right to be fully respected. From 1991-1998, Governor Lawton Chiles and his cabinet litigated numerous, lengthy court battles over the right to bargain. [19]

Despite legislative and executive pushback, the judicial branch has been the lone defender of this battered Constitutional right. It consistently holds that the Florida Legislature cannot abridge public employees' right to bargain collectively absent a compelling state interest making it necessary to do so. [20] Unfortunately for public employees, the judiciary has not yet had the opportunity to adequately address the current Florida laws that impermissibly impede upon their right to bargain. However, that opportunity may soon be on the horizon. [21]

II. Public Employees are Denied a Meaningful Right to Bargain Under Current Florida Law

"With the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6." [22] Litigants, judges, special magistrates, and arbitrators repeat this phrase so often that it is almost mantric. [23] And yet, public ***299** employees are subject to legal restrictions on their contracting rights that private employees are not. In particular, two laws single out and unconstitutionally nullify the collective bargaining rights of public employees: Florida's Financial Urgency Statute [24] and its Impasse Resolution Statute. [25] As applied, these laws allow public employers to undermine, if not eliminate, good faith bargaining.

A. Florida's Financial Urgency Law

"[T]here can be no doubt that common sense does generally find something revolting about the breaking of a promise."

Morris Cohen (1933). [26]

Florida Statute § 447.4095 (1997) ostensibly allows a public employer to modify labor contracts in the event of a bona fide financial emergency. However, Florida's Public Employee Relation's Committee (PERC) has recently rendered all collectively bargained contracts non-binding and illusory, through a dubious interpretation of that law which allows employers to void contracts without being subject to strict scrutiny, as required.

Because the right to bargain collectively is a fundamental constitutional right, any attempts to abridge it should be subject to strict scrutiny. [27] Yet, in 2009, PERC read the statute to allow a state employer to simply declare a "financial urgency" without being subjected to any scrutiny and then unilaterally change the terms of a valid contract over ***300** the objection of workers. [28]

Currently, a public employer needs nothing but its word to declare a "financial urgency" and invoke the contract-killing provisions of the statute. PERC was able to form this lax interpretation because the statute itself gives no hints as to what a "financial urgency" actually is, or when a municipality would be justified in declaring one.

"Financial urgency" is a term that appears nowhere else in Florida law. [29] Two terms come close to providing clues to what legislators may have meant when they used the term: "financial emergency" and "financial exigency."

The term "financial emergency" is found in Florida Statute §§ 218.50-504 dealing with charter school agreements and local governments. [30] There, the use of a "financial emergency" is subject to very specific criteria. A "financial emergency" may only be declared in situations when a public entity proves that it does not have sufficient unreserved funds to meet its obligations. Further, even if properly declared, a "financial emergency" does not allow an entity to void its contractual obligations. [31]

Another term that may inform the mystery of "financial urgency" is "financial exigency" (found in PERC case law). [32] A "financial exigency" applies when an employer is forced by an emergency (such as a public safety or weather event) to take immediate action regarding public workers' wages, hours or working conditions. [33] Presumably, this ***301** is because in an exigency, there is no time to return to the bargaining table to discuss the impact of the exigency on workers. [34] However, case law informs us that an "exigency" is likely a situation more severe than an "urgency." [35]

Because PERC has found that a "financial urgency" is neither a "financial emergency" nor a "financial exigency," it becomes nearly impossible to discern when a public employer truly cannot pay on its bargained agreements, and when it is attempting to shirk them for political purposes. [36] When municipalities have no clear standards to adhere to before voiding a contract, their contracts cease to be enforceable and become merely illusory. [37] Two recent declarations by Florida cities illustrate this point: Miami and Hollywood.

Blaming growing pension costs for a $100 million budget deficit in 2011, Miami city leaders threatened layoffs for more than one-thousand employees. [38] The city's desperation to avoid paying bargained-for pension costs led it to invoke a "financial urgency." [39] PERC allowed Miami to unilaterally change the terms of the contract with its employees based on an unverified assertion of inability to pay and without returning to the bargaining process to remedy the problem. [40] ***302** The bargained-for agreement that city leaders made with their employees was unenforceable. It was illusory.

On August 1, 2012, the city of Hollywood Fire Fighter's Union (IAFF Local 1375) filed an unfair labor practice with PERC. The Hollywood Fire Fighters charged that the city unlawfully declared a "financial urgency." [41] The final order by PERC absolved the city of Hollywood of any duty to prove that modifying the parties' contract was the least restrictive means to address its

"urgency." In doing so, PERC sidestepped the employees' constitutional right to bargain and the city's duty to withstand strict scrutiny of its decisions when they affect their workers' fundamental right to bargain. [42]

The absurdity of the "financial urgency" statute is simply illustrated. A municipality cannot declare such a financial urgency and then selectively void or unilaterally impose new terms on its agreements with its bank, utility provider, or even individual employment contracts. The statute singles out only collectively bargained agreements for avoidance by employers and allows employers to renege on their contracts without passing strict scrutiny as mandated by law. [43]

Florida legislators technically took a neutral stance on unionization when drafting Florida Statute § 447. [44] However, the financial urgency statute certainly discourages organization by making collectively-bargained contracts illusory and non-binding while other contracts, including individual employment contracts, enjoy full legal enforcement by the courts.

A federal court recently enjoined a New York county ordinance similar to Florida's law, [45] noting that the "[union] can no longer represent [its] members in any meaningful way, now that any negotiated provision they have endeavored to secure in the past can instantly be reduced to a nullity." [46] While the final disposition on the ordinance has ***303** not yet been determined by the courts, the enjoining court was quite clear in its analysis that the state law was likely a violation of the U.S. constitutional right to contract. Because the U.S. Constitution does not guarantee collective bargaining rights and the Florida Constitution does, it stands to reason that a law that violates the U.S. Constitution's Contracts Clause would clearly be violative of the Florida Constitution's Article I, Section 6.

It is not to say that a city, county, or state organization could not, under any circumstance, seek to change a contract due to a financial crisis. In fact, the Legislature has affirmative authority to "reduce previously approved appropriations to pay public workers' salaries made pursuant to collective bargaining agreement[s], but only where it can demonstrate compelling state interest; [the] legislature must be given some leeway to deal with bona fide emergencies." [47]

There are frameworks available for adoption under both the Bankruptcy Code and the National Labor Relations Act (NLRA) that balance the right to bargain with management rights in an emergency. The NLRA excuses non-compliance with a collectively-bargained contract due to financial exigency. [48] However under the NLRA, an employer is not permitted to unilaterally ignore selected provisions of a contract mid-term. [49] Similarly, a private sector employer cannot fail to perform on a contract mid-term unless it has declared bankruptcy. [50] Even then, the employer must petition the bankruptcy court for permission to revoke or avoid an agreement and then return to the bargaining table to attempt to negotiate new terms of employment. [51]

B. Florida's Impasse Resolution Scheme

The second law differentiating the collective bargaining rights of public employees from private employees is the Impasse Resolution ***304** scheme of Chapter 447, Florida Statutes. When the parties at the negotiating table cannot reach an agreement on a mandatory subject of bargaining [52] after a reasonable period of time, either may declare an impasse under Chapter 447. The parties may use mediation as a first-step, but many proceed directly to a fact-finding arbitration. At arbitration, a special magistrate holds hearings, determines facts and makes a decision on the unresolved issues. [53] The arbitrator's decision is guided by objective standards laid out in Chapter 447. [54] However, this is not the end of things. The arbitrator's decision is not binding. It is merely a suggestion to be disregarded at the next step.

The true final decision-maker over the issues at impasse is the municipality itself. [55] The same party that was once at the bargaining table is now placed in a position to break the impasse. [56] This process gives municipalities every incentive to resort

to impasse over wages, hours, and working conditions. The process also renders collective bargaining, a constitutional right in Florida, a shallow exercise in "collective begging."

Proponents of Chapter 447 argue that workers and their unions are participants in the political process, and therefore, the legislative bodies of municipalities are ultimately responsible to them. Many ***305** commentators have noted how useless this "power" is in the South.[57] One sums it up thusly: "a local legislator may occasionally regret voting for a final contract that will disaffect constituents who are public employees, but in all likelihood the majority of his constituents are hostile to unions and will support his vote."[58]

There is one specific place in Florida where political power is even more of an illusion than in other areas of the state. The Reedy Creek Improvement District (RCID) is visited by millions of tourists every year and most do not even know they have been there. They only know it as Walt Disney World and Disney's various resorts and attractions. The Florida Legislature created the RCID in 1967 at the behest of Walt Disney himself.[59] RCID allowed Disney to build his empire without interference from local ordinances governing building and financing.

Today, RCID functions like a city. It controls its own planning, zoning, transportation, fire protection, and utility services.[60] RCID employs hundreds of public workers.[61] There are two "cities" within RCID: Bay Lake and Lake Buena Vista.[62] In the latest available census data, the city of Bay Lake has a population of 47 people.[63] The city of Lake Buena Vista has an exact population of 10 people.[64] According to the RCID Comprehensive Plan, its population is fixed and not expected to grow or shrink considerably through 2020.[65] That is because all land in RCID is owned either by subsidiaries of Walt Disney World or Disney World executives who are deeded 5-acre lots in order to give them voting rights within RCID.[66] RCID elections are decided by landowners-1 vote per acre of land owned.[67] Walt Disney World owns two- thirds of the land, namely 17,000 acres, which is far more than any ***306** other private owner.[68] Consequently, Walt Disney World is solely responsible for determining who is elected to RCID executive and legislative body offices. The legislative body positions are sometimes even "inherited" within families with deep ties to Disney.[69]

Without even the pretense of political power, RCID employees are wholly stripped of their constitutional right to bargain. Workers have no voting rights within RCID and have no influence to exert over its "elected" officials. This problem is not a hypothetical one. In January 2013, the RCID legislative body ("Board") convened to resolve an impasse between the Reedy Creek Firefighters and RCID negotiators regarding an insurance plan.[70] The Board sat quietly and listened to presentations from both Firefighter and RCID negotiators.[71] Board members asked few questions and did not engage in a substantive debate. In the end, all Board members sided with RCID managers.[72]

Reedy Creek Firefighters then led an effort in the Florida Legislature to change Chapter 447 so that an impasse resolution would end with an arbitrator's binding decision.[73] The process began well for the workers. Orange County's legislative delegation voted unanimously to send the idea to Tallahassee and Disney publically maintained neutrality on the issue. Behind the scenes, it was a different story. The bill died in committee at the behest of Disney in a shady exercise of back-door dealings.[74]

Florida public employees' right to bargain is undermined at both the bargaining table and once a contract is agreed upon. Florida law incentivizes municipalities to go to impasse with union officials over mandatory subjects of bargaining under Chapter 447's impasse scheme because it allows management itself to be the ultimate decision-maker of contractual disputes. Once a contract is in place, Florida's financial urgency statute allows a municipality to void it at any time with little or no proof that it is unable to pay its debts. These public laws render the ***307** rights guaranteed in Section 1, Article 6 of the Florida Constitution illusory. Further, these public laws intrude into matters that should be governed principally by private law.

III. The Tension Between the Private Law of Contracts and the Public Law of Enforcing Contracts

Depending on who you ask, contract law may be more about public law or more about private law.[75] But almost everyone seems to agree that contract law is both private and public in nature.[76] Contract law is private because contracts are essentially the creation of new rules and responsibilities between two parties.[77]

Yet all contracts, even the most private, have public law consequences.[78] Less savvy or powerful parties may be taken advantage of in contravention of public policy or the welfare of the state. That is why statutes and the common law require some kinds of contracts to adhere to formalities designed to protect both private and public interests.[79] In the 1930s, federal and state statutes regarding labor contracts were deemed necessary to require employers to go to the bargaining table and quiet industrial strife.[80] Regarding public employee labor rights, not very many people would dispute that it is a good idea to prohibit striking by essential public safety personnel like firefighters and police officers.

Yet, the main purpose of a labor contract is most correctly seen as one primarily interested in private law issues because the purpose of a labor contract is to govern the employee-employer relationship.[81] While ***308** a measure of public law is necessary to enforce private law contracts,[82] too much public interference into contract law detracts[83] from its essential purpose: to allow parties the freedom to bargain and make enforceable promises.[84] The only public law necessary in labor contracts is the sort that gets the parties to the table on relatively equal grounds and keeps them there until they hash out an agreement that they can both agree to.[85]

IV. Public Law Interference in Labor Law Contracts Should be Limited

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his ***309** services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

-Oliver Wendell Holmes (1896).[86]

Labor negotiations, or battles, as Holmes referred to them, are most fairly waged when agreements are determined by the parties, not the state. Both parties have great interest in making the enterprise thrive.[87] Labor agreements create “buy-ins” for employees who would usually be shut out from the day-to-day decisions that most affect their working environment and consequently their lives.[88] When the state interferes so as to make the power of one party greater than another, they have impermissibly interfered with the private law nature of contracts.[89]

Florida courts generally recognize and uphold the private-law nature of collectively bargained contracts between public employees and their employers by disfavoring decisions that impede on the worker's right to contract.[90] This is consistent with the theory that too much public law interference with private contract law is disfavored.[91]

At the bargaining table, some public law is needed to bring inherently unequal parties to relatively equal bargaining positions for ***310** the purpose of forming a labor agreement. Without being compelled, it is doubtful that many, if any, employers would sit down and bargain with employee representatives without the threat of great industrial unrest. In Florida, the right to good faith bargaining is constitutionally protected. Yet, a statute that dramatically undermines that protection[92] has been on

the books for more than forty years. Workers who should be able to create private law with their employers via labor contracts are hampered at the bargaining table.

When a labor contract is formed, it is formed on agreement and understanding that the commitment is binding, at least for a period of time. [93] That certainty for the future is a key feature of labor contracts and of all contracts. [94] In Florida, no private-sector employer has the authority conferred upon it by the legislature to selectively abrogate collectively bargained contracts. Yet, Florida allows such abrogation without showing cause by public employers.

The right of public employees to enter into and enforce collective agreements will never be equal to the right of private-sector employees. [95] However, the inequality cannot be tipped so far as to render the rights of one group-the public employees-null and void. Therefore, action is required to restore the balance and rights, to public sector employees by reducing unconstitutional public law interference in private law contracting matters.

Conclusion

Undoing this wave of anti-worker animus will take either a massive sea change in Tallahassee or a declaration by the Florida Supreme Court that Chapter 447 and the Financial Urgency Statute are violative to the letter and spirit of the Florida Constitution. Such intrusions by the state on legally binding labor agreements have created a contractual caste system where contracts bargained by public-sector workers and individual public-sector workers are treated as more valid and enforceable than contracts collectively bargained by private-sectors workers via their union. Until balance is restored to the bargaining ***311** process and contracts are ensured as fully enforceable, the constitutional right to bargain will remain a fiction for Florida's public employees.

Footnotes

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1 Year In Review, UPI (1968), at http://www.upi.com/Audio/Year_in_ Review/Events-of-1968/Pope-Paul-VI/Garbage-Strike/12303153093431-7/.

2 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 (1978).

3 Public Schools: Walkout in Florida, Time (Mar. 1, 1968), available at http://www.time.com/time/magazine/article/0,9171,941242,00.html.

4 Id.

5 Teacher Strike Changed Labor in Florida, WJHG (Sept. 18, 2012, 3:40 PM), http://www.wjhg.com/news/headlines/Teacher-Strike-Changed-Labor-in-Florida-170236516.html ("The leader of the [teacher's] strike was fined thirty thousand dollars and sentenced to two years in prison, but the jail time was later waived.").

6 Raymond G. McGuire, Public Employee Collective Bargaining in Florida-Past, Present and Future, 1 Fla. St. U. L. Rev. 26, 34 (1973). Prior to 1943, both the Florida Statutes and the Constitution of 1885 were silent on the right of public employees to bargain collectively or to strike against their employers. As a common law state, however, Florida presumably followed the traditional rule that in the absence of direct legislative mandate, public employers had no obligation to bargain with the collective bargaining representative of their employees.
Id.

7 See Fla. Const. art. 1 §§ 6, 10.

8 Id.

9 See infra text accompanying notes 37-41.

10 See infra text accompanying notes 59-64.

11 Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993) (The right to contract is expressly guaranteed by article I, section 10 of the Florida Constitution and is equally enforceable in labor contracts by operation of article I, section 6 of the Florida Constitution).

12 Id. ("The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law . . . . The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created.").

13 Fla. Const. art. I, § 6 (emphasis added).

14 Coastal Fla. Police Benevolent Ass'n, Inc. v. Williams, 838 So. 2d 543, 549 (Fla. 2003).

15 Id.

16 Fla. Const. art. I, § 3.

17 Id. § 8.

18 Dade Cnty. Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684, 688 (Fla. 1972).
The legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field and therefore, judicial implementation of the rights in question would be premature at this time. If not, this Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility."). does not within reasonable time extend its time and study into field of regulating right of collective bargaining by public employees as guaranteed by State Constitution, Supreme Court will, in an appropriate case, have no choice but to fashion guidelines by judicial decree in such manner as may seem to the Court best adapted to meet requirements of the Constitution.
Id.

19 See generally State v. Fla. Police Benevolent Ass'n, Inc., 613 So. 2d 415 (Fla. 1992); Chiles, 615 So. 2d at 671; and Chiles v. State Emps. Attorneys Guild, 734 So. 2d 1030 (Fla. 1999).

20 See Coastal Fla. Police Benevolent Ass'n, 838 So. 2d at 548 ("This Court has deemed the right to collective bargaining to be of a fundamental character and has applied a strict scrutiny test to any action which tends to undermine this right."); Dade Cnty. Sch. Adm'rs Ass'n, Local 77 v. Sch. Bd. of Miami-Dade Cnty., 840 So. 2d 1103, 1104 (Fla. 1st DCA 2003).

21 See infra text accompanying notes 59-64.

22 Dade Cnty. Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969).

23 See City of Tallahassee v. Pub. Emp. Relations Comm'n, 410 So. 2d 487, 489 (Fla. 1981); United Teachers of Dade, FEA/United AFT, Local 1974 v. Dade Cnty. Sch. Bd., 500 So. 2d 508, 510 (Fla. 1986); Chiles v. State Emps. Attorneys Guild, 714 So. 2d 502, 503 (Fla. 1st DCA 1998) aff'd, 734 So. 2d 1030 (Fla. 1999); State Emps. Attorneys Guild v. State, 653 So. 2d 487, 488 (Fla. 1st DCA 1995); Lakeland Fire Fighters Ass'n, Local 2350, 1975 WL 42142, *5 (Fla. Div. Admin. Hrgs. 1975).

24 Fla. Stat. § 447.4095 (1997):
In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

25 Fla. Stat. § 447.403 (2004).

26 Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 572 (1933).

27 See supra text accompanying note 18.

28 See Manatee Educ. Ass'n v. Sch. Dist. of Manatee Cnty., 35 F.P.E.R. ¶ 46, at 89 (2009) (holding that a public employer is not required to demonstrate a compelling state interest or the absence of viable alternatives before invoking the financial urgency statute).

29 Jennifer L. Rosinski, 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, 35 Nova L. Rev. 227, 229 (2010).
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." But despite the legislature's good intentions when crafting the statute, its language poses more questions than answers. Even now, fifteen years after its enactment, the statute remains a mystery.
Id.

30 See generally Fla. Stat. §§ 218.50-504.

31 See Fla. Stat. § 218.503(3)(h) (declaring financial emergency may require a plan by the entity's officials to provide for "payment in full" of any outstanding contractual obligations).

32 See Pensacola Junior Coll. Faculty Ass'n v. Bd. of Trs. of Pensacola Junior Coll., 13 F.P.E.R. ¶ 18150 (1987).

33 See Pasco Cnty. Sch. Bd. v. Fla. Pub. Emps. Relations Comm'n, 353 So. 2d 108, 125 (Fla. 1st DCA 1977) (citing NLRB v. Minute Maid Corp., 283 F.2d 705 (5th Cir. 1960)); see also Sch. Bd. of Indian River Cnty. v. Indian River Cnty. Educ. Ass'n, Local 3617, 373 So. 2d 412, 414 (Fla. 4th DCA 1979) (showing where management had to take immediate action without returning to the bargaining table, such as in the case of a citrus crop freeze).

34 Pensacola Junior Coll. Faculty Ass'n, 13 F.P.E.R. ¶ 18150 (1987).

35 Compare Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993) (holding that a financial emergency cannot be declared unless "no other reasonable alternative means of preserving its contract" exists), with Manatee Educ. Ass'n v. Sch. Dist. of Manatee Cnty., 35 F.P.E.R. ¶ 46, 89 (2009) (holding that a public employer is not required to demonstrate a compelling state interest or the absence of viable alternatives before invoking the financial urgency statute).

36 Rosinski, supra note 29, at 228.
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. 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." 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. It is that political feature that distinguishes collective bargaining in the public sector from that in the private.
Id.

37 See Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1270 (Fla. 2008) ("[A] contract that is not mutually enforceable is illusory."). See also 11 Fla. Jur. 2d Contracts § 94.

38 Charles Rabin, Miami Commission Focuses on Averting Budget Calamity, Miami Herald, June 11, 2010, at B1.

39 Id.

40 Rosinski, supra note 29, at 230.

41 Hollywood Fire Fighters v. City of Hollywood, Petitioner's Statement of the Case (on file with author).

42 Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993) ("Before legislature can reduce previously approved appropriations for increase in public workers' salaries pursuant to collective bargaining agreement, legislature must demonstrate that funds are available from no other possible reasonable source; political expediency is not compelling reason.").

43 See Dade Cnty. Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684 (Fla. 1972).

44 Fla. Stat. § 447.201 ("Nothing [in the Act] shall be construed either to encourage or discourage organization of public employees.").

45 On June 18, 2012, the Nassau County Executive Manager signed into law LL 315-12. LL 315-12 allows the County to unilaterally (1) "relieve from duty any duty employees represented by a collective bargaining unit for one day per week"; (2) "modify any County contracts"; (3) "freeze base and supplemental wages for County employees"; and (4) "reduce or eliminate employer contribution to employee benefits." LL 315-12, § 2(A)(1), (3)-(5).

46 Donohue v. Mangano, 886 F. Supp. 2d 126, 152 (E.D.N.Y. 2012).

47 Chiles, 615 So. 2d at 673 (emphasis added).

48 RBE Elecs. of S.D., Inc., 320 N.L.R.B. 80, 81 (1995).
The Board has similarly held that under exigent circumstances an employer need not give notice and bargain concerning the effects of closing its operations, but has limited its definition of such exigent circumstances to situations such as where an employer lacked funds to continue operating and paying employees, or lost performance bonds required by law and had the bank end the employer's line of credit.
Id. n.10 (citing Your Host, Inc., 315 N.L.R.B. 295, 297 (1994); Compu-Net Commc'ns, Inc., 315 N.L.R.B. 216, 223 (1994)).

49 RBE Elecs. of S.D., 320 N.L.R.B. 80, 81.

50 11 U.S.C. § 1113.

51 Id.

52 Like the National Labor Relations Board, Florida courts have found that wages, hours and working conditions are mandatory subjects of bargaining and are the only subjects that a party may declare impasse over. City of Orlando v. Fla. Pub. Emps. Relations Comm'n, 435 So. 2d 275, 279 (Fla. 5th DCA 1983 (quoting Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967). See also City of New Port Richey v. Hillsborough Cty. Police Benevolent Ass'n, Inc., 505 So. 2d 1096 (Fla. 2d DCA 1987) (holding that an issue which has "an impact" upon terms and conditions of employment must be bargained); Bd. of Cnty. Comm'rs v. Cent. Fla. Prof'l Fire Fighters Ass'n, Local 2057, 467 So. 2d 1023 (Fla. 5th DCA 1985) (holding that an issue "affecting, or impacting upon, employment or a condition of employment" must be bargained).

53 See Fla. Stat. § 447.403 (2004).

54 See id. § 447.405 (Entitled "Factors to be Considered by the Special Magistrate").

55 Alaine S. Williams, Alternatives to the Right to Strike for Public Employees: Do They Adequately Implement Florida's Constitutional Right to Collectively Bargain?, 7 Fla. St. U. L. Rev. 475 (1979) ("The one-sided nature of the Florida collective bargaining process, together with the prohibition on public employee strikes, leaves little leverage in the hands of the worker over terms and conditions of employment."). See also McHugh, supra note 2, at 319.
Impartiality is nearly impossible when the school board is both the public employer (with responsibility for negotiating the contract) and the legislative body (with ultimate authority for resolving contract disputes). Nothing undermines the validity of factfinding in the school districts more than the fact that the school boards wear two hats.
Id.

56 See Williams, supra note 55.

57 McHugh, supra note 2, at 279.

58 Williams, supra note 55, at 484.

59 About, Reedy Creek Improvement District, http:// www.rcid.org/About.aspx (last visited Mar. 29, 2013).

60 Doing Business, Reedy Creek Improvement District, http:// www.rcid.org/DoingBusiness.aspx (last visited Mar. 29, 2013).

61 Id.

62 Id.

63 2010 Population Search, U.S. Census Bureau, http:// www.census.gov/popfinder/ (last visited Apr. 9, 2013).

64 Id.

65 Comprehensive Plan 2020, Reedy Creek Improvement District (2012), available at http://www.rcid.org/Portals/0/Documents/Comprehensive_Plan/2020_ Comprehensive_Plan.pdf.

66 Jason Garcia, Disney's Reedy Creek Government Has Rare Board Vacancy, But Don't Bother Running, Orlando Sentinel (May 9, 2011), http:// articles.orlandosentinel.com/2011-05-09/business/os-disney-reedy-creek-election-20110509_1_disney-awards-reedy-creek-improvement-district-tom-moses.

67 Id.

68 Id.

69 Id.

70 Jason Garcia, Reedy Creek Board Sides with Management in Contract Talks, Orlando Sentinel (Jan. 11, 2013), http:// articles.orlandosentinel.com/2013-01-11/the-daily-disney/os-reedy-creek-firefighters-20130111_1_reedy-creek-contract-talks-firefighters.

71 Id.

72 Id.

73 Jason Garcia, Firefighters Seek State Help in Battles with Disney-Controlled Government, Orlando Sentinel (Feb. 25, 2013), http:// articles.orlandosentinel.com/2013-02-25/the-daily-disney/os-firefighters-challenge-disney-government-20130222_1_reedy-creek-firefighters-walt-disney-world.

74 Jason Garcia, Disney Lobbying Helped Kill Bill Sought by Reedy Creek Firefighters, Orlando Sentinel (Apr. 29, 2013, 2:03 PM), http:// www.orlandosentinel.com/news/blogs/political-pulse/os-disney-world-lobbying-helped-doom-bill-sought-by-reedy-creek-firefighters-20130429,0,28825.post.

75 Compare Harry Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1007-08, 1021, 1024 (1955) (characterizing the main focus and purpose of collectively bargained contracts as private law), with Archibald Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 636 (1956) (focusing on the public policy and needs of a labor agreement). See also Curtis Bridgeman, Contracts as Plans, 2009 U. Ill. L. Rev. 341 (2009) (discussing the evolution of the private law theory within contract theory).

76 See Shulman, supra note 75.

77 Id. at 1007-08.

78 Morris R. Cohen, The Basis of Contracts, 46 Harv. L. Rev. 553, 586 (1933) (“[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.”).

79 Examples of such formalities would be the statute of frauds, the parole evidence rule, and the prohibition of enforcing contracts against children except for food or shelter. See U.C.C. art. 1.

80 The National Labor Relations Act was passed in 1935. National Labor Relations Act, National Labor Relations Board, http://www.nlrb.gov/national-labor-relations-act (last visited Apr. 9, 2013).

81 David E. Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663, 721 (1973).
There can be no doubt that a desire for higher economic rewards is often the generating force leading to collective bargaining. The promise of higher wages and improved benefits was, and probably still is, one of the prime attractions offered by the union organizer.

But it is equally true that one of the objectives of collective bargaining, and I would argue its larger significance, is the creation of a system of private law to govern the employer-employee relationship.
Id.

82 Cox, supra note 75, at 605.
Labor, management, and arbitrators must recognize that the ideals and needs of society limit their freedom of decision . . . [but, t]he principles determining legal rights and duties under a collective bargaining agreement should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs.
Id.

83 Cohen, supra note 78, at 558 (“Contractualism in the law . . . rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least.”).

84 Shulman, supra note 75, at 1005 (“To be sure, the parties are seeking to bind one another and to define ‘rights' and ‘obligations' for the future.”).

85 See id. at 999.
[O]ur system of free enterprise and democratic government required the state, subject to the limitations of public order, to permit workers to organize and to extend their organization for the purpose of strengthening their bargaining position in the struggle for a better share in return for their services. Their shares were to be determined by the parties to the struggle, not by the state; and the state should not interfere so as to make the struggle unequal.
Id.

86 Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

87 Shulman, supra note 75, at 1005.
Both sides are interested in the welfare of the enterprise. Neither would unashamedly seek contractual commitments that would destroy the other. Each has conflicts of interests in its own ranks. Both might be content to leave the future to discretion, if they had full confidence in that discretion and in its full acceptance when exercised. And even when the negotiating representatives have full confidence in each other as individuals, they recognize that it will be many others, not they, who will play major roles in the administration of the agreement.
Id.

88 Feller, supra note 81, at 724 (“Collective bargaining is not, then, the occasion for introducing rules into the employment relationship. It is, rather, a method by which the employees participate in what would otherwise be a system of unilateral management rulemaking and administration.”).

89 See generally Shulman, supra note 75.

90 See Chiles v. United Faculty of Fla., 615 So. 2d 671, 672 (1993) (rejecting state's position that public-employee bargaining agreements cannot ever fully constitute binding contracts, even after they are accepted and funded); City of Miami Beach v. Bd. of Trs. of City Pension Fund for Firefighters & Police Officers in Miami Beach, 91 So. 3d 237 (Fla. 3d DCA 2012)).

91 See supra note 75.

92 See supra Parts I & II.

93 Feller, supra note 81, at 764 (Collective bargaining is accepted for a couple of reasons but one that Feller mentions is: “a desire for certainty or stability with respect to labor matters.”).

94 Cohen, supra note 78, at 555 (“The development of contract is largely an incident of commercial and industrial enterprises that involve a greater anticipation of the future than is necessary in a simpler or more primitive economy.”).

95 Sarasota Cnty. Sch. Dist. v. Sarasota Classified/Teachers Ass'n, 614 So. 2d 1143, 1148 (Fla. 2d DCA 1993) (“A public employee's constitutional right to bargain collectively is not and cannot be coextensive with private employee's right to bargain collectively.”).

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