CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: September 22-23, 2011

Name of Course: 37th Annual Public Employment Labor Relations Forum (1288R ABF)

City: Lake Buena Vista Facility: Hilton Walt Disney World Orlando

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course material	Comments
James W. Linn	___	___	_____
Ronald G. Meyer	___	___	_____
Todd D. Engelhardt	___	___	_____
F. Damon Kitchen	___	___	_____
Lawrence F. Kranert, Jr.	___	___	_____
Stephen A. Meck	___	___	_____
Thomas W. Young, III	___	___	_____
Thomas M. Gonzalez	___	___	_____
Deborah C. Brown	___	___	_____
Jody M. Litchford	___	___	_____
David C. Miller	___	___	_____
Michael Mattimore	___	___	_____
Donald D. Slesnick	___	___	_____
Paul A. Donnelly	___	___	_____
C. Christopher Anderson III	___	___	_____

General Speaker Comments: _____

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General Seminar Comments: _____

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Course material Comments: _____

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Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

___ Convenience
___ Aesthetics (comfort, cleanliness, etc.)
___ Amenities (restaurants, restrooms, parking, etc.)

Facility Comments: _____

_____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

_____

Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 30 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org to Rules Updates to Rules Regulating The Florida Bar.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date either by going to www.floridabar.org to Member Profile to CLE Status Inquiry or the mailing label of The Florida Bar News.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Three months prior to the end of your reporting cycle, you will receive either:
   1) a CLER Reporting Affidavit, if you still lack hours; or,
   2) a CLER Notice of Compliance, if you have completed your hours.

7. **What do I do with the Affidavit?**
   You are to update and correct the form, complete any hours you lack, and sign and return the affidavit by your reporting date. Complete instructions appear on the reverse side of the form.

8. **What do I do with the Notice of Compliance?**
   If the information is correct, you need not respond. This document is your confirmation that you have completed the requirement for your current reporting cycle.

9. **What happens if I am late returning my Affidavit or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

10. **Will I receive any other information about my reporting cycle?**
    Approximately 45 days prior to the end of your reporting cycle, if you have not yet completed your hours.

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period
and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee,
the City, County and Local Government Law Section
and the Labor and Employment Law Section

37th Annual Public Employment Labor Relations Forum

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

September 22-23, 2011

Hilton Walt Disney World Orlando
1751 Hotel Plaza Boulevard
Lake Buena Vista, FL 32830

Course No. 1288R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 12.0 hours)

General ..... 12.0 hours Ethics ..... 1.0 hour

CERTIFICATION CREDIT

(Maximum 12.0 hours)

City County & Local Government Law ..... 12.0 hours
Labor & Employment Law ..... 9.0 hours
State/Federal Government Administrative Practice ..... 12.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be INTERMEDIATE.

CITY, COUNTY & LOCAL GOVERNMENT SECTION

Kenneth A. Tinkler, Tampa — Chair
Jewel White Cole, Clearwater — Chair-elect
Hans Ottinot Sr., Sunny Isles Beach — CLE Chair

LABOR AND EMPLOYMENT LAW SECTION

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Michael K. Grogan, Jacksonville — Program Co-Chair

CLE COMMITTEE

Candace S. Preston, Wauchula — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

THURSDAY, SEPTEMBER 22, 2011

12:30 p.m. – 1:00 p.m.	**Late Registration**
1:00 p.m. – 1:10 p.m.	**Welcome/Opening Remarks** *Stephen A. Meck, General Counsel, Florida Public Employees Relations Commission, Tallahassee*
1:10 p.m. – 3:00 p.m.	**Pension Reform and Update** *James W. Linn, Lewis, Longman & Walker, P.A., Tallahassee* *Ronald G. Meyer, Meyer, Brooks, Demma & Blohm, P. A., Tallahassee*
3:00 p.m. – 3:15 p.m.	**Break**
3:15 p.m. – 4:10 p.m.	**Federal Eleventh Circuit and Florida's Public Sector Labor Law Update** *Todd D. Engelhardt, Sniffen & Spellman, P.A., Tallahassee* *F. Damon Kitchen, Constangy, Brooks, Smith, LLC, Jacksonville*
4:10 p.m. – 5:05 p.m.	**Florida Civil Rights Act (FCRA) and Florida Commission on Human Relations (FCHR)** *Lawrence F. Kranert Jr., FCHR General Counsel, Tallahassee*
5:05 p.m. – 5:15 p.m.	**Joint City, County and Local Government and Labor and Employment Law Section Meeting (all invited)**
5:15 p.m. – 6:00 p.m.	**Section Meetings (all invited)**
6:00 p.m. – 7:30 p.m.	**All Member Reception (included in registration fee)**

FRIDAY, September 23, 2011

8:40 a.m. – 8:45 a.m.	**Opening Remarks** *Michael K. Grogan, Allen, Norton & Blue, P.A., Jacksonville*
8:45 a.m. – 9:15 a.m.	**An Overview of the Impasse Resolution Process** *Stephen A. Meck, General Counsel, Florida Public Employees Relations Commission, Tallahassee*
9:15 a.m. – 10:00 a.m.	**The Special Magistrate Process** *Thomas W. Young III, Port Charlotte*

10:00 a.m. – 10:15 a.m.	**Break**
10:15 a.m. – 11:00 a.m.	**Senate Bill 88 and other Legislative Actions - How Do These Affect Collective Bargaining** *Thomas M. Gonzalez, Thompson, Sizemore, Gonzalez & Hearing, Tampa*
11:00 a.m. – 11:50 a.m.	**Collective Bargaining Agreements, Waivers and Status Quo: Navigating the Maze** *Deborah C. Brown, Stetson University College of Law, Gulfport*
11:50 a.m. – 1:10 p.m.	**Luncheon (included in registration fee)** **Life After Public Employment** *Jody M. Litchford, Deputy City Attorney, City of Orlando, Orlando*
1:10 p.m. – 2:00 p.m.	**Financial Urgency under Section 447.4095** *David C. Miller, Bryant, Miller, Olive, Miami*
2:00 p.m. – 3:00 p.m.	**What is Happening in Miami? The Litigation of Section 447.4095** *Michael Mattimore, Allen, Norton & Blue, P.A., Tallahassee* *Donald D. Slesnick, Slesnick & Casey, LLP, Miami*
3:00 p.m. – 3:15 p.m.	**Break**
3:15 p.m. – 4:00 p.m.	**Drug Testing** *Paul A. Donnelly, Donnelly & Gross, P.A., Gainesville*
4:00 p.m. – 4:50 p.m.	**Public Official Ethics** *C. Christopher Anderson III, Florida Commission on Ethics, Tallahassee*
4:50 p.m. – 5:00 p.m.	**Questions and Answers and Closing Remarks**

TABLE OF CONTENTS

State Public Section Law Survey
F. Damon Kitchen, Constangy, Brooks, Smith, LLC, Jacksonville

FLORIDA CIVIL RIGHTS ACT (FCRA) AND FLORIDA COMMISSION ON HUMAN RELATIONS (FCHR)
Lawrence F. Kranert Jr., FCHR General Counsel, Tallahassee

AN OVERVIEW OF THE IMPASSE RESOLUTION PROCESS
Stephen A. Meck, General Counsel, Florida Public Employees Relations Commission, Tallahassee

THE SPECIAL MAGISTRATE PROCESS
Thomas W. Young III, Port Charlotte

DRUG TESTING
Paul A. Donnelly, Donnelly & Gross, P.A., Gainesville

PUBLIC OFFICIAL ETHICS
C. Christopher Anderson III, Florida Commission on Ethics, Tallahassee

AUTHORS/LECTURERS

C. CHRISTOPHER "CHRIS" ANDERSON, III received his J.D. from The Florida State University College of Law, after majoring in history at Huntingdon College in Montgomery, Alabama. Chris is a member of The Florida Bar, the Jefferson County Bar Association, and the Florida Government Bar Association. He serves as Chief Assistant General Counsel for the Florida Commission on Ethics. Previously, he served as an Assistant State Attorney in the Second Circuit, as an Assistant Public Defender in the Seventh and Second Circuits, as a Senior Attorney for the Department of Insurance, as an Assistant General Counsel for the Department of Corrections, and as a private practitioner. Also, Chris is a past recipient of the Florida Association of County Attorneys' Ethics Award and its Appreciation Award, and he is a frequent speaker on statutory ethics and related topics at Bar CLE programs and other events.

DEBORAH C. BROWN is the Associate Vice President for Legal Affairs and Human Resources at Stetson University College of Law, but currently transitioning to her new role as Associate Vice President and General Counsel for Saint Leo University in September 2011. She is a graduate of Florida State University (B.A.) and Stetson College of Law (J.D.). She began her career as a hearing officer/staff attorney with the Public Employees Relations Commission. Mrs. Brown then joined the firm of Thompson, Sizemore & Gonzalez from 1989 through 1996, where she represented employers in labor and employment related matters. She left the firm in 1996 to become the Manager of Employee Relations for Walt Disney World Co., one of the largest single site employers in the United States. She was promoted to Director of Employee Relations in 1998, and remained in that position until she rejoined the firm in 2000. Mrs. Brown is past Chair of the Editorial Board for *NACUA Notes*, currently serves on both The Florida Bar Education Law Committee and the Executive Council for the Labor and Employment Law Section, and is President of the Board of Directors for the Tampa Lighthouse for the Blind. She has chaired various Bar committees over the years, including the Labor & Employment Law Committee of the HCBA (1993-94), the Labor and Employment Law Section of The Florida Bar (1996-97), and The Florida Bar Continuing Legal Education Committee (1997-98). She was Board certified in Labor and Employment Law from 2011-June 2011, and served as Chair of the Board Certification Committee for Labor and Employment Law in 2003/04. She served as Vice Chair of the NACUA Publications Committee in 2007-2008, on the NACUA Web Page and Legal Resources Committee in 2008-2009, and as a member of the United Educators Legal Advisory Committee from 2007-2010. In 2003, she received the Outstanding Alumni Award from Stetson University College of Law. In 2004 through 2008, and in 2010, she was selected as one of "Florida's Legal Elite" by *Florida Trend* magazine. She was also named by *Florida Super Lawyers* magazine as one of Florida's top attorneys for 2008 through 2010, and was recognized as one of Tampa Bay's Top Lawyers 2010 by *Tampa Bay Magazine*.

PAUL A. DONNELLY, a founding partner with Donnelly & Gross, P.A., has tried criminal and civil cases to juries and judges and represented clients in administrative, arbitration and mediation proceedings. His focus is on employment, labor and other civil litigation. Mr. Donnelly began his career as an Assistant Public Defender for the Fourth Judicial Circuit in Jacksonville, Florida in 1989. He entered private practice in 1991. Along with his work with the firm, he serves as Adjunct Professor in Trial Practice for the University of Florida, Frederic G. Levin College of Law. And, Mr. Donnelly is an authorized arbitrator for the Florida courts. Mr. Donnelly represents labor unions on matters relating to organizing, elections, collective bargaining, grievance and arbitration, the duty of fair representation, unfair labor practices, and civil litigation. For the past nearly 20 years, Mr. Donnelly has served as statewide counsel for

Communications Workers of America as well as counsel for numerous International Association of Fire Fighters Locals, and international unions throughout Florida. In 2008, he was appointed by Florida's Governor to serve a four-year term on the Judicial Nominating Commission for the Eighth Judicial Circuit of Florida. In 2010, Mr. Donnelly was elected Chairman of the JNC. Mr. Donnelly is AV rated, the highest rating possible by his peers, and is included in the Bar Register of Preeminent Lawyers through Martindale-Hubbell. He is also recognized in Woodard and White's The Best Lawyers in America for lawyers ranked by their peers as the top two percent nationwide in their field. Mr. Donnelly is named as a Florida Super Lawyer in labor and employment law. Education: University of Florida, B.A., High Honors, 1986; University of Florida, College of Law, J.D. 1989. Admissions: The Florida Bar; United States District Court, Northern District of Florida; United States District Court, Middle District of Florida; United States Court of Appeals, Eleventh Circuit; United States Court of Appeals, Federal Circuit. Professional Memberships: Judicial Nominating Commission, Eighth Judicial Circuit of Florida; Master of the Bench, James C. Adkins, Jr., American Inns of Court; Eighth Judicial Circuit Bar Association (Past Board of Directors); The Florida Bar Labor and Employment Law Section; The Florida Bar Real Estate, Probate, and Trust Section; Federal Bar Association, Gainesville Chapter (Charter Member); Bench and Bar Committee, Eighth Judicial Circuit (Past Member); Professionalism Committee, Eighth Judicial Circuit (Past Member).

TODD D. ENGELHARDT practices in the areas of Labor and Employment Law, Commercial Litigation and Commercial Transactions, Civil Rights Litigation, and Appellate Law. He has represented clients before the United States Patent & Trademark Office; the Florida Public Service Commission; the Florida Commission on Human Relations; and various other state agencies. He is admitted to practice in the United States District Courts for the Northern and Middle Districts of Florida, the Eleventh Circuit Court of Appeals, the United States Supreme Court, and all state courts in Florida, as well as the United States Bankruptcy Court for the Northern District of Florida. Mr. Engelhardt is a member of the First District Court of Appeal American Inn of Court as well as The Florida Bar Standing Committee on Professionalism. He is also a member of The Florida Bar Labor and Employment and Appellate Practice sections. Mr. Engelhardt received his B.S. in Political Science and his J.D. from Florida State University, graduating *magna cum laude*. While in law school he was a member of Moot Court and was later selected as a member of The Order of the Coif and The Order of Barristers. He interned at The Florida Bar Center for Professionalism. Prior to attending law school, Mr. Engelhardt worked in the banking industry for ten years, specializing in operations and accounting involving electronic commerce, and served on local fraud and forgery task forces in Tallahassee and Jacksonville.

THOMAS M. GONZALEZ is a partner in Thompson Sizemore Gonzalez & Hearing, P.A. He is AV rated. Education: B.A., Tulane University, 1972; and J.D., Florida State University, 1975. Bar Admissions: The Florida Bar; U.S. District Court, Northern, Middle and Southern Districts of Florida; and U.S. Court of Appeals, Eleventh Circuit. He was a member of The Florida Bar Board of Governors from 1988-1991. He was a member of The Florida Bar Labor & Employment Law Section Executive Council from 1984-1987. He is a Fellow of the American College of Trial Lawyers. He was the President of the Hillsborough County Bar Association from 1984-85. He is the recipient of the Michael A. Fogarty "In the Trenches" Award in 2001. Hillsborough County School Board, Board Attorney, 2005-present. Mr. Gonzalez is listed in The Best Lawyers in America, 1987 to Present; Florida Trend's Florida Legal Elite; and Florida SuperLawyers, 2008. He is on the Florida State University College of Law, Board of Visitors since 2002 and was Chair from 2006-2008.

MICHAEL K. GROGAN is the managing partner in the Jacksonville Office of Allen, Norton & Blue, P.A. Mike has been practicing law for 35 years and is a member of the Florida, Georgia, and Federal Bar Associations. He received his BS from MacMurray College and his JD from Mercer University where he served as Managing Editor of The Mercer Law Review. For many years Mike has been listed as a Florida Super Lawyer in the area of Employment and Labor representing management. Mike is certified by The Florida Bar as a Specialist in the areas of Labor and Employment Law and City, County and Local Government Law. Mike is a former Chair of the Local Government Section of The Florida Bar as well as Past-President of the Academy of Florida Management Attorneys. Mike is a past recipient of the Marsicano and Buchman Awards. Mike and the firm represent over 300 public sector clients throughout the State of Florida, including constitutional officers, cities, counties, colleges and special districts.

F. DAMON KITCHEN is a managing partner with the law firm of Constangy, Brooks & Smith, LLP. Mr. Kitchen's practice is limited exclusively to the representation of public and private sector management clients in all kinds of labor and employment matters before state and federal courts and administrative agencies. He received his B.A. degree from Wake Forest University and his J.D. degree from Walter F. George School of Law at Mercer University. While at Mercer, Mr. Kitchen was a member of the Mercer Law Review and Moot Court Board. Mr. Kitchen is a member in good standing of The Florida Bar and The State Bar of Georgia. He currently serves as the Chair-Elect of the Council of Sections of The Florida Bar, and is a past Chair of The Florida Bar Labor & Employment Law Section (2005-2006). Additionally, Mr. Kitchen is a member of the Labor and Employment Law Section of The State Bar of Georgia. Mr. Kitchen is also a member of the Jacksonville, Federal and American Bar Associations and is a past President of the Jacksonville Chapter of the Federal Bar Association (2000-2001). Mr. Kitchen is board certified to practice labor and employment law by The Florida Bar and is "AV" rated by the Martindale Hubbell Law Directory. Mr. Kitchen is also listed in *Best Lawyers in America, Florida's Super Lawyers,* and *Chambers USA.* Mr. Kitchen is a frequent speaker.

LAWRENCE KRANERT is currently General Counsel for the Florida Commission on Human Relations. He received his undergraduate degree from the University of Miami and graduated with honors from the University of Miami Law School. He has been a member of The Florida Bar since 1974. Prior to joining the Commission on Human Relations, Mr. Kranert was legal consultant to several medical corporations in Central Florida. For over 20 years, Mr. Kranert was with the Department of Children and Families (formerly Department of Health and Rehabilitative Services) where he served as Broward County's District Legal Counsel and General Counsel to Florida State Hospital in Chattahoochee. While serving as District Legal Counsel Mr. Kranert received numerous awards including a State of Florida Award for his work in Child Abuse Prevention and several Davis Productivity Awards. As District Legal Counsel Mr. Kranert implemented the Child Welfare Legal Services in Broward County and also helped organize the Broward County Guardian Ad Litem Program. In addition, Mr. Kranert provided legal services to the Agency on Health Care Administration where he was recognized for his outstanding work in reducing the number of cases by the Board of Pharmacists. Mr. Kranert was appointed by the City of Orlando Mayor Buddy Dyer to serve on the Orange County Children and Families Committee and Community Appropriations Committee. He has served as Co-Chair of the Juvenile Rules Committee for The Florida Bar, taught at Tallahassee Community College and Broward Community College. Mr. Kranert has been a Guardian Ad Litem, volunteer with Special Olympics, Little League Coach and participates at various charitable events in the community.

JAMES W. "JIM" LINN is a shareholder in the Tallahassee office of Lewis, Longman & Walker, P.A. The firm has four offices (West Palm Beach, Jacksonville, Bradenton and Tallahassee) with 34 attorneys and five paralegals. Lewis, Longman & Walker represents a number of cities, counties, special districts and other governmental entities throughout Florida in employment, pension, environmental, land use, administrative and legislative matters. Mr. Linn was selected for inclusion in the 2009 and 2011 editions of "The Best Lawyers in America," and holds an "av" rating from Martindale-Hubbell, the highest rating available for legal ability and adherence to ethical standards. In 2011 he received the Ralph A. Marsicano Award for significant contributions to the development of local government law in Florida, presented by the City, County and Local Government Law Section of The Florida Bar. A substantial portion of Mr. Linn's practice is devoted to advising public employers and pension boards on federal and state laws pertaining to governmental retirement programs, and restructuring retirement plans. He has also successfully represented numerous public entities in pension-related litigation and administrative proceedings. Mr. Linn is a frequent lecturer on pension-related topics, and has appeared at seminars sponsored by The Florida Bar, Florida League of Cities, Florida Public Employer Labor Relations Association, Florida Government Finance Officers Association and Florida Association of Special Districts. He served as Chairman of The Florida Bar Section on Local Government Law (now the Section on City, County and Local Government Law) in 1995-96. He graduated, with honors, from the Florida State University College of Law in 1980.

JODY M. LITCHFORD received her B.A. in Psychology, magna cum laude, from Vanderbilt University and her J.D. with honors from the University of Virginia. She began her legal career at the Department of Justice in Washington, D.C. She was subsequently employed by the City of Orlando as the Legal Advisor for the Orlando Police Department and is currently the Deputy City Attorney for the City of Orlando, with operational and supervisory responsibility over all practice areas. She is a Past President of the Florida Municipal Attorneys Association, Past President of the International Chiefs of Police Legal Officer's Section, and Past President and current Board Member of the Florida Association of Police Attorneys. Jody has lectured nationally on employment law and related subjects. She has published numerous articles on employment law topics, particularly dealing with police or government personnel issues.

MICHAEL MATTIMORE is the Managing Partner in the Tallahassee office of Allen Norton & Blue, P.A. and is board certified in labor and employment law by The Florida Bar. Mr. Mattimore has had 32 years of practice in labor and employment law. Mr. Mattimore was the Chairman of the Public Employees Relations Commission from 1987 to 1992. He has been the Chief Negotiator for the State of Florida since 2001. He was appointed by the Governor to co-chair Florida's Workforce 2008 Commission. He is a Trustee of The Florida Bar Labor and Employment Law of Board of Trustees. He is AV rated. He was listed in Leading Lawyers of America in 2007, 2008, 2009, 2010, and 2011. In 2007, 2008, 2009, 2010, 2011, he was selected as a Florida Super Lawyer, Central North and Gulf Coast based upon a statewide survey of 44,000 active lawyers. He was listed in Florida Trend's Elite Lawyers of Florida in 2007, 2008, 2009, 2010, and 2011. He was selected by "Best Lawyers" as the foremost labor and employment lawyer, and the Wall Street Journal named Michael Mattimore as one of the best lawyers in America. Court Admissions: U.S. Supreme Court; U.S. Courts of Appeal for the 11th, 6th, and 5th Circuits; U.S. District Courts for the Northern, Middle, and Southern Districts of Florida; and all Florida State Courts. Education: Florida State University College of Law, J.D. ; Oxford University, St. Edmunds College of Law; University of Miami, Masters in Counseling Psychology; and Florida International University, B.A.

STEPHEN A. MECK has been practicing labor and employment law in the public sector for over 28 years. He has been General Counsel for the Florida Public Employees Relations Commission for 16 years, serving under four different Chairs. He holds a Juris Doctor degree from Florida State University (with honors) and a Bachelor of Science degree (Magna cum Laude) at the same institution. While serving as a hearing officer, Mr. Meck graduated from the National Judicial College in Reno, Nevada, and later served there as a faculty advisor. He has been the Chair of the state General Counsels' Association, long-term executive council member and past chair of The Florida Bar Labor and Employment Law Section, and executive council member and past president of the Association of Labor Relations Agencies. Mr. Meck has lectured extensively at the major law schools in Florida and given numerous lectures at state, national, and international conferences. He has published decisions in thousands of unfair labor practice cases.

RONALD G. MEYER is the founding partner of the Tallahassee firm of Meyer, Brooks, Demma and Blohm, P.A. He is a past Chair of the Labor and Employment Law Section of The Florida Bar. He is an experienced labor and employment law practitioner and regularly appears before state and federal courts and administrative tribunals. Ron has an Av rating from Martindale-Hubbell and is listed in the current editions of Superlawyers and Best Lawyers in America. He is a graduate of Stetson College of Law and has an undergraduate degree in Broadcasting from the University of Florida. Ron is lead counsel in a suit challenging the recent modifications to the Florida Retirement System made by the 2011 Session of the Florida Legislature.

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DON SLESNICK is the managing partner for the Law Offices of Slesnick & Casey, LLP. He has been in private practice since 1978, representing public sector employee organizations. Prior to this he held management positions with the Dade County Public Schools and the Dade County Police Department. He has recently concluded ten years (four terms) as Mayor of Coral Gables, Florida - a post to which he was first elected in April 2001. He served as the 2009-10 President of the Florida League of Mayors. Don received a B.A. (Foreign Affairs) from the University of Virginia, a J.D. from the University of Florida and a M.P.A. from Florida International University. He was admitted to The Florida Bar in 1972, the U.S. Supreme Court in 1985; is a Florida Bar Board Certified Specialist in Labor & Employment Relations and a Florida Supreme Court Certified Mediator. He was a Fellow of the College of Labor & Employment Lawyers and a member of the Florida Academy of Professional Mediators. Martindale-Hubbell has awarded Don a rating of "AV Preeminent." He was included in the "The Best Lawyers In America", has been designated as a Florida "Super Lawyer" (2006-2011) and named as one of South Florida's "Top Lawyers" (2005-2011). Active for many years in his profession, Don has been Chairman of The Florida Bar Labor & Employment Law Section, Co-Chairman of the ABA State and Local Government Bargaining and Employment Law Committee. He is presently serving as a member of the governing council of the ABA Labor & Employment Section and represents the Section in the ABA House of Delegates. He holds an ABA Presidential appointment to that organization's Commission on Civic Education in the Nation's Schools. Don is a Vietnam veteran and a former U.S. Army advisor to NATO forces in Germany. He has been active in

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PENSION REFORM AND UPDATE

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PENSION REFORM AND UPDATE

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BACKGROUND

Prior to 1970, numerous public retirement systems existed in Florida with different membership criteria and benefits schedules. In 1970, the Legislature created the FRS by combining existing retirement systems. *See* Ch. 1970-112, Laws of Fla. (1970). Membership in the FRS became mandatory for all officers and employees employed on or after December 1, 1970. *See* §121.011, Fla. Stat. (1971). At its inception, the FRS was a contributory system in which regular members contributed 4% of their gross compensation toward their FRS retirement and special risk members contributed 6%. Employers contributed an amount equal to the employee contributions.

In 1974, the Florida Legislature converted the FRS to a noncontributory system, eliminating the required member contributions (indeed prohibiting member contributions) and increasing the employer contributions to 9% for regular members and 13% for special risk members. In adopting the changes, the Legislature noted that the retirement fund at that time was not actuarially funded and that it was "the intent of the legislature to correct the trust fund imbalance and to implement such administrative changes as would accrue to the benefit of covered employees." Ch. 74-302, Laws of Fla. (1974). The changes became effective January 1, 1975.

As part of the 1974 Act, the Florida Legislature also adopted the following amendment to the FRS's preservation of rights provision:

> The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

Ch. 74-302, §1, Laws of Fla. (1974), *codified at* §121.011(3)(d), Fla. Stat. (1975). Prior to the adoption of this amendment, the Courts in Florida had held that active participants in noncontributory public retirement systems held no vested rights to the benefits under those systems. *See Anders v. Nicholson*, 111 Fla. 849, 150 So. 639 (Fla. 1933).

In 1976, Florida voters adopted Article X, Section 14 of the Florida Constitution, which states:

> A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless

> such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

After the adoption of this constitutional amendment, the Legislature enacted section 112.61, Florida Statutes, stating:

> It is the intent of the Legislature in implementing the provisions of s.14, Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.

The FRS has remained a noncontributory plan since 1975, meaning that employees are neither required nor permitted to contribute to their retirement funds in the FRS. It is a consolidated retirement plan which holds and administers retirement moneys for more than 900 state and local government employers in Florida, covering approximately 655,000 active and separated members and providing benefits to approximately 304,000 retired members. Participation in the FRS is compulsory for all employees (with limited exceptions) employed by an employer that participates in the FRS. *See* §121.051(1), Fla. Stat. (2010).

The FRS members must choose to participate in either the FRS "Pension Plan" or the FRS "Investment Plan" within five months of their hire. *See* §121.4501(4)(a), Fla. Stat. (2010).

The FRS "Pension Plan" or defined benefit plan entitles members to an annuitized monthly retirement income based upon a formula consisting of the member's average final compensation, employment class, and years of creditable service. *See* §121.091, Fla. Stat. (2010). Prior to the 2011 amendment to the law, members achieved full vesting in Pension Plan benefits upon completion of six (6) years of service and the Pension Plan provided retirees an annual cost-of-living-adjustment (COLA) of 3% regardless of the number of years of credited service or when those years of service were performed. *See* §§121.021(45), 121.101(1)(b), Fla. Stat. (2010).

The FRS "Investment Plan" or defined contribution plan entitles members to their employers' monthly contributions to the FRS as a percentage of the members' monthly salary and to earnings on those contributions, but it does not assure a guaranteed result. Members fully vest in the Investment Plan benefits upon completion of one (1) year of service. *See* §121.4501(6), Fla. Stat. (2010). After their initial election, members can choose to switch between the Pension Plan and Investment Plan one time during their active service. *See* §121.4501(4)(e), Fla. Stat. (2010).

FRS funds are managed by the State Board of Administration. FRS benefit payments are administered by the Department of Management Services through the Division of Retirement. FRS employers are required to contribute a fixed percentage of their employees' monthly compensation to the Division of Retirement for distribution to the Florida Retirement System Contributions Clearing Trust Fund. The employer contribution rate is set annually by statute based upon an actuarial determination of the level of funding necessary to support the benefit obligations under both FRS plans. The employer contribution rate is the same percentage for members of the Pension Plan as for members of the Investment Plan.

Experts recommend that public pension funds operate at or above an 80% ratio. As of July 1, 2010, the FRS Pension Plan was funded at 87.9%. *See SBA Overview March 31, 2011*, p. 9, www.sbafla.com/fsb/LinkClick.aspx?fileticket=HJKuogA9hQE%3D&tabid=997&mid=2293.

According to the State Board of Administration which manages the FRS funds, the FRS Pension Plan "has been and continues to be one of the most well-funded and healthiest public pension funds in the United States" and is "generally characterized as being in the top four by most objective publications." *SBA Overview March 31, 2011*, p. 6, www.sbafla.com/fsb/LinkClick.aspx?fileticket=HJKuogA9hQE%3D&tabid=997&mid=2293.

Despite the actuarial soundness of the FRS, Chapter 2011-68 was enacted took effect on July 1, 2011. The law makes significant changes to the FRS, but the majority of the changes do not affect current members. Instead, the following changes affect only employees who initially enroll in the FRS after July 1, 2011:

a. Increasing the number of final years of compensation upon which retirement benefits are calculated from five years to eight years;

b. Increasing the years required for vesting in the Pension Plan from six to eight years;

c. For most classes of service, increasing the retirement age from 62 to 65 and increasing the required years of service from 30 to 33 years; and

d. For special risk employees, increasing the retirement age from 55 to 60 and increasing the required years of service from 25 to 30 years.

However, two significant changes that apply to persons who became members of the FRS prior to July 1, 2011: (1) the mandatory 3% pay deduction for all members of the FRS employed on or after July 1, 2011; and (2) the reduction in the COLA for members whose effective retirement date is on or after July 1, 2011. These changes were not accompanied by a concomitant increase or improvement in retirement benefits. While there was no increase or improvement in benefits, the law did decrease the employer contribution rates for each membership class. A comparison of the new and prior rates is set forth below:

	2011-2012	2010-2011
Regular	3.28 %	9.63 %
Special Risk	10.21 %	22.11 %
Special Risk Administrative Support	4.07 %	12.10 %
Legislators, Governor, Cabinet, State Attorneys, Public Defenders	7.02 %	15.20 %
Justices and Judges	9.78%	20.65 %
County Elected Officers	9.27%	17.50%
Senior Management Services	4.81%	13.43 %

Additionally, Chapter 2011-68 establishes required employer contributions for the 2011-2012 fiscal year for each membership class "to address unfunded actuarial liabilities of the system," as follows:

Regular	.49 %
Special Risk	2.75 %
Special Risk Administrative Support	0.83 %
Legislators, Governor, Cabinet, State Attorneys, Public Defenders	0.88 %
Justices and Judges	0.77 %
County Elected Officers	0.73 %
Senior Management Services	0.32 %

These changed rates made possible by the 3% salary deduction and COLA reduction resulted in the Legislature having funds to apply to other areas of the budget.

A. DOES CHAPTER 2011-68, LAWS OF FLORIDA, UNCONSTITUTIONALLY IMPAIR THE CONTRACTUAL RIGHTS OF CLASS MEMBERS?

Article I, section 10 of the Florida Constitution states "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." This Article is similar to Article I, section 10 of the United States Constitution which also precludes any law "impairing the obligation of contracts." Florida courts have interpreted the state constitutional provision in accordance with the Federal constitution. *See Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979).[1]

The United States Supreme Court set forth the current test for determining if a violation of the Contract Clause has occurred in *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). In *U.S. Trust*, the Court established that the inquiry into whether a violation of the Contract Clause has occurred involves the following questions: (1) Is there a contractual obligation?; (2) Was that obligation impaired?; (3) If yes, was the impairment substantial?; and (4) If yes, was the impairment reasonable and necessary to serve a legitimate or important public purpose? If a party establishes that there is a contract obligation that has been substantially impaired and the impairment was not reasonable and necessary to serve a legitimate public purpose, then, a violation of the Contract Clause has occurred. When the State is a party to the contract, in determining if an impairment is reasonable and necessary, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26. The Court noted:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations

[1] *Pomponio* involved a state statute's effect on a contract between private parties whereas a different result obtains when the State is a party to the contract. Thus, the analysis in *Pomponio* is slightly different as recognized in *Pomponio* and *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). *U.S. Trust*, however, did involve the State as a party to the contract.

> whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id.

The Florida Supreme Court also has recognized that deference to the Legislature is not required when determining reasonableness and necessity, which the Court has interpreted as requiring a compelling state interest. *See Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). In *Chiles*, the Court found that the Legislature had violated the Florida Constitution's Contract Clause by eliminating pay raises in a collective bargaining agreement that it had previously funded. In so holding, the Court stated:

> The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution . . .. The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created.

Id. at 673. The Court recognized that the Legislature had some discretion during bona fide emergencies, but held that before the Legislature could impair its contractual obligations, it had to demonstrate "a compelling state interest." *Id.* To determine what would constitute a compelling state interest, the Court, citing to *U.S. Trust*, stated:

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

615 So. 2d at 673.

Applying the impairment test to the facts underlying the challenge which is underway to the pension law changes, it is evident that the challenged provisions of Chapter 2011-68 are an unconstitutional impairment of contract. First, section 121.011(3)(d), Florida Statutes clearly and unambiguously establishes that the rights of the members of the FRS under Chapter 121 "shall be legally enforceable as valid contract rights and shall not be abridged in any way." The Florida Supreme Court in *Florida Sheriffs Ass'n v. Department of Administration*, 408 So. 2d 1033 (1981) held that this statute creates contractual rights in earned benefits. Thus, a contractual obligation clearly exists.

The next inquiry is whether the contract was impaired and if so, whether the impairment was substantial. The relevant terms of the contract between the State and FRS participants who became members of the FRS prior to July 1, 2011, were: (1) a mandatory, noncontributory pension; and (2) a 3% COLA on pension benefits upon retirement irrespective of years of service or dates of service. Chapter 2011-68, Laws of Florida substantially alters these contractual provisions. *See* Ch. 2011-68, §§5, 7, 11, 13, 17, 24, 26, 29, 33, 40, Laws of Fla. (2011). It now requires such FRS participants to contribute 3% of their salary (pre-tax) toward their pension

thereby converting the noncontributory system under the prior contract to a contributory system after July 1, 2011, and mandatorily requiring a 3% reduction in the employee's salary. The new law also reduces the COLA percentage on all retirement benefits based upon how many years an employee works after July 1, 2011, essentially penalizing employees for working beyond that date. For instance, under Chapter 2011-68, §17, an employee who retires effective July 1, 2012, with 30 years of service (29 years of which occurred before July 1, 2011) would receive a COLA of 2.9% rather than 3% (the formula under the new law is: 29/30 = .9667 X 3% = 2.9%). The new reduced COLA applies to all of the employee's benefits and not just those benefits accrued after July 1, 2011.

Both of these provisions in Chapter 2011-68, Laws of Florida substantially and retroactively impair the FRS participants' contractual rights in the FRS. The 3% salary deduction results in an abrogation of the very essence of the FRS members' contract with the State. Their contract was for a noncontributory pension plan, and they now have a contributory pension plan, a completely different system. Additionally, by requiring FRS members to contribute 3% of their salary to the FRS, the State has decreased the value of their retirement benefits overall by the proportion of their contributions to the FRS. Essentially, they will be required "to pay more for each pension dollar they will eventually receive." *Association of Pennsylvania State College and University Faculties v. State System of Higher Education*, 479 A. 2d 962, 965 (Pa. 1984) (Pennsylvania Supreme Court found that a change to the state's retirement system which required members to contribute an additional one and one-quarter percent of their wages was an unconstitutional impairment of contract with regard to employees who were members prior to the effective date of the amendment). As stated in *Dewberry v. Auto-Owners Insurance Co.*, 363 So. 2d 1077, 1080 (Fla. 1978), "[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution."

In *Dewberry*, prior to October 1, 1976, the plaintiff entered into a contract with the defendant for a stacking uninsured motorist coverage policy. However, the Legislature passed a bill effective October 1, 1976, that prohibited stacking for any accidents occurring on or after October 1, 1976. The plaintiff was in an accident in December 1976 and filed a declaratory judgment lawsuit to enforce the stacking provision of his contract, alleging that the legislative act was an unconstitutional impairment of contract. The Florida Supreme Court found that the legislative act retroactively diminished the value of the plaintiff's insurance contract in that the plaintiff had to pay the same amount for less coverage and thereby impaired plaintiff's contract. In reaching this decision, the Court stated "[a]ny conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution." *Id.* at 1080. Likewise, in the instance of the pension law changes, the retroactive diminishment of FRS members' retirement benefits (they have to pay more for the same benefit) is prohibited by section 121.011(3)(d), Florida Statutes as is an abrogation of the "mandatory, noncontributory retirement plan." *cf. Florida Sheriffs Ass'n v. Department of Administration, supra* (finding that a prospective modification of a special risk credit from 3% to 2% in the "mandatory, noncontributory retirement plan" was not an impairment of contract).

The reduction in the COLA percentage also is a prohibited retroactive change in FRS members' benefits. *See Florida Sheriffs, supra.* The COLA amendment in Chapter 2011-68 does not apply only to benefits earned after July 1, 2011. Instead, the reduced COLA applies to

all retirement benefits for those members who retire after July 1, 2011, and whose entitlement to such benefits was earned prior to July 1, 2011.

Although Florida courts have not had the opportunity to review FRS amendments like the 2011 changes, other states have addressed the substantial impairment of contracted pension rights. Like Florida, New York has an express provision granting contract rights to retirement system members. Article V, section 7 of the New York State Constitution states that "[a]fter July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." New York's highest court interpreted this provision in *Birnbaum v. New York State Teachers Retirement System*, 152 N.E. 2d 241 (N.Y. 1958). In *Birnbaum*, active members of the New York Teachers Retirement System ("TRS") challenged the TRS's adoption of a mortality table which would reduce by approximately 5% the amount of monetary payments the members would receive under the TRS on the basis that it impaired the contractual relationship guaranteed under the New York Constitution. The Court found that the constitutional provision fixed "the rights of the employee at the time he became a member of the system" and that the challenged change in the mortality table was "a diminution and an impairment of the benefits of the Retirement System." *Id.* at 245. Thus, the Court held that the new mortality table was invalid as applied to current members of the TRS.

Even in the absence of an express statutory or constitutional provision, other states have found that employees have a contract right in their retirement system. When contractual rights exist, the states have held that those contractual rights are substantially impaired when the contracting public entity passes laws or ordinances changing the employees' existing pension rights. *See State of Nevada Employees Assoc., Inc. v. Keating*, 903 F. 2d 1223 (9th Cir. 1990)(determining that the State's elimination of the right of public employees to withdraw pension contributions without penalty substantially impaired the State's contractual obligations); *Calabro v. City of Omaha*, 531 N.W. 2d 541 (Neb. 1995)(finding a substantial contract impairment where the city eliminated a cost-of-living supplemental benefit plan provided to retired firefighters); *Dadisman v. Moore*, 384 S.E. 2d 816 (W.Va. 1989)(holding that the State's inadequate funding of the pension system constituted a substantial impairment of contract); *Oregon State Police Officers' Ass'n v. State of Oregon*, 918 P. 2d 765 (Or. 1996)(finding that several changes to Oregon's pension system, including a required 6% contribution rate for employees while prohibiting employers from offsetting the contribution rate, was a substantial impairment of contract).

The substantiality of the changes arising from the 2011 pension law changes is clearly evident when viewed from the perspective of FRS members. The changes result in an immediate 3% salary reduction for all members of the FRS. Such a reduction results in a substantial reduction in their ability to pay for necessities such as food and housing. Furthermore, FRS members of who have planned for retirement on the basis of receiving an annual 3% COLA are suddenly after years of planning faced with a severely reduced benefit. Accordingly, it is clear that the modifications contained in Chapter 2011-68 are a substantial impairment of contract. *See Chiles; Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F. 2d 766, 772 (2nd Cir. 1991)(finding that the institution of a lag payroll substantially impaired State's obligation under the collective bargaining agreement and stating "it would be inconsistent

for us to accept the defendants' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create").

The final inquiry in determining if a violation of the Contract Clause has occurred is whether the substantial impairment was reasonable and necessary. Florida's pension plan is one of the most stable in the nation. The actuarial soundness of the FRS is well documented. *See 2009-2010 State Board of Administration Investment Report*, http://www.sbafla.com/fsb/LinkClick.aspx?fileticket=1KGUzNfF0IQ%3d&tabid=749&mid=1957. In the 2010 report from the State Board of Administration ("SBA"), the SBA states:

> The FRS Pension Plan continues to be one of the best-run public pension funds in the United States. In fact, independent research once again confirmed that the FRS is one of the best-funded plans in the nation. It was recently recognized by the Pew Center on the States as one of four model pension funds, entering 2008 fully funded. Additionally, the FRS was highlighted as the top performing large U.S. pension fund for calendar year 2009 by Wilshire/TUCS and was deemed among the most cost-effective pension providers among its peers by CEM Benchmarking, Inc.

2009-2010 State Board of Administration Investment Report, p. 6-7.

Moreover, the legislative history of Senate Bill 2100 shows that the actuarial soundness of the FRS was not the reason for the modifications. In fact, the actuarial soundness of the FRS is not even mentioned. *See The Florida Senate Bill Analysis and Fiscal Impact Statement* (April 1, 2011), http://www.flsenate.gov/Session/2011/2100/Analyses/ps5XnOs0q1WqXSBwrjk2IzHaDug=7/Public/Bills/2100-2199/2100/Analysis/2011s2100.bc.PDF; *The Florida Legislature, Summary of Conference Committee Action* (May 5, 2011), http://www.flsenate.gov/Session/Bill/2011/2100/Analyses/VOuskO0TtfDTnw=PL=kf8cNN2b2gYc=|7/Public/Bills/2100-2199/2100/Analysis/S2100%20Conference%20Report.PDF. Indeed, it could not be since the employer contribution rates were decreased by more than the now required 3% contribution rate for individual members. Thus, the 3% deduction from members' salaries in no way increases the actuarial soundness of the FRS. Instead, the reason for the modifications had nothing to do with the FRS and everything to do with general budget issues caused by the economic recession. Rather than raise taxes, cut spending or make different spending decisions, the Legislature implemented the modifications to the FRS to balance its budget. This classic legislative action of impairing its own contracts because the Legislature would rather use the funds elsewhere is precisely the type of action that the United States Supreme Court has determined does not constitute reasonable and necessary impairment of a state's contractual obligations. *See U.S. Trust, supra.* As the Florida Supreme Court in *Chiles, supra* succinctly stated, "[t]he mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason." 615 So. 2d at 673. Likewise, the Legislature did not have a compelling reason to modify the FRS and therefore, the substantial impairment resulting from the passage of Chapter 2011-68, Laws of Florida is unconstitutional and cannot stand.

B. IS CHAPTER 2011-68 AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF FRS MEMBERS WITHOUT FULL COMPENSATION?

Article X, section 6 of the Florida Constitution states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Article X, section 6 is consistent with the United States Constitution's Takings Clause. The Fifth Amendment of the United States Constitution, like Article X, section 6, precludes the taking of private property for public use without just compensation. In interpreting the Takings Clause, the United States Supreme Court has found that the purpose of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960). In changing the pension system, the State has done exactly what the constitutional provisions were enacted to prevent -- it has taken the private property of FRS members alone to bear the public burden of balancing the State's budget. Therefore, the 3% salary deduction and the COLA reduction result in an unconstitutional taking under Article X, section 6 of the Florida Constitution.

In general, there are two types of takings which require the State to justly compensate the property owner, physical/eminent domain takings and regulatory takings. *See Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). In a physical taking, the State confiscates private property for a public use. *Id.* Under a regulatory taking, the State regulates private property under its police power in such a manner that the "regulation effectively deprives the owner of the economically viable use of that property." *Id.* at 624. A taking under Article X, section 6 of the Florida Constitution "applies equally to real and personal property." *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN*, 576 So. 2d 261, 263 (Fla. 1990)(finding that the state's failure to return the respondents' truck for a period of two years raises a meritorious claim of a taking); *see also Flatt v. City of Brooksville*, 368 So. 2d 631 (Fla. 2d DCA 1979)(finding that plaintiffs could recover for the unwarranted governmental destruction of their personal property).

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed. 2d 358 (1980), the Court also addressed the application of the Takings Clause to personal property. The case involved a challenge to section 28.33, Florida Statutes which authorized the clerk of the Circuit Court to keep the interest earned on an interpleader fund deposited in the court's registry. In addition to taking the interest earned on the funds deposited, the clerk also charged a fee for services rendered in receiving the money into the court registry. The Florida Supreme Court found that a taking had not occurred because the funds were not private property. The United States Supreme Court rejected this finding and held that the principal sum deposited in the registry was private property and that the taking of the interest on the private property was in violation of the Fifth Amendment. In reaching this conclusion, the Court stated:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The

> earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164, 101 S.Ct. at 452.

A physical taking and not a regulatory taking is at issue as a result of the pension law changes. After current FRS members have worked and already earned their compensation at their contractual rates of pay, a 3% deduction is imposed on their earned compensation/salary. Participants cannot opt out of the FRS or otherwise prevent the deduction from their salary. Moreover, even under the limited circumstances by which they can receive a refund of their salary deductions (i.e. they leave public employment), they do not receive any interest or investment income on the returned funds regardless of how many years those funds have been invested by the FRS trust fund. *See* Ch. 2011-68, §15, Laws of Fla. (2011). FRS members have not been granted any increase in benefits or coverage to account for this salary deduction. Additionally, the COLA that was a part of the FRS members' contract with the State upon entering the FRS will now be reduced based upon the time they work beyond July 1, 2011, with no commensurate increase in benefits or coverage.

The purpose for the salary deduction and COLA reduction was not to increase benefits for FRS members or to ensure the actuarial soundness of the FRS. In fact, Chapter 2011-68 offers no enhancement of retirement benefits at all and even if the funds are returned (in the event the employee leaves public employment), as stated previously, no interest or other investment income is provided even though the funds will have been earning income in the FRS trust fund. Receiving a benefit that is already required and not providing interest or investment income is not full compensation. Instead, the Legislature, in implementing Chapter 2011-68, has appropriated FRS members' personal property for public use, i.e., balancing the State's budget. This is simply an attempt to raise revenue at the expense of public employees. Balancing the budget, a clear public use of funds, should be borne equally by the public as a whole.

Accordingly, the 3% salary deduction and COLA reduction constitute a taking of private property without full compensation in violation of Article X, section 6 of the Florida Constitution. *See Webb's Fabulous Pharmacies, Inc.*; *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN*, 576 So. 2d 261, 263 (Fla. 1990); *Canel v. Topinka*, 818 N.E. 2d 311 (Ill. 2004)(finding that an unconstitutional taking occurred when the state refused to return dividends made on unclaimed property).

C. DOES CHAPTER 2011-68, LAWS OF FLORIDA, UNCONSTITUTIONALLY ABRIDGE THE RIGHT TO COLLECTIVELY BARGAIN GUARANTEED BY ARTICLE I, SECTION 6?

Article I, Section 6, of the Florida Constitution provides:

> **Right to work**.-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.***

(emphasis supplied). This provision guarantees public employees the same rights to collectively bargain as those enjoyed by private employees, with the exception of the right to strike. *See Dade County Classroom Teachers Ass'n v. Ryan*, 225 So. 2d 903, 905 (Fla. 1969). These rights specifically include the right to bargain over pensions and retirement benefits. *See City of Tallahassee v. Pub. Empl. Relations Comm'n*, 410 So. 2d 487 (Fla. 1981). This right may be abridged based only upon a compelling state interest implemented by the least restrictive means. *See Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999). Chapter 2011-68, Laws of Florida, which became effective July 1, 2011, and was enacted without any prior collective bargaining and without any language making its provisions contingent upon such bargaining, plainly and unambiguously abridges this right.

In *City of Tallahassee, supra*, the Florida Supreme Court found unconstitutional a statute that completely removed the subject of retirement from collective bargaining, stating that "Article I, Section 6, permits regulation of the bargaining process but not the abridgment thereof." 410 So. 2d at 490. Although Chapter 2011-68 does not explicitly remove retirement and pensions from collective bargaining, it effectively does so by making significant and fundamental changes to the FRS without providing any collective bargaining opportunity for the employees who are covered by the FRS. It does not even purport to regulate collective bargaining; it simply unilaterally establishes all of the new terms and conditions applicable to those covered without mentioning the obligation to bargain at all. Its failure to do so in Chapter 2011-68 is significant because the various public employers whose participation in the FRS is mandatory therefore have no power to bargain over the changes being made, rendering any demand to bargain made to them by a certified union futile.[2] This is a substantial and material abridgment of the right to collectively bargain by any definition.

The Legislature has failed to specify, and there is in fact not any compelling state interest requiring or justifying its unilateral action. As previously noted, these changes were enacted solely to raise funds to balance the budget, not to remedy some imminent problem with the

[2] This includes the State itself because the Legislature has designated the Governor as the public employer for State employees in Section 447.203(2), *Florida Statutes*, exempting itself from any bargaining obligation and, thus, from any unfair labor practice for failure to bargain. *See* §447.501(1)(c), *Fla. Stat.*, prohibiting "public employers or their agents or representatives" from "refusing to bargain collectively."

financial stability of the retirement fund. Under C*hiles*, therefore, the Legislature is not free to jettison the right to collectively bargain simply because it is politically more expedient than raising taxes.

Article I, Section 6, guarantees public employees, the right to ***effective*** collective bargaining. *See Hillsborough Governmental Employees Ass'n. v. Hillsborough Aviation Authority*, 522 So. 2d 358 (Fla. 1988). No such bargaining is possible where the Legislature has already unilaterally determined what the result will be. As noted by the United States Supreme Court in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991), "it is difficult to bargain if, during the negotiations, the employer is free to alter the very terms and conditions of employment that are the subject of negotiations." Consequently, Chapter 2011-68 unconstitutionally abridges Article I, Section 6.

PENSION LITIGATION
2011

Florida Retirement System Changes
SB 2100

1.14

Pension "Reform" Challenge

- Senate Bill 2100 made many changes to the Florida Retirement System (FRS) some of which only apply to new employees first hired after July 1, 2011:
  - Average compensation changed from 5 to 8 years
  - Vesting increased from 6 to 8 years
  - Retirement age increased from 62 to 65
  - Years of service requirement increased from 30 to 33
  - Special risk retirement age increased from 55 to 60 and required years of service from 25 to 30 years

Pension "Reform" Challenge

- Two significant changes apply to all current FRS participants:
  - Mandatory 3% pay deduction for contribution to retirement
  - Reduction in earned cost-of-living adjustment (COLA) for service performed after July 1, 2011, but which affects calculation for prior service
- Thes e changes are challenged by the lawsuit which is pending in Leon Circuit Court *(Williams, et. al v. Scott, et. al, Case No. 2011CA1584)*

Pension "Reform" Challenge

Section 121.011(3)(d), Florida Statutes, provides:

"As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way." (underlining added)

Pension "Reform" Challenge

- Many employees (such as educators) have individual contracts which establish salary
- Collectively bargained contracts establish salary
- Statutes and personnel policies establish salary
- Thes e different ways of ensuring a day's pay for a day's work create a protected interest in salary, i.e.,a "property right"

Pension "Reform" Challenge

Article I, Section 10, Florida Constitution, states:

"**Prohibited laws.** – No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." (underlining added)

Pension "Reform" Challenge

- The Legislature may only impair a contractual right if a "compelling state interest" exists:

"[T]he legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other reasonable source." *(Chiles v. United Faculty of Florida,* 615 So. 2d 671)

Pension "Reform" Challenge

- Deducting 3% of the earned salary from public workers is also a "taking" prohibited by Article X, Section 6 of the Constitution ("[n]o private property shall be taken except for a public purpose and with full compensation therefor…")
- Further, the unilateral changes violate Article I, Section 6 of the Constitution (guaranteeing that the right of employees to bargain collectively "shall not be denied or abridged.")

Pension "Reform" Challenge

- The status of the case is:
  - On June 30, 2011, the Judge denied the request to "sequester" funds being collected
  - The Judge determined that she has the authority to require the State to return contributions if she finds the law to be unconstitutional
  - The Court has scheduled final trial level disposition of the case for October 26, 2011, either through motions for summary judgment or a non-jury trial

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PENSION REFORM UPDATE

James W. Linn
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I. 2011 Legislation Affecting Public Employee Retirement Plans

This year the Florida legislature enacted two major bills impacting public employee retirement plans in Florida: SB 1128 (codified as Ch. 2011-216, Laws of Florida), and SB 2100 (codified as Ch. 2011-68, Laws of Florida). SB 2811 concerns local government retirement plans, and SB 2100 contains a number of revisions to the Florida Retirement System (FRS). Both bills are summarized below.

A. SB 1128 (Local Government Retirement Plans)

1. Revises the definition of compensation for all local government defined benefit retirement plans. For plans that are not subject to collective bargaining, for service earned on or after 7/1/11, up to 300 hours of overtime may be included in compensation for pension purposes as specified in the plan, but payments for accrued unused sick or annual leave may not be included. For plans that are subject to collective bargaining, effective for the first agreement reached on or after 7/1/11 for service earned on or after that date, up to 300 hours of overtime may be included in compensation for pension purposes as specified in the collective bargaining agreement or plan, but payments for accrued unused sick or annual leave may not be included.

2. Prohibits the use of an actuarial or cash surplus in a government pension plan for any expenses outside the plan.

3. Prohibits the reduction of plan sponsor contributions to a local government pension plan below the normal cost.

4. Requires that all actuarial reports disclose the present value of the plan's accrued vested, nonvested and total benefits, as adopted by the Financial Accounting Standards Board, using the Florida Retirement System's assumed rate of return (currently 7.75%), "to promote the comparability of actuarial data between local plans."

5. Eliminates the requirement in Chapters 175 and 185 that pension benefits be increased whenever member contributions are increased.

6. Directs the Department of Management Services to provide a fact sheet on each participating local government defined benefit pension plan summarizing the plan's actuarial status. The fact sheet must contain a summary of the plan's most recent actuarial data, minimum funding requirements as a percentage of pay, and a 5 year history of funded ratios. The fact sheets must be posted on the Department's website, and plan sponsors that have websites must provide a link to the department's website.

7. Amends Chapters 175 and 185 to allow a city with a local law plan in existence on June 30, 1986, to change the city's representation on the pension board, only if the change does not reduce the membership percentage of firefighters and police officers on the board.

8. Revises the "deemed in compliance" grandfather date in Chapters 175 and 185 for plans established pursuant to special act, from May 23, 1939 to May 27, 1939.

9. Directs the Department of Management Services to develop a standardized rating system for local government defined benefit pension plans.

10. Creates a Task Force on Public Employee Disability Presumptions. The Task Force will be made up of management and union/employee representatives appointed by the Senate President and House Speaker, as well as employees of the Department of Management Services and Chief Financial Officer. The Task Force report and recommendations must be submitted to the legislature by January 1, 2012.

B. SB 2100 (Florida Retirement System)

Changes Affecting Current FRS Members

1. 3% employee contribution for all FRS members except DROP participants beginning 7/1/11 (previously there was no employee contribution). There is no employee contribution for DROP participants.

2. The 3% FRS cost of living adjustment for service earned on or after 7/1/11 will be eliminated. The prior 3% COLA would continue to apply to service earned prior to that date. Subject to the availability of funding, the 3% COLA will be reinstated effective 6/30/16.

Changes Affecting Members Who First Join FRS on or after July 1, 2011

3. Average final compensation will be the highest 8 fiscal years of compensation for members who first join FRS on or after 7/1/11 (previously the highest 5 years).

4. 8 year vesting period for members who first join FRS on or after 7/1/11 (previously 6 years).

5. The normal retirement date for regular class members, senior managers and elected officers who first join FRS on or after 7/1/11 will be age 65 with 8 years of service or 33 years of service regardless of age (previously age 62 with 6 years of service or 30 years of service regardless of age).

6. The normal retirement age for special risk members who first join FRS on or after 7/1/11 is age 60 with 8 years of service or 30 years of service regardless of age (previously age 55 with 6 years of service or 25 years of service regardless of age).

7. The 5 year DROP program is retained, but the DROP interest rate is reduced to 1.3% for members who enter the DROP on or after 7/1/11 (the previous DROP interest rate was 6.5%).

According to legislative staff, the above FRS changes are expected to produce $1.18 billion in savings to the state in fiscal year 2011-12.

FRS Contributions Effective July 1, 2011

FRS employee contributions: 3% beginning 7/1/11 for all FRS members except DROP participants (there is no employee contribution for DROP participants).

FRS employer "normal cost" contributions:

FRS Membership Class	Current Employer Contribution	Employer Contribution Beginning 7/1/11	Employer Contribution Beginning 7/1/12
Regular	9.63%	3.28%	3.28%
Special Risk	22.11%	10.21%	10.21%
Judges	20.65%	9.78%	9.78%
State Atty./Public Defender	15.20%	7.02%	7.02%
County, City, Sp. District Elected Officers	17.50%	9.27%	9.27%
Special Risk Adm. Support	12.10%	4.07%	4.07%
Senior Management	13.43%	4.81%	4.81%
DROP	11.14%	3.31%	3.31%

In addition to the above normal cost rates, FRS employers will be required to make additional contributions for unfunded actuarial liabilities, as shown below.

FRS Membership Class	Additional Employer Contribution Beginning 7/1/11	Additional Employer Contribution Beginning 7/1/12
Regular	0.49%	2.16
Special Risk	2.75%	8.21
Judges	0.77%	12.86
State Atty./Public Defender	0.88%	21.76
County, City, Sp. District Elected Officers	0.73%	22.05
Special Risk Adm. Support	0.83%	21.4
Senior Management	0.32%	10.51
DROP	0.0%	6.36

Note: the above rates do not include the FRS health insurance subsidy contribution (1.11%) or the administrative/education fee (0.03%), which are required to be paid by FRS employers.

II. Florida Cases on Reducing Public Employee Retirement Benefits

The leading Florida case on reducing public employee pension benefits is the Florida Supreme Court's opinion in *Florida Sheriffs Association v. State Dept. of Administration, Division of Retirement*, 408 So.2d 1033 (Fla. 1982). *Florida Sheriffs Association* concerns the right of the state legislature to prospectively reduce benefits under the Florida Retirement System (FRS) of employees who have not yet retired. In 1979 the legislature amended the FRS statute to reduce the benefit multiplier for special risk employees from 3% to 2% for each year of future service. There was no change in the benefits that FRS special risk members accrued up to the date of the change. Thus, a member who had 10 years of service prior to the change would have an accrued benefit of 30% (3% x 10 years), and would earn an additional 2% for each year of service after the change. The Florida Sheriffs Association and others challenged the legislature's right to adopt the benefit change, based on the "preservation of rights" provision in the FRS statute, which stated:

> The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

The Court reviewed a number of its past opinions, and summarized them as follows:

> Although …this Court has stated that the legislature can alter retirement benefits of active employees, the Court has also expressly held that, whether in a voluntary or mandatory plan, once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments. Id. at 1036.

The appellants argued in *Florida Sheriffs Association* that the 1974 enactment of the "preservation of rights" provision made Florida's retirement system an absolute and binding contractual relationship between employees and the state. The appellants contended that by enacting the preservation of rights clause, the legislature agreed that it would not abridge those rights by reducing retirement benefits at any future time. The Florida Supreme Court rejected the appellants' argument, stating:

> We stress that the [preservation of] rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state. Such a decision could lead to fiscal irresponsibility. . . 408 So. 2d at 1035.

The Florida Supreme Court's opinion in *Florida Sheriffs Association* is consistent with the "anti-cutback rule" contained in the federal Employee Retirement Income Security Act of 1974 (commonly known as "ERISA") and the Internal Revenue Code. Although ERISA generally does not apply to governmental retirement plans, it is reasonable to expect that Florida state courts would look to ERISA, and the many cases decided under that federal law, in reviewing reductions in retirement benefits affecting public employees in Florida. ERISA's anti-cutback rule is found in 29 U.S.C. § 1054(g). It provides, with certain exceptions, that an individual's accrued benefit under a qualified retirement plan cannot be decreased or eliminated through a plan amendment. A parallel rule is found in Internal Revenue Code Section 411(d)(6).

Section 411(a)(7)(A) of the Internal Revenue Code defines the term "accrued benefit." For a qualified defined benefit plan like most governmental defined contribution plans, a participant's accrued benefit is the benefit under the terms of the plan expressed in the form of an annual benefit commencing at normal retirement age. The accrued benefit is the retirement benefit earned in the past, up to the time of a plan change. Neither ERISA nor the Internal Revenue Code protects the benefits that employees may earn in the future. Thus, there is no violation of the anti-cutback or accrued benefit rules for an employer to reduce or eliminate retirement benefits based on future service, or to freeze the benefits employees have already earned under a qualified plan.

The Florida Supreme Court has held that public employee retirement benefits are terms and conditions of employment that are mandatory subjects of collective bargaining. *City of Tallahassee v. Public Employers Relations Commission*, 410 So.2d 487 (Fla. 1981). Several years after *City of Tallahassee* the Second District Court of Appeal addressed the issue of whether a public employer's unilateral decision to decrease employer contributions to a pension plan, while leaving benefits and employee contributions unchanged, violated the collective bargaining law. The court began its analysis by reiterating the Florida Supreme Court's holding in *City of Tallahassee* that changes in pension benefits are a mandatory subject of collective bargaining. The court similarly concluded that bargaining is also required for any change in employee contributions. However, the court found that where the change affects only employer contributions, and there is no impact on employee benefits or contributions, or the actuarial soundness of the plan, the public employer is not required to bargain over the change. *City of New Port Richey v. Hillsborough County Police Benevolent Association, Inc.* 505 So.2d 1096 (Fla. 2nd DCA 1987); rev. denied 518 So.2d 1275 (1987). In describing the differing roles of public employers and their employees, the court pointed out a critical distinction:

> [W]hile we recognize that public employees are entitled to the same right to bargain as private employees, we are mindful of the fact that the City, as a public employer, has a responsibility not only to its employees, but also to the taxpayers it serves. The City's duty is to provide services to those taxpayers as inexpensively as possible. Unlike a corporation that is responsible to a limited number of stockholders to produce a profit if possible, a public employer is responsible to the public and to the community as a whole to operate in the public interest as economically as possible. 518 So.2d 1275 at 1098. (Emphasis added)

III. Recent Special Magistrate Report on Defined Contribution Plan for Police Officers

In a recent report, PERC Special Magistrate William McGuiness recommended a defined contribution retirement plan for Sarasota police officers. City of Sarasota and Southwest Florida PBA, PERC Case No. SM-2011-02, Aug. 23, 2011. The report is apparently the first time a PERC special magistrate has found in favor of a public employer seeking to implement a defined contribution plan for police officers or firefighters. The Special Magistrate also recommended that the City and union negotiate the transition of all employees to social security (the City does not now participate in social security for its police officers).

Like many Florida cities, the City of Sarasota has experienced a significant decline in revenues over the past several years. At the same time the City's pension costs have increased dramatically. The City's annual required contributions to its police pension plan will be more than 50% of payroll for the 2011-12 fiscal year, or about $38,260 for each active police officer. If there are no changes to the current plan, the City's police pension costs are projected to increase from $5.5 million next year to more than $14 million in 2033.

City Pension Defined Benefit Plan Proposal

In negotiations with the PBA, the City proposed a pension benefit freeze for all police officers, followed by a reduction in benefits for future service of currently vested officers, and a defined contribution plan for non-vested officers and those hired in the future. Under the City's proposal there would be no change to the current 3% benefit multiplier or the current normal retirement date (age 50 with 10 years of service or 25 years of service regardless of age). The City's proposal contained pension benefit reductions in several areas, applied to future service under its defined benefit plan:

- Benefit freeze for all active members.
- Cost of living adjustment -- 2% per year beginning at age 67 (now 3.2% beginning the year after retirement).
- Normal form of benefit: 10 years certain and life (now an automatic 66.6% survivor benefit to the spouse of married members).
- Pensionable compensation – overtime limited to 300 hours per year (now no limit on overtime).
- Average final compensation – highest 5 years (now highest 3 years)
- DROP – 2% interest rate (now 6.5%)
- Disability – maintain current disability benefit formula (now 75% of AFC minimum benefit for line of duty and 25% of AFC minimum benefit for non-duty disability).

City Pension Defined Contribution Plan Proposal

Under the City's proposal, non-vested officers and those hired in the future would participate in a defined contribution plan. The City and employees would each make an 8% mandatory contribution to the DC plan, and employees could voluntarily contribute up to another 8% which would be matched on a dollar for dollar basis by the City (maximum combined DC contribution: 32%). Line of duty disability benefits would be maintained for DC participants in accordance with the current DB plan formula. Employees who incur a non-duty disability would receive the vested balance of their DC account.

The PBA did not make a pension counter-proposal prior to the Special Magistrate hearing. At the hearing, the PBA proposed retaining the current defined benefit plan, with several minor revisions.

The Special Magistrate determined that the City's pension proposal should be the basis for his recommendations. Specifically, the Special Magistrate made the following recommendations:

Recommendations Concerning the Defined Benefit Plan

- Vested officers will have option of continuing in DB plan with reduced benefits for future service, or participating in DC plan (City proposal).
- Cost of living adjustment -- 2% per year beginning at age 65 (City proposed 2% beginning at age 67).
- Normal form of benefit: 10 years certain and life (City proposal).

- Pensionable compensation – overtime limited to 500 hours per year (City proposed 300 hours per year overtime limit).
- DROP – 2.5% interest rate (City proposed 2.0%)
- Disability – maintain current disability benefit formula (close to City proposal). Parties should negotiate transition to social security (neither party proposed this).

Recommendations Concerning the Defined Contribution Plan

- Non-vested officers and those hired in the future will participate in DC plan (City proposal).
- Employer contributions – 8% mandatory and up to 8% match (City proposal).
- Employee contributions – 8% mandatory and up to 8% voluntary (City proposal).
- Vesting of employer contributions – 50% after 5 years; 10% per year thereafter (City proposal).
- Disability – maintain current disability benefits; phase in reductions over a period of years.

Pension Reform Update

37th Annual
Public Employment Labor Relations Forum

September 22, 2011

James W. Linn

2011 Legislation

- SB 2100 – Florida Retirement System
- SB 1128 – Local Government Retirement Plans

2

SB 2100 -- Florida Retirement System Changes

- 3% employee contribution eff. 7/1/11 (was zero)
- No COLA for service after 7/1/11 (was 3%)
- Delayed normal retirement age*
  - Regular: age 65 or 33 years* (was age 62 or 30 years)
  - Special Risk: age 60 or 30 years* (was age 55 or 25 yrs)
- Average final compensation: highest 8 years* (was high 5)
- 8 year vesting period* (was 6 years)
- DROP interest = 1.3% for members who enter DROP after 7/1/11 (was 6.5%)

*changes apply to members who first join FRS on or after 7/1/11

3

New Florida Retirement System Employer Contribution Rates for 2011 - 2012

FRS Membership Class	Current Employer Contribution	Employer Contribution Beginning 7/1/11	Employer Contribution Beginning 7/1/12
Regular	10.77%	4.91%	6.58%
Special Risk	23.25%	14.1%	19.56%
Senior Management	14.57%	6.27%	16.46%

Above rates include the additional 1.14% health insurance subsidy contribution and administrative/education fee

4

SB 1128 -- Local Government Retirement Plans

- For service on and after 7/1/11 -- prohibits inclusion of overtime in excess of 300 hours per year and payments for unused sick or annual leave in compensation for pension purposes. OT up to 300 hrs/yr subject to collective bargaining.
- For plans that are subject to collective bargaining, changes are effective for the first agreement negotiated after 7/1/11.
- Applies to all local government pension plans, including police and firefighter plans under Chapters 175 and 185.

5

SB 1128 -- Local Government Retirement Plans

- Prohibits the use of an actuarial or cash surplus in a government pension plan for any expenses outside the plan.
- Prohibits the reduction of plan sponsor contributions to a local government pension plan below the normal cost.
- Eliminates the requirement in Chapters 175 and 185 that pension benefits be increased whenever member contributions are increased.

6

SB 1128 -- Local Government Retirement Plans

- Requires that all actuarial reports disclose the present value of the plan's accrued vested, nonvested and total benefits, as adopted by the Financial Accounting Standards Board, using the Florida Retirement System's assumed rate of return (currently 7.75%), "to promote the comparability of actuarial data between local plans."

7

SB 1128 -- Local Government Retirement Plans

- Department of Management Services to provide a fact sheet on each participating local government defined benefit pension plan summarizing the plan's actuarial status.
- Fact sheet to contain a summary of the plan's most recent actuarial data, minimum funding requirements as a percentage of pay, and a 5 year history of funded ratios.
- Fact sheets to be posted on the Department's website.

8

SB 1128 -- Local Government Retirement Plans

- DMS to develop a standardized rating system for local government defined benefit pension plans.
- Task Force on Public Employee Disability Presumptions:
  - Made up of management and union/employee representatives appointed by the Senate President and House Speaker, as well as employees of the Department of Management Services and Chief Financial Officer.
  - Task Force report and recommendations must be submitted to the legislature by January 1, 2012.

9

Chapters 175 & 185: "Extra Benefits" Still in Play

10

Ch. 175/185 Premium Taxes

- Chapters 175 and 185, F.S. provide for a rebate of the state excise tax on property and casualty insurance premiums to cities and districts that have police and fire pension plans.
- The premium tax monies must be used exclusively for firefighter and police pensions, and the local pension plan must comply with the requirements of Chapters 175 and 185.

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11

Ch. 175/185 "Extra Benefits"

- All premium taxes in excess of the "frozen" amount must be placed in the "excess state monies reserve" and used only for "extra benefits"
- "Frozen amount" = premium taxes received in 1998 plus premium taxes used for benefit improvements since 1999 (aka "adjusted base amount")
- If excess premium taxes are used to provide formula benefits, the cost of the benefit shifts to the local government over time.

12

Ch. 175/185 Restrictions

- Plan must meet Ch. 175/185 minimum benefits
- If benefits are reduced below 1999 level, plan will no longer be eligible for premium taxes
- Premium tax revenue above the "frozen amount" must be used for "extra benefits"
- Increase in member contributions requires union agreement
- Pension board composition and plan operation set by state statute, and subject to state regulation

13

Ch. 175/185: Possible Options

- **"Stop & Restart"** – increase frozen amount of premium tax revenue that can be used to reduce government contribution.
- **"Share Plan"** use excess premium tax revenues for defined contribution accounts instead of formula benefits.
- **"Hybrid DB/Share Plan"** – reduce benefits in DB plan to 1999 level. All excess premium tax revenues go to DC "share plan."
- **Opt out of Ch. 175/185 --** Local governments can stop participating in Ch. 175/185 and stop receiving premium tax revenues. But local taxpayers would still pay the tax.

14

Legal Guidelines

- Changes in retirement benefits and employee contributions are mandatory subjects of collective bargaining.
- Accrued pension benefits (benefits earned in the past) cannot be reduced or taken away.
- Future benefits can be reduced for current employees who have not reached retirement status.
- Local government is ultimately responsible for unfunded pension liabilities.

15

Pension Reform Options

- Join FRS
- Reduce Benefits for New Hires (2 Tier)
- Reduce Benefits for All Employees
- Set up Defined Contribution (DC) plan
- Set up Hybrid DB + DC plan

16

Pension Reform: What Florida Cities Have Done

17

Pension Reform: What Florida Cities Have Done

Port Orange (2010) – Fire [Not Yet Implemented]*

- Reduced wages by 6% (imposed in lieu of increase in employee pension contribution)
- Reduced pension benefits for current and future employees
  - Push back normal retirement date
  - Reduce pensionable earnings (exclude OT)
  - Extend final averaging period from 3 to 5 years
  - Reduce maximum benefit from 90% to 80%
  - Reduce COLA
  - Reduce DROP earnings

* litigation pending

18

Pension Reform:
What Florida Cities Have Done

Miami Beach (2010) – All Employees*

- Wage freeze
- Pension changes for current employees:
  - Increase employee pension contribution by 2%
  - 5 year final averaging period (phased in)
- Reduced pension benefits for new hires (2 Tier)

* litigation pending – police/fire

19

Pension Reform:
What Florida Cities Have Done

Delray Beach (2010) – General Employees

- Final average comp period extended from 2 to 5 years
- Normal retirement date delayed to age 62 (was 60)
- Employee contributions increased from 2.5% to 3.05%
- Standard benefit changed to single life annuity (was 60% joint & survivor annuity)
- Line of duty disability benefit reduced from 75% to 60%

20

Pension Reform:
What Florida Cities Have Done

Miami (2010) – Pension Changes (All Employees)*

[Financial urgency declared – City Commission adopted wage and benefit reductions 8/31/10]:

- Later normal retirement age (to "Rule of 70" with min. age 50 from Rule of 64/68)
- 5 year average final compensation (was highest single year)
- Reduce benefit formula for future service (to 3% from 3.5% after 15 yrs)
- Normal form of benefit: life and 10 years certain (PF); life annuity (General)
- $100,000 cap on benefits

* litigation pending

21

Pension Reform: What Florida Cities Have Done

Town of Palm Beach (2011) – Fire [Town Council imposed wage and benefit reductions 4/21/11]:

- Pension benefits frozen
- Pension changes for current and future employees:
  - Reduced multiplier for future service (to 1.25%)
  - Defined contribution plan on top of DB plan
  - Normal retirement under DB plan delayed to age 65 (but DC plan distributions may begin earlier)
  - Joint & Survivor Annuity abolished; replaced with life annuity (member may purchase survivor benefit)
  - No COLA
  - Town will withdraw from participation in Ch. 175

22

Pension Reform: What Florida Cities Have Done

Palm Bay (2011) – Fire [Settlement Approved 5/19/11]

- 3 year wage freeze
- Reduction in pension benefits for current employees:
  - Reduction in supplemental benefit (from $25 to $12 per month per year of service)
- Reduction in pension benefits for future employees:
  - Reduced multiplier - 3.2% after 20 yrs (was 5% after 20 yrs)
  - 2% COLA deferred 6 yrs (was 3%)
  - Line of duty disability benefit - 66% (was 75%)
- Stop/Restart – one-time transfer from excess premium tax reserve to reduce city's contribution; increase each year in "frozen amount" used to offset City annual contribution

23

Pension Reform: What Florida Cities Have Done

Coral Gables (2011) – General [Settlement approved by union members and City Commission in July 2011]

- Pension benefits frozen; reduced benefits for future service
- Pension changes for current and future employees:
  - Reduced multiplier for future service (from 3.0 % to 2.25%)
  - Increase employee pension contribution by 5% (to 10%)
  - 5 year final averaging period (phased in from 3 year average)
  - Delay retirement age to age 65 or Rule of 85 (from age 52 or Rule of 70)
  - Reduced disability benefits
- Future pension cost increases shared by City and employees
- City may establish DC plan in the future for new hires.

24

Pension Reform: Work in Progress

Sarasota (2011) – Police [City proposal at impasse; Special Magistrate report issued 8/23/11 largely supporting City position]

- Pension benefits to be frozen for all employees
- Pension changes for vested current employees:
  - 5 year final averaging period (now 3 years)
  - Reduce COLA from 3.2% to 2.0% beginning at age 67
  - Overtime limited to 300 hours per year
  - Standard form of benefit: 10 years certain & life (now 60% automatic spouse survivor benefit for life of spouse)
  - Reduce DROP interest to 2.0% (now 6.5%)
- DC plan for non-vested current and future employees (maximum combined City + employee contribution = 32%)
- City will withdraw from participation in Ch. 185

25

Pension Reform: Work in Progress

Hollywood (2011) – All Employees [City declared financial urgency; pension changes to be submitted to referendum on 9/13/11]

- Pension benefits to be frozen for all employees
- Pension changes proposed for current employees:
  - Delayed normal retirement date (Police/Fire - age 55 w/10 yrs or age 52 w/25 yrs; General – age 65 or age 62 w/25yrs or age 60 w/30yrs)
  - Reduced benefit multiplier (2.5% - police/fire; 2.0% - general)
  - 5 year final averaging period (now 3 years)
  - No COLA for future service
  - No DROP
- City will withdraw from participation in Ch. 175 & 185

26

Looking to the Future

27

The Future of Public Pensions in Florida – DB Plans

Recent FRS changes provide a clue to the future of DB plans:

- Increased employee contributions – cost sharing is possible
- Elimination of COLA
- Later normal retirement age
  - General: age 65 or 33 years of service
  - Police/Fire: age 60 or 30 years of service
- 8 year average final compensation
- 8 year vesting
- Lower DROP interest rates

28

The Future of Public Pensions in Florida – DC Plans

- Defined contribution plans are on the rise – for general employees
- DC plans can cost more in initial years than reducing DB plan benefits
- Local governments must weigh:
  - Cost savings (short and long-term)
  - Reduction of risk
  - Impact on employees

29

The Future of Public Pensions in Florida – Hybrid Plans

- Hybrid DB / DC plans combine:
  - Base DB plan – guaranteed benefit
  - DC plan (with matching employer & employee contributions) on top of DB plan
- Hybrid plans are attractive because they provide:
  - Shared risk
  - Shared cost
  - Some level of guaranteed benefit

30

Questions?

31

FEDERAL ELEVENTH CIRCUIT AND FLORIDA'S PUBLIC SECTOR LABOR LAW UPDATE

By

Todd D. Engelhardt, Tallahassee
F. Damon Kitchen, Jacksonville

ELEVENTH CIRCUIT EMPLOYMENT LAW UPDATE*

By Todd D. Engelhardt

ADA/REHABILITATION ACT

The U.S. Equal Employment Opportunity Commission ("EEOC") approved a final set of regulations for the Americans with Disabilities Act Amendments Act ("ADAAA") at the end of December 2010. The EEOC's five commissioners voted privately and unanimously to approve the long-awaited regulations. However, it may be months before the rules are made public. Congress passed the ADAAA in September 2008 to make legislative fixes in light of several federal court rulings that limited worker protections offered under the original Americans with Disabilities Act ("ADA"), which was enacted in 1990. The ADAAA, which took effect on January 1, 2009, required the EEOC to develop and issue regulations within one year of enactment. The proposed rules for governing enforcement of the ADAAA appeared in the *Federal Register* on September. 23, 2009, and the comment period for the proposal ended sixty days later. The ADAAA final regulations were released to the Office of Management and Budget ("OMB") and other federal agencies for review and comment.

On March 24, 2011, the EEOC issued a press release announcing that the final regulations implementing the ADA Amendments Act (ADAAA) are publicly available online. The purpose of the regulations is to "simplify the determination of who has a 'disability' and make it easier for people to establish that they are protected by the Americans with Disabilities Act (ADA)." Importantly, the final regulations "clarify that the term 'major life activities' includes 'major bodily functions,' such as functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions." The final regulations also "make it easier for individuals to establish coverage under the 'regarded as' part of the definition of 'disability.'"

Tarmas v. Secretary of Navy, 2011 WL 2636866 (11th Cir. July 6, 2011)

Plaintiff was a civilian employee with the Navy for over 25 years. He was diagnosed with delayed sleep phase syndrome and a mood disorder and had severe insomnia, which began to interfere with his work schedule. His supervisors arranged a flexible work schedule for Plaintiff but he rejected the proposal and decided to use his sick or annual leave to account for hours that he missed on account of tardiness. Plaintiff continued to arrive late to work and received a "letter of caution," citing possible abuse of the leave system, unauthorized absences, and failure to adhere to the leave procedure. Nevertheless, he received an acceptable performance rating and kept his job. However, Plaintiff still filed a complaint with the EEOC alleging disability discrimination and received a right-to-sue letter. The district court found that Plaintiff could not show a prima facie case of discrimination because, even assuming he was disabled and otherwise qualified, he had suffered no adverse action.

The Eleventh Circuit affirmed the judgment of the district court due to the non-disciplinary letter of caution that was issued. The court ruled that even assuming Plaintiff had a disability, he is required to show an adverse action based on this disability before he can seek relief. The court found that Plaintiff did no experience any changes in the terms or conditions of his employment as a result of the letter of caution, and, as such, this letter was not an adverse employment action and thus summary judgment as to this claim was properly granted in favor of Defendant.

ADEA

Simmons v. Sykes Enterprises, Inc., 2011 WL 2151105 (10th Cir. June 2, 2011)

The Tenth Circuit Court of Appeals addressed Plaintiff's claim that Sykes terminated her in violation of the Age Discrimination in Employment Act ("ADEA"). Sykes terminated Plaintiff, a 62 year old, ten-year employee, following an investigation indicating Plaintiff, a human resources assistant, had disclosed the protected health information of another employee. Plaintiff claimed the termination was based in part on the discriminatory animus based on her age her immediate supervisors allegedly demonstrated in statements to her. Both supervisors participated in the investigation, but did not make the decision to termination Plaintiff. Plaintiff asserted the "cat's paw" theory of liability, recently affirmed by the U.S. Supreme Court in Staub v. Proctor Hospital, 131 S. Ct. 1186 (Mar. 1, 2011), applied to her termination. The Court noted that in Title VII or USERRA actions for discrimination, the acts of discrimination need only be the motivating cause of the employment action. By contrast, under the ADEA the acts of age discrimination must be the "but-for" cause of the employment action. Applying Staub directly to an age-discrimination case would result in application of a lesser standard of proof for subordinate bias liability (motivating factor v. but-for cause). Based on this higher standard for the ADEA, the Court affirmed the grant of summary judgment in favor of the employer.

Ritchie v. Industrial Steel, Inc., 2011 WL 1899570 (11th Cir. May 19, 2011)

Plaintiff appealed the district court's grant of summary judgment in favor of Defendant in an action brought pursuant to the ADEA. In his complaint, Plaintiff claimed that he was discriminated against and harassed because of his age and that he was ultimately fired and replaced by a younger worker. Defendant claimed Plaintiff was fired due to shortcoming related to his job performance.

The Eleventh Circuit affirmed the district court's holding that discriminatory remarks do not constitute direct evidence of harassment if they were not related to the challenged employment action. While the two decision makers in this case did often refer to Plaintiff as "old man," Plaintiff could not demonstrate that those remarks were related to the decision to end his employment. Furthermore, there was no evidence that the decision makers had a preference for younger workers or expressed that Plaintiff could not perform the job because of his age. For these reasons, the Eleventh Circuit affirmed the grant of summary judgment in favor of the Defendant.

CAT'S PAW THEORY

Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011)

The United States Supreme Court issued a decision on March 1, 2011, applying the "Cat's Paw" theory of liability to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which prohibits discrimination towards employees based on military service and obligations. The Plaintiff in Staub claimed his supervisors were hostile to his military service obligations and created false reports based on that hostility that led to his termination by the human resources department of the Defendant. A jury ruled in favor of the Plaintiff, but the Seventh Circuit Court of Appeals reversed the award, stating the Defendant conducted an independent investigation into the Plaintiff's personnel file before the termination. The Supreme Court reversed the Seventh Circuit and allowed for liability against an employer where the actions of the Plaintiff's supervisors resulted in the "independent" decision-maker terminating Plaintiff, particularly where the decision-maker relied on information from such supervisors. The Court further stated it would not create a bright line rule against employer liability even if the independent decision-maker conducted his or her own investigation; however, the depth of the investigation could affect whether the alleged discriminatory animus was a motivating factor. This decision is based on the Court stating that Federal torts adopt general tort law related to proximate cause and it is likely this decision will have persuasive authority beyond USERRA, and to all similar discrimination actions.

EQUAL PAY ACT

Nelson v. Chattahoochee Valley Hosp. Soc., 731 F.Supp. 2d 1217 (M.D. Ala. 2010)

Plaintiff, a registered nurse, filed suit against her former employer, Chattahoochee Valley Hospital Society, alleging, among other things, sex-based wage discrimination under the Equal Pay Act of 1963 ("EPA"). Plaintiff claimed that Defendant violated the EPA by paying the male nurse manager 30% more than Defendant paid Plaintiff while she was interim nurse manager. While Defendant did not dispute that Plaintiff established a prima-facie case under the EPA, Defendant relied on the EPA's catch-all, "any other factor other than sex" affirmative defense. Defendant argued that Plaintiff's services as interim nurse manager were temporary and that the EPA does not require employers to pay permanent and temporary employees the same amount, even if they are doing substantially the same work.

The EEOC regulations provide that an employer does not violate the EPA by temporarily assigning an employee to a higher-paying position without raising the employer's pay. While the Court stated that the EEOC's views do not control the court but are only to be viewed as guidance, the Court agreed with the EEOC regulations and held that the temporary nature of a position is a factor other than sex "sufficient to justify an otherwise illegal pay disparity, provided that the position was temporary in fact and that the employee in that position knew it was temporary."
However, in this case, the Defendant did not satisfy its burden of proof by a preponderance of the evidence in showing that the Plaintiff's position was temporary in fact or that she knew it was temporary. As such, the court denied Defendant's motion for summary judgment on Plaintiff's EPA claim.

ERISA

Blankenship v. Metropolitan Life Insurance Company, 644 F.3d 1350 (11th Cir. 2011)

Plaintiff challenged the denial by Defendant of his claims for long-term disability under ERISA. The district court concluded that Defendant's decision to deny benefits was arbitrary and capricious because of Defendant's "structural conflict of interest as both administrator and payor of the pertinent benefits." A pertinent conflict of interest exists when the ERISA plan administrator makes eligibility decisions and also pays the awarded benefits out of its own fund. However, even where a conflict of interest exists, courts must still give deference to the plan administrator's "discretionary decision-making" as a whole.

In this case, Defendant relied on the medical information submitted by Plaintiff's doctors and also relied on the advice of several independent medical professionals in determining that Plaintiff had failed to make a sufficient showing of disability under the relevant plan. As such, the Eleventh Circuit concluded that the plan administrator had a reasonable basis for the denial of ERISA benefits and that its conflict of interest did not automatically make that decision arbitrary and capricious. As such, the decision of the lower court was reversed in favor of Defendant.

FMLA

Spakes v. Broward County Sheriff's Office, 631 F.3d 1307 (11th Cir. 2011)

The Broward County Sheriff's Office appealed a judgment based on an interference and retaliation claim brought under the FMLA in Spakes. The Eleventh Circuit Court of Appeals stated plainly that the causal nexus element required for FMLA retaliation claims does not apply to an FMLA interference claim. Thus, an employee is not required to show a connection between the employer's actions and the FLMA protected activity for interference claims. Still, employers are able to defeat FMLA interference claims by establishing lawful reasons for the adverse employment action.

Andrews v. CSX Transp., Inc., 737 F.Supp. 2d 1342 (M.D. Fla. 2010)

Plaintiff alleged that Defendant violated his rights under the FMLA when it terminated him for "excessive absenteeism." Plaintiff alleged that six of the nine absences were due to a serious medical condition and that Defendant never informed Plaintiff that these absences could be certified under the FMLA until after he was charged with excessive absenteeism. Under the FMLA, both the employer and the employee have specific notice requirements. The employee must give the employer notice of need for FMLA leave, and the employer must give the employee notice of the procedures to apply for FMLA, which do include providing a medical certification form.

However, a period of absence alone is not adequate notice to an employer that the employee needs FMLA leave. Furthermore, employees cannot merely demand FMLA leave but must give employers sufficient reasons to believe they are entitled to FMLA leave. In this case, the court held that Defendant had no notice of Plaintiff's alleged need for FMLA leave, and thus no resulting duty. The court held that chronic absenteeism is not enough to put an employer on notice that an employee may qualify for FMLA leave. Furthermore, the court found that none of Plaintiff's medical issues were serious enough to qualify him for FMLA leave, and, as such, Plaintiff was not entitled to relief.

FLSA

The Patient Protection and Affordable Care Act (P.L. 111-148) amended Section 7 of the FLSA to require employers to provide a nursing mother reasonable break time to breastfeed. Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary. A bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011)

On March 22, 2011, the United States Supreme Court issued a significant opinion that will impact employers. The Supreme Court held that the FLSA's language "filed any complaint" includes internal oral complaints. Plaintiff had claimed his termination was in retaliation for his repeated complaints about the location of the time clock, which allegedly prevented employees from being paid for the time they spent putting on and taking off work-related protective clothing. The employer received summary judgment because Plaintiff had only made oral complaints, and the District Court and 7th Circuit agreed with employer. The Supreme Court reversed, finding that oral complaints provide an employer with fair notice of an employee's claims. The Supreme Court also noted that its ruling comports with the interpretations of the language by the Secretary of Labor and the EEOC. Two justices dissented, believing the phrase "filed any complaint" was limited to the filing of complaints with a court or agency, and not to internal complaints.

Dionne v. Floormasters Enterprises, Inc., Case No. 09-15405 (11th Cir. July 28, 2011)

An employee filed a complaint pursuant to the FLSA seeking overtime, liquidated damages, and attorney's fees and costs. The employer filed a motion to dismiss along with a notice of tender of full payment of $637.98. The employee responded with an affidavit claiming entitlement to $3,000. The employer then filed a second notice of tender of full payment and motion to dismiss, and attached a copy of the check tendered to Plaintiff. In both motions the employer denied any liability. The trial court granted the motion to dismiss. Employee sought attorney's fees, but his motion was denied because no judicial determination had been made that employee was the prevailing party. The 11th Circuit affirmed, noting that the "catalyst" test relied upon by the employee was rejected by the Supreme Court in 2001. Applying rules of statutory interpretation to the FLSA, the Court held that the FLSA requires that the plaintiff receive a judgment in his favor to be entitled to attorney's fees and costs.

Abel v. Southern Shuttle Services, Inc., 631 F.3d 1210 (11th Cir. 2010)

A shuttle driver for an airport shuttle service sued his employer claiming that he was entitled to unpaid overtime compensation under the FLSA. The issue in the case was whether the shuttle driver fell within the FLSA's Motor Carrier Act (MCA) exemption. The Court ruled that the airport shuttle service was subject to the Secretary of Transportation's jurisdiction under the MCA and noted that "the purely intrastate transport of passengers to and from an

airport may, under certain circumstances, constitute interstate commerce and thus bring the transportation company within the jurisdiction of the Secretary of Transportation." Additionally, the Court found that the shuttle driver's business-related activities directly affected the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the MCA. Summary judgment granted in favor of the shuttle driver employee was affirmed.

Diaz v. Jaguar Rest. Group, LLC, 627 F.3d 1212 (11th Cir. 2010)

Plaintiff brought a claim pursuant to the FLSA seeking payment of overtime wages. Defendant raised several affirmative defenses but did not include a defense based on the exemption for administrative employees. Additionally, Defendant made no effort prior to trial to amend its Answer and only sought to include the issue at trial through a single sentence in the pretrial pleadings and jury instructions. Plaintiff objected to both. At trial, Defendant moved to amend its Answer to add the defense after the close of evidence. The District Court granted Defendant's Motion in order to conform the pleadings to the issues presented at trial, and the jury concluded that Plaintiff was an administrative employee.
On appeal, the Eleventh Circuit ruled Plaintiff's evidence was insufficient to demonstrate implied consent for the amendment and that Defendant's failure to move to amend at any point before the trial resulted in a waiver of the defense.

Moreno v. Regions Bank, 729 F.Supp. 2d1346 (M.D. Fla. 2010)

The Middle District of Florida ruled that a pervasive or all-inclusive release could not be approved for resolution of an FLSA claim. The release at issue included language that generally accompanied civil liability actions, including the release of all claims "known or unknown" at the time of settlement. It also encompassed several specifically identified claims based on Federal statutes. Although the Court recognized this language was generally accepted as common litigation practice for some causes of action, it rejected such a settlement as inappropriate for an FLSA lawsuit based on the specific issues raised, particularly where the issues addressed in FLSA claims do not often include an examination of any allegations outside of such claims or the related pleadings. Accordingly, the Court rejected the settlement and held that the language was unacceptable.

Navarro v. Santos Furniture Custom Design, Inc., 372 Fed.Appx. 24 (11th Cir. 2010)

An employee brought a claim pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, against his employer seeking damages for unpaid overtime wages spanning his fourteen-year employment with his employer. The issue on appeal was whether or not the employer had adequately raised the statute of limitations as a defense. On appeal, the employee urged that the District Court's application of § 255(a)'s limitation was improper because the employer had waived the limitation by failing to properly plead it in their Answer. The employer, on the other hand, urged that § 255(a) was not a traditional statute of limitations that must be raised as an affirmative defense.

Section 255 (a) of the FLSA provides, in pertinent part: "Any action … to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act … may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of

action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a).

The Court held that although Rule 8(c) requires that a statute of limitations defense be raised as an affirmative defense, this Court has noted that "the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it," and, as a result, "if a plaintiff receives notice of an affirmative defense by some means other than the pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice." Therefore, because the employee in this case was fully aware that the employer intended to rely on the statute of limitations defense, and because the employee did not assert any prejudice from the lateness of the pleading, the employer's failure to comply with Rule 8(c) did not result in a waiver.

GENDER

House Bill 361, titled the "Competitive Workforce Act," was filed on January 26, 2011, to prevent Florida employers from discriminating against workers based on sexual orientation. It would prohibit all forms of discrimination in the workplace, including sexual orientation.

Aponte-Rivera v. DHL Solutions, 2011 WL 2027977(1st Cir. 2011)

Plaintiff sued her employer for violation of Title VII alleging gender-based discrimination and hostile work environment. The employer asserted it had a procedure for reporting harassment and discrimination and that it took action once Plaintiff reported the alleged discrimination. Plaintiff asserted the employer did not take sufficient action to prevent continuing harassment. The trial court allowed this issue to go to the jury and the jury found in Plaintiff's favor.

The First Circuit Court of Appeals affirmed the jury verdict, ruling that a reasonable jury could have determined that Plaintiff's supervisors subjected her to discriminatory intimidation, ridicule, and insult sufficiently pervasive to alter the condition of her employment and create a hostile work environment. Further, focusing on the continued actions after Plaintiff availed herself of the employer's corrective opportunities, the Court ruled a jury could have found Plaintiff's attempt to report the discrimination did not result in a lasting improvement in her work situation.

"HOT TOPICS"

Social Media

The National Labor Relations Board ("NLRB") has recently sent shockwaves through the employment law community by issuing a complaint against an employer for terminating an employee who posted negative remarks about her supervisor on her personal Facebook page. The complaint, which was issued by the NLRB's Hartford office, also claims that the employer illegally denied union representation to the employee during an investigatory interview, and maintained an overly broad blogging and internet posting policy.

The employer, an ambulance service, asked the employee in question to put together an investigative report regarding a customer complaint made about the employee. The employee responded by asking for union representation during the meeting, which was denied. Later in the day, the employee posted negative comments about her supervisor on

her personal Facebook page, to which her co-workers responded with supportive comments. The employee was suspended, and, thereafter, terminated, for violating the employer's internet usage policy.

The National Labor Relations Act ("NLRA"), the Federal Law that allows unions to organize in the private sector, generally prohibits employers from implementing broad policies discouraging employees from discussing or criticizing their work environment. The issue presented in this case - whether disparaging comments posted by employees on social networking cites fall within this class of protected speech - will be decided by an Administrative Law Judge. A hearing has been scheduled for January 25, 2011.

The National Labor Relations Board ("NLRB") recently issued announcements regarding claims made by employees against their former employers due to social media websites. In a "Twitter" case, a reporter for The Arizona Daily Star opened a Twitter account at the request of the newspaper and began making posts critical of the editorial staff and which made light of homicide. The newspaper did not have a written social media policy and subsequently terminated the reporter for his comments. The NLRB determined that the claim was not actionable, because the posts by the reporter did not involve protected or concerted activity in that the "tweets" did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment.

By contrast, the NLRB issued a complaint against a non-profit employer that provides social services to low-income clients, alleging that five employees were wrongfully terminated for criticizing working conditions on "Facebook." In their complaint filed against Hispanics United of Buffalo, the NLRB found that comments posted by employees constituted protected or concerted activity because they involved a conversation among coworkers about their terms and conditions of employment (including job performance and staffing levels). The comments were made in response to another employee who had posted a coworker's allegation that employees did not do enough to help the organization's clients.

Wal-Mart Stores, Inc. v. Dukes - Class Certification/Sexual Discrimination

The United States Supreme Court overturned (5-4 decision) the Ninth Circuit Court of Appeals' decision in Dukes v. Wal-Mart Stores, Inc. (Case No. 10-277) which granted class certification to current and former female Wal-Mart employees. The proposed class consisted of all current and former female Wal-Mart employees since 1998 impacted by Wal-Mart's alleged company-wide practices that discriminated against female workers (approximately 1.5 million). The Court's ruling means the Plaintiffs cannot proceed as a certified class; rather, each employee must individually proceed against Wal-Mart. In denying class certification, the Court held that there was no commonality of questions of law or fact, because "proof of commonality necessarily overlaps with [the female employees] merits contention that Wal-Mart engages in a pattern or practice of discrimination." Further, the Court determined the statistical evidence Plaintiffs offered in support of Wal-Mart's alleged pattern or practice was insufficient to link the numerous individual decisions on which the statistical evidence was based as to why female employees may not have advanced. Essentially, given the multiple bases for the decisions of individual managers at Wal-Mart stores across the United States, the female employees did not have enough in common for class certification purposes.

As background, the case involves female employees alleging that Wal-Mart had a policy of paying women less than men for the same jobs and giving them fewer promotions. The

female employees further seek back pay from Wal-Mart, which the Court explicitly ruled could not be included in such a class action, based on the number of factors that would have to be determined for each alleged Plaintiff. Importantly, the United States Supreme Court did not rule on the merits of Plaintiffs' discrimination claims.

Termination Due to Bankruptcy

On May 17, 2011, the Eleventh Circuit issued an opinion in Myers v. TooJay's Management Corporation (Case No. 10-10774), holding that although Section 525(b) of the Bankruptcy Code provides that a private employer may not "terminate the employment of, or discriminate with respect to employment against" an individual on the basis that the individual has filed for bankruptcy, this protection does not extend as far as section 525(a) of the Bankruptcy Code for public employers. In Myers, TooJay's denied Myers employment after a pre-employment investigation revealed Myers' prior bankruptcy. Myers alleged that Section 525(b) prevented TooJay's from discriminating against him based on his bankruptcy.

In analyzing Myers' claims, the Court noted that Section 525(a) specifically provides that a public employer may not "deny employment to" an applicant because the applicant has filed for bankruptcy. However, Section 525(b), governing private employers, lacks this particular language and, as a result, the prohibition against denying applicants employment based on the filing of a bankruptcy does not extend to the private sector. The Court noted that the 3rd and 5th Circuits have arrived at the same conclusion.

LABOR

Bledsoe v. Emory Worldwide Airlines, 635 F.3d 836 (6th Cir. 2011)

The Sixth Circuit Court of Appeals affirmed a determination in favor of the employer based on a lawsuit the Plaintiff filed pursuant to the Worker Adjustment and Retraining Notification ("WARN") Act, which requires certain employers to notify employees in advance of large-scale reductions in force. The Plaintiff appealed the decision, asserting in part that the WARN Act provided for a jury trial. The Sixth Circuit ruled the WARN Act did not provide for a jury trial because any amounts to be paid to an employee were in the form of restitution, the statute placed the authority to determine liability entirely in the trial court's discretion and the Act did not provide for separate damages and equitable remedies, unlike actions under the Family Medical Leave Act or the Fair Labor Standards Act.

NATIONAL ORIGIN

Yili Tseng v. Florida A & M University, 380 Fed.Appx. 908 (11th Cir. 2010)

Plaintiff, a visiting profession from Taiwan, appealed the District Court's order of summary judgment in favor of Florida A & M University and its Board of Trustees ("FAMU"). In the District Court, Plaintiff filed an employment discrimination action and alleged, among things, that FAMU discriminated against him on the basis of national origin by promoting another visiting profession (from China) to a tenure-track position. FAMU argued that it did not select Plaintiff because the other professor was simply more qualified, had better communication skills, and collaborated more with other faculty members.

The Court affirmed the District Court's ruling. Specifically, the Court reasoned that Plaintiff failed to present any direct or circumstantial evidence to show that FAMU's proffered reasons for its decision were a pretext for discrimination. With respect to direct evidence, the Court explained that just because Plaintiff "was passed over in favor of another foreign national, who also was not a native speaker of English, hardly supports a conclusion that FAMU acted out of animus toward foreigners or foreign accents." Plaintiff also failed to identify any remarks or actions that clearly indicated an intent to discriminate. Regarding circumstantial evidence, the Court stated, "FAMU's choice between two candidates of roughly similar qualifications was not unreasonable. Even if [Plaintiff] were slightly more qualified in some respects, there was not such a disparity between them that 'no reasonable person' could have selected [the other professor] over him…[Plaintiff's] evidence does not show that FAMU's proffered reasons were false. Even if it did, [Plaintiff] offers nothing to suggest that a discriminatory animus against Taiwanese or preference for mainland Chinese was the real motivation for FAMU's decision…FAMU hired and rehired [Plaintiff] for the visiting position four years in a row, all the while being well aware of his nationality.

Alvarez v. Royal Atlantic Developers, Inc., 610 F.3d 1253 (11th Cir. 2010)

Plaintiff was hired for a controller position with the Defendant corporation by Heidi Verdezoto. Four months after she was hired, she was fired for the stated reasons of "never competently assum[ing[the responsibilities" of the job and for excessively delegating work to her staff. Plaintiff, who was of Cuban origin, brought suit alleging, among other things, national-origin discrimination under Title VII and the Florida Civil Rights Act. The district court concluded that Plaintiff had failed to make out a prima facie case under the McDonnell Douglas framework for circumstantial evidence as she did not show that she was replaced by a non-Cuban or that non-Cuban employees were treated more favorable than she had been. The district court awarded summary judgment in favor of the defendant, and the Plaintiff appealed.

The Eleventh Circuit affirmed the grant of summary judgment in favor of Defendant but for different reasons than those of the district court. The Eleventh Circuit assumed that Plaintiff had established a prima facie case of discrimination but stated that it did not matter if she had made out a prima facie case if she could not "create a genuine issue of material fact as to whether [Defendant's] proffered reasons for firing her are pretext masking discrimination." The court iterated that the inquiry into pretext centers on the employer's beliefs, not on the employee's beliefs, and that even if the employer was dissatisfied with Plaintiff for mistaken or unfair reasons, it does not matter if those reasons were not mere pretext to cover discrimination against Plaintiff because of her Cuban origin. The court found that the record established beyond dispute that Plaintiff, like her non-Cuban predecessors, simply failed to satisfy the high standards of Heidi Verdezoto. Furthermore, due to Verdezoto's superior attitude towards all of her employees, the court stated that this was as "classic example of the Vince Lombardi rule: someone who treats everyone badly is not guilty of discriminating against anyone." As such, the court held that the summary judgment in favor of Defendant was proper on the discrimination claim.

Title II of GINA

On November 9, 2010, the EEOC published its final regulations implementing Title II of GINA in the *Federal Register*. The final regulations are important and should be considered by all employers, because Title II governs employers and "prohibits the use of genetic

information in employment, restricts employers and other entities covered by Title II from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information."

OSHA

Ellison v. U.S. Dept. of Labor, Admin. Review Bd., Case 09-13054 (11th Cir. 2010)

Plaintiff alleged that he was terminated in retaliation for engaging in protected activities under the whistleblower provisions of the Clean Air Act, Toxic Substances Control Act, Safe Drinking Water Act, Federal Water Pollution Control Act, Solid Waste Disposal Act, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). OSHA determined that the complaint was without merit and, thereafter, Plaintiff appealed to the Department of Labor Administrative Review Board ("ARB"). The ARB dismissed the appeal as untimely, because Plaintiff failed to file his initial brief in accordance with the scheduling order and his counsel's explanation for the delay was not credible.

On appeal, the Court upheld the decision of the ARB. In its reasoning, the Court explained, "[we acknowledge that the dismissal of an appeal is a harsh sanction for a procedural error. But because the scheduling order was unambiguous, because [Plaintiff's] counsel was an experienced litigator familiar with ARB procedures, and because [Plaintiff] was offered an opportunity to justify the filing delay, we cannot conclude that this sanction amounts to an abuse of discretion in this case."

RACE

Reeves v. DSI Sec. Services, Inc., 395 Fed.Appx. 544 (11th Cir. 2010)

Plaintiff brought racial discrimination claims under Title VII and § 1981, alleging a hostile work environment. The court affirmed the district court's grant of summary judgment in favor of Defendant as to the claims of racial discrimination. The court affirmed the standard from Baldwin that statements not related to race will not be considered in a determination of racial discrimination. In this case, Plaintiff failed to show that he was subjected to a hostile work environment that could objectively be perceived as hostile and abusive. While Plaintiff presented evidence that Defendant had acted rudely towards him, Plaintiff did not present any evidence that the Defendant's actions were racially motivated. As such, the district court properly granted summary judgment in favor of Defendants as to Plaintiff's hostile work environment claim.

RELIGION

Dixon v. The Hallmark Companies, Inc., 627 F.3d 849 (11th Cir. 2010)

Plaintiffs appealed the district court's grant of summary judgment in favor of their former employer on their claims, among others, of religious discrimination, retaliation and failure to accommodate religious beliefs in violation of Title VII of the Civil Rights Act of 1964. Plaintiffs, husband and wife, were on the on-site property manager and maintenance technician at an apartment complex. The wife was informed that she could not display religious items in the management office and was told to take down her artwork that had a Biblical citation on it. Plaintiff refused to take it down, and the supervisor removed it from the wall. When Plaintiff returned from the office and saw the picture had been removed, a

dispute ensued and Plaintiffs were fired by their supervisor. A disputed fact was whether the supervisor told the husband while he was being fired, "You're fired, too. You're too religious."

The Eleventh Circuit held that the district court improperly concluded that a jury could not infer religious discrimination from the alleged comment, "You're fired, too. You're too religious," because the comment was not "You're fired too *because* you're too religious." The district court improperly overlooked Eleventh Circuit precedent characterizing similar remarks as direct evidence of discrimination. The Eleventh Circuit concluded that if inferences were drawn in favor of the Plaintiff, as they must be at the summary judgment stage, a reasonable jury could find that the supervisor's alleged comment constituted direct evidence of religious discrimination. Thus, the Eleventh Circuit ruled that the district court erred in granting summary judgment on this claim.

RETALITATION

Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011)

On December 7, 2010, the U.S. Supreme Court heard oral arguments on the issue of whether Title VII prohibits retaliation against a third party who was aware of, but did not engage in, protected activities. Plaintiff claimed his employer terminated him after his fiancée filed an EEOC Complaint. Plaintiff admitted he did not participate in filing the Complaint or engage in any other protected activity. The Sixth Circuit affirmed summary judgment for the employer on the basis that Plaintiff was not a person within the scope of protection Title VII provided for retaliation. In doing so, the Sixth Circuit joined the Third, Fifth and Eighth Circuits in concluding the protection Title VII provides extends only to persons who actually participated in a protected activity.

The Supreme Court reversed the award of summary judgment in North American's favor based on its ruling that Title VII's retaliation provisions are to be interpreted broadly. The Court was unwilling to create a general rule that all third parties allegedly affected by the filing of a discrimination complaint would fit into the protection of Title VII, but at the same time concluded that a sufficient relationship between the complainant and the third party allegedly affected by the adverse employment action would afford that third party protection under Title VII and standing to pursue such an action.

Borough of Duryea v. Guanieri, 131 S.Ct. 2488 (2011)

Plaintiff alleged the Borough took improper retaliatory action against him by issuing eleven directives and withholding $338.00 in overtime pay. Plaintiff alleged the Borough took these actions after his dismissal and subsequent successful effort to overturn the dismissal through his union process. Plaintiff won a jury verdict on his claim that the actions were in retaliation for filing his grievance in violation of the 1st Amendment "right ... to petition the government for a redress of grievances." The Third Circuit Court of Appeals affirmed the jury verdict.

Ultimately, the U.S. Supreme Court vacated the verdict and remanded the case, holding that a government employer's alleged retaliatory actions do not give rise to liability under the Petition Clause unless the employee's petition relates to a matter of public concern. The Court stated that suits under the Petition Clause are subject to the same "public

concern" test as suits brought under the Speech Clause. Plaintiff's claim did not meet the standard for a matter of public concern.

SEXUAL AND RACIAL HARASSMENT

Cargo v. Alabama, Bd. of Pardons and Parole Div., 391 Fed.Appx. 753 (11th Cir. 2010)

Plaintiff appealed the grant of summary judgment in favor of Defendant on her claims alleging a hostile work environment based on sex, race, and age. However, the Eleventh Circuit affirmed the district court's grant of the motion, holding that the behavior described by Plaintiff was not severe or pervasive enough to support a hostile work environment claim. The court upheld the reasoning that "petty office squabbles" do not rise to the level of harassment. None of the incidents were severe, and five or six incidents over the course of three to four years is hardly pervasive. No off-color comments that were made interfered with Plaintiff's job performance. Since Plaintiff failed to point to evidence creating a genuine issue of material fact as to whether there was a hostile work environment based on sex or race harassment, the Eleventh Circuit affirmed the grant of summary judgment in favor of Defendant.

STATUTE OF LIMITATIONS

Williams v. Gwinnett Co. Public Schools, 2011 WL 1560651(11th Cir. 2011)

Plaintiff, a substitute teacher, filed a complaint against the school district alleging retaliation and discrimination in violation of Title VII and the ADA for speaking up about matters related to his dig allergy. On Plaintiff's appeal of a grant of summary judgment in favor of Defendant, he argued that the charge of discrimination that he filed was timely. In ordre to exhaust his administrative remedies, Plaintiff was required to file a charge of discrimination within 180 days after the alleged discriminatory act. He argued that the statute of limitations began to run when he received a letter from the Board of Education stating that he had been terminated. However, the Eleventh Circuit held that a "collateral review of an employment decision does not toll the running of the limitations period." As such, the 180-day period began to run on the day that Plaintiff was fired. Thus, the Eleventh Circuit held that Plaintiff's charge of discrimination was untimely and that summary judgment was properly awarded in favor of Defendant.

WHISTLEBLOWER

The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act" or "Act") recently signed into law offers new monetary incentives and a new private right of action for whistleblowers in the financial service industry. One of the most notable incentives under the Act includes whistleblower awards ranging from 10 to 30 percent of the monetary sanctions collected from a company if certain criterion is established. Additionally, the Act creates a new private right of action for retaliation resulting from lawful whistleblower acts and increases the protections offered to whistleblowers under the Sarbanes-Oxley Act of 2002. The Act applies to all employers, not just public companies like many financial regulatory statutes.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4273, (the "Dodd Frank Act") was signed into law by President Obama on July 21, 2010. The Dodd Frank Act represents a significant change to federal financial regulations and, among other provisions, establishes a Bureau of Consumer Financial Protection within the Federal Reserve to regulate consumer financial products and services in compliance with federal law. Additionally, the Dodd Frank Act includes a provision that requires the Securities and Exchange Commission to pay awards, under prescribed regulations and subject to certain limitations, to eligible whistleblowers that voluntarily provide the SEC with original information about a violation of federal securities laws that leads to the successful enforcement of a covered judicial administrative action, or a related action.

WORKER'S COMPENSATION

Riba v. Wal-Mart Stores East, L.P., Case No. 3:10cv112/MCR/EMT (N.D. Fla. 2010).

On August 26, 2010, Judge Casey Rodgers issued an Order addressing issues related to Florida's Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008 (the "Act"). In Riba, Plaintiff alleged that while working at Wal-Mart he "used force out of self defense and in an attempt to detain a shoplifting suspect pursuant to store policy." After the incident, Plaintiff asserted that false accusations were placed in his personnel file suggesting that he violated store policy. As a result, Plaintiff filed suit arguing that he was wrongfully disciplined, terminated, and treated disparately because of his age. Defendant moved to dismiss Count III of Plaintiff's Complaint (wrongful termination in violation of Fla. Stat § 790.251(4)(e)).

In its Order dismissing Count III of Plaintiff's Complaint, the Court noted that under Florida law, at-will employees may be terminated for any reason and that there is no common law tort of wrongful termination. However, Plaintiff argued that the Act served as a public policy exception to the rule and created an exception for the general right of self-defense. In its analysis of the Act, the Court stated as follows:
"[w]ithin that Act, employers are prohibited from violating 'the constitutional rights of any customer, employee, or invitee as provided in paragraphs (a) - (e),' and paragraph (e) specifically states as follows: (e) No public or private employer may terminate the employment of or otherwise discriminate against an employee, or expel a customer or invitee for exercising his or her constitutional right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes. Fla. Stat. § 790.251(4)(e)."

Plaintiff argued that the phrase, '"or for exercising the right of self-defense,' creates a broad exception to at-will employment by establishing a statutory right of self defense by any means (not limited to a firearm in a motor vehicle), protected by the right to bring a wrongful termination suit."

Ultimately, the Court disagreed with Plaintiff and held, "[t]he statute does not create a cause of action for wrongful termination involving self defense in the workplace generally."

STATE PUBLIC SECTOR LAW SURVEY[1]

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I. Introduction.

The purpose of this portion of the Public Employment Labor Relations Forum is to cover state law developments in the public sector which have occurred since October 2010. Although no monumental legislation, case decisions, or administrative rulings were issued during the 2010-2011 survey period, there have been several interesting developments that are worthy of note.

II. New Legislation.

A. Section 215.425, Florida Statutes.

One law that was significantly amended in 2011, was Section 215.425, Florida Statutes, dealing with the payment of extra compensation to public employees. On June 17, 2011, Governor Scott signed Senate Bill 88 into law, which became effective on July 1, 2011, and amends Section 215.425, Florida Statutes. See Chapter 2011-143, Section 1, Laws of Fla. (2011). As amended, Section 215.425, Florida Statutes, for the first time places restrictions upon the amount of severance pay that state, county and local governmental entities may provide to their employees. Of particular concern, Section 215.425(4)(b), Florida Statutes, restricts state, county and local governmental entities from providing more than 6 weeks of severance pay to employees, where such payment "represents the settlement of an employment dispute."

The issue raised by the recent amendment is whether the restriction on severance pay contained in Section 215.425(4)(b), Florida Statutes, applies to settlements by state, county and local governmental entities of employment discrimination and/or retaliation claims asserted against them. To date, there is no authority on point that addresses this issue. As set forth below, however, there are good arguments for the proposition that Section 215.425, Florida Statutes, as amended, does not apply to settlements of employment discrimination and/or retaliation claims asserted against state, county and local governmental entities.

1. Former Version of Section 215.425, Florida Statutes.

Prior to its recent amendment, Section 215.425, Florida Statutes, made no reference to severance pay. Moreover, while it placed conditions upon the payment of "extra compensation"

[1] The author expresses his appreciation to Adriana Barnette, a third year law student at the University of Florida Levin College of Law, for her assistance in the preparation of these written materials.

for work already performed, it did not place any limits upon the amount of such payments. The statute read:

> No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature. However, when adopting salary schedules for a fiscal year, a district school board or community college district board of trustees may apply the schedule for payment of all services rendered subsequent to July 1 of that fiscal year. The provisions of this section do not apply to extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services; to extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or to a clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49.

See Section 215.425, Fla. Stat. (2010). Although the prohibition against extra compensation for work already performed found in Section 215.425 has been in existence for over eighty (80) years,[2] no court or Attorney General opinions have addressed whether it applies to settlements of employment discrimination and/or retaliation claims asserted against state, county and local governmental entities.

While the prior version of Section 215.425, Florida Statutes, made no mention of severance payments, three (3) Attorney General Opinions addressed whether the statute barred severance pay as extra compensation for work already performed. In all three (3) of those opinions, the Attorney General concluded that severance pay "in lieu of notice" of an employee's upcoming termination would constitute extra compensation for work already performed and, as such, would violate Section 215.425 unless the severance pay had been authorized by preexisting contract or personnel policy. See Op. Att'y Gen. Fla. 91-51 (1991); Op. Att'y Gen. Fla. 97-21 (1997); Op. Att'y Gen. Fla. 2007-26 (2007).

On the other hand, the Attorney General concluded that severance benefits that equaled one (1) year's pay and benefits did not violate Section 215.425, Florida Statutes, where those benefits were permitted by policy. See Op. Att'y Gen. Fla. 97-21 (1997). The Dade County School Board wished to "implement a cost saving program" to induce high paid teachers to retire early, wherein the School Board would provide the teachers with paid leave for one (1) year, after which the teachers would retire. The Attorney General concluded that the paid leave would not violate Section 215.425, because it was specifically authorized by a preexisting School Board rule. Id. Thus, under the former version of Section 215.425, as interpreted by the Attorney General, governmental entities could provide any amount of severance benefits they wished, so long as they did so through contract or personnel policy.

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[2] See Amos v. Mathews, 126 So. 308, 334 (Fla. 1930).

2. Current Version of Section 215.425, Florida Statutes.

On November 23, 2010, Senator Don Gaetz sponsored and filed Senate Bill 88 with the Florida Senate. The bill, which was enacted into law effective July 1, 2011, substantially amends Section 215.425, Florida Statutes. For purposes of these written materials, the pertinent parts of Section 215.425, Florida Statutes, as amended, are as follows:

215.425. Extra compensation claims prohibited; bonuses; severance pay

(1) No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature. However, when adopting salary schedules for a fiscal year, a district school board or community college district board of trustees may apply the schedule for payment of all services rendered subsequent to July 1 of that fiscal year.

* * * * *

(4)(a) On or after July 1, 2011, a unit of government that enters into a contract or employment agreement, or renewal or renegotiation of an existing contract or employment agreement, that contains a provision for severance pay with an officer, agent, employee, or contractor must include the following provisions in the contract:

1. A requirement that severance pay provided may not exceed an amount greater than 20 weeks of compensation.

2. A prohibition of provision of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.036(29), by the unit of government.

(b) On or after July 1, 2011, an officer, agent, employee, or contractor may receive severance pay that is not provided for in a contract or employment agreement if the severance pay represents the settlement of an employment dispute. Such severance pay may not exceed an amount greater than 6 weeks of compensation. The settlement may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement.

* * * * *

(d) As used in this subsection, the term "severance pay" means the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated. The term does not include compensation for:

1. Earned and accrued annual, sick, compensatory, or administrative leave;

2. Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112; or

3. Any subsidy for the cost of a group insurance plan available to an employee upon normal or disability retirement that is by policy available to all employees of the unit of government pursuant to the unit's health insurance plan. This subparagraph may not be construed to limit the ability of a unit of government to reduce or eliminate such subsidies.

The Legislative Staff Analysis accompanying Senate Bill 88 makes no mention of whether the amendments to Section 215.425 are intended to limit settlements of employment discrimination and/or retaliation claims. However, Senator Gaetz's comments on his Florida Senate webpage indicate that the intent behind Senate Bill 88 was to eliminate the use of golden parachutes, rather than restrict the ability to settle employment discrimination and/or retaliation claims. According to Senator Gaetz, "[t]his bill prohibits the unethical and wasteful practice of giving 'golden parachutes' or huge severance packages to public employees, including judges and appointed officials. The legislation was inspired by dozens of excessive bonus schemes, wasteful benefit packages and hush money paid by local governments, community colleges, public hospitals, and school districts." See also Florida Senate Bill Analysis and Fiscal Impact Statement, P. 5 (April 14, 2011) ("Restrictions on severance pay will limit the ability of public employers to recruit employees by including severance pay clauses in their contracts. Alternatively, it will eliminate abuses associated with severance pay that may be occurring now.").

B. Analysis.

1. Statutory Construction Issues.

a. *Severance Pay Versus Back Pay*.

By its terms, Section 215.425(4)(b), Florida Statutes, as amended, only limits the amount of "severance pay" that may be given to an officer or employee. It makes no mention of "back pay," much less place limitations upon the payment thereof. In contrast, employment discrimination and/or retaliation claims involve back pay as a potential element of damages. Thus, argument can be made that Section 215.425(4)(b), Florida Statutes, does not limit the payment of back pay in settlement of an employment discrimination and/or retaliation claim.

While this argument may seem counterintuitive, there is authority to support the view that severance pay and back pay in this context are not synonymous. For example, federal employees may pursue separate claims for severance pay and for back pay. The Back Pay Act, 5 U.S.C. Section 5596, permits federal employees to recover back pay where an "unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of all or part" of the

employee's pay. The Severance Pay Act, 5 U.S.C. Section 5595, on the other hand, provides for severance pay to federal employees who are involuntarily terminated from service for reasons other than misconduct. See also Glisson v. Interim Healthcare, Inc., 2000 WL 33996188 (M.D. Fla. 2000) (treating former employee's age discrimination claim for back pay and ERISA claim for severance pay as separate concepts). Indeed, back pay and severance pay serve different purposes. Back pay is to make an aggrieved party whole when they have lost pay as a consequence of discriminatory employment action. Metropolitan Dade County v. Sokolowski, 439 So.2d 932, 935 (Fla. 3d DCA 1983). Severance pay, on the other hand, is "given because of a perceived societal or moral obligation to financially assist an employee when he or she is unable to work because of old age, employment-related accidents or physical disabilities, sickness or layoffs." Bradshaw v. Pantry Pride Enterprises, Inc., 566 So.2d 1306, 1308 (Fla. 3d DCA 1990).

b. Settlement of "Employment Dispute."

Absent a contract or employment agreement that provides otherwise, Section 215, 425(4)(b), Florida Statutes, as amended, permits the payment of up to six (6) weeks of severance pay in settlement of an "employment dispute."[3] The statute does not define the term "employment dispute," so the question becomes whether the term encompasses employment discrimination and/or retaliation claims.

Although weak, argument could be made that the term "employment dispute," as used in Section 215.425(4)(b), Florida Statutes, simply refers to disputes concerning whether a state, county or local governmental entity failed to provide required notice of its intent to terminate an employee. That argument finds some support in the fact that the only analysis concerning severance pay under Section 215.425, Florida Statutes is found in three (3) Attorney General opinions, which addressed whether severance pay may be given "in lieu of notice" of an employee's upcoming termination. See Op. Att'y Gen. Fla. 91-51 (1991); Op. Att'y Gen. Fla. 97-21 (1997); Op. Att'y Gen. Fla. 2007-26 (2007).

c. Recently or About To Be Terminated.

The limitation on severance pay set forth in Section 215.425, Florida Statutes, applies only to severance payments that are made to employees who are about to be terminated or who were "recently" terminated.[4] See Section 215.425(4)(d), Fla. Stat. (2011). Given that settlements of employment discrimination and/or retaliation claims often do not occur until months or years after the alleged discrimination or retaliation took place, this limitation is quite significant. Unfortunately, the statute does not define the word "recently." However, when viewed *in pari materia* with the twenty (20) week and six (6) week timeframes set forth in

[3] If a contract or employment agreement that provides for severance pay is entered into or renewed after July 1, 2011, the amount of severance pay is limited to twenty (20) weeks. See Section 215.425(4)(a), Florida Statutes, as amended (2011).

[4] Payments made in settlement of employment discrimination and/or retaliation claims brought by current employees could not be characterized as "severance" pay and would not implicate Section 215.425(4)(b), Florida Statutes.

Sections 215.425(4)(a)1. and 215.425(4)(b), argument can be made that the word "recently" means a period of days or weeks, rather than months or years. Thus, argument can be made that Section 215.425, Florida Statutes, would not apply to the settlement of employment discrimination and/or retaliation claims, where the settlement took place months or years after the employee's termination.

d. *Severance Does Not Encompass Emotional Distress or Attorney's Fees.*

Although Section 215.425, Florida Statutes, limits the amount of severance that may be paid in settlement of an employment dispute, it places no limitation upon payment for emotional distress and attorney's fees. See Section 215.425(4)(d), Florida Statutes (2011) (defining "severance pay" to mean "actual or constructive compensation, including salary, benefits, or perquisites").

e. *Absurd Results.*

Application of Section 215.425(4)(b), Florida Statutes, to settlements of employment discrimination and/or retaliation claims would lead to absurd results that are contrary to the very purpose of the statute and its recent amendments. The purpose of Section 215.425 is to safeguard the public treasury against the payment of extra compensation for work already performed and the "practice of giving 'golden parachutes' or huge severance packages to public employees . . . ." However, if the limitation on severance pay contained within Section 215.425(4)(b) applied to settlements of employment discrimination and/or retaliation claims, it could make settlement of many of those claims impossible and thereby increase litigation costs.

For example, settlement of a meritorious wrongful discharge lawsuit that involved a claim for months or years of back pay would be impossible, because settlement of the back pay claim would be limited to six (6) weeks worth of pay and benefits. Consequently, the state, county or local governmental entity would be forced to litigate the case to a verdict -- thereby needlessly increasing its own litigation costs, as well as increasing its exposure to the former employee's claim for attorney's fees and costs. Such construction and application of Section 215.425, Florida Statutes, would be an absurd result that should be avoided. See Dept. of Revenue v. School Bd. of Hillsborough County, 2011 WL 2278975 (Fla. 2d DCA 2011) (courts should avoid interpreting statutes in such a way that would lead to absurd results). Moreover, such construction and application would be contrary to Florida's public policy of encouraging settlement of civil actions. See Saleeby v. Rocky Elson Const., Inc., 3 So.3d 1078, 1084 (Fla. 2009) (noting Florida's public policy to encourage settlements); Baudo v. Bon Secours Hospital, 684 So.2d 211, 213 (Fla. 3d DCA 1996) (noting various Florida Statutes designed to further Florida's public policy of encouraging the settlement of civil actions).

2. Other Authority Permitting Settlements.

a. Section 111.071, Florida Statutes.

Section 111.071(1)(a) & (b), Florida Statutes, permits "[a]ny county, municipality, political subdivision, or agency of the state which has been excluded from participation in the Insurance Risk Management Trust Fund" "to expend available funds" to pay any compromise or settlement of Section 1983 claims brought against public officials, provided that there has not been a determination in a final judgment that the official intentionally caused the harm. The statute's only limitation upon the amount of such settlements is that funds must be available. Thus, in situations in which a former employee could bring his or her employment discrimination and/or retaliation claim in the form of a Section 1983 claim against a public official of a county, municipality, or other political subdivision that does not participate in the Insurance Risk Management Trust Fund, it appears that Section 111.071, Florida Statutes, would grant the governmental entity unfettered authority to settle such claims, provided that there are available funds to do so.

b. Section 768.28, Florida Statutes.

Section 768.28(5), Florida Statutes, provides that "[n]otwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided [i.e., $100,000 per claim, capped at $200,000 per incident], to settle a claim made or a judgment rendered against it without further action by the Legislature . . . ." Based upon the foregoing language, it appears that agencies and subdivisions of the state are free to settle claims that are subject to Section 768.28, Florida Statutes, for any amount falling within the sovereign immunity caps. Although Section 768.28, Florida Statutes, does not apply to federal employment claims, it does apply to employment claims arising under the Florida Civil Rights Act.[5] Zamora v. Florida Atlantic University, 969 So.2d 1108 (Fla. 4th DCA 2007) (holding that the Florida Civil Rights Act incorporated by reference the provisions of Section 768.28(5), Florida Statutes).

c. Inherent Authority

Municipalities and counties -- through their boards of city and/or county commissioners -- have the power to sue and be sued. Florida City Police Dept. v. Corcoran, 661 So.2d 409, 410 (Fla. 3d DCA 1995) (municipalities); Edwards v. Lindsley, 349 So.2d 817, 819 (Fla. 1st DCA 1977) (boards of county commissioners). Moreover, the power of a municipality or board of county commissioners to settle litigation is incident to and implied from their powers to sue and be sued. Abramson v. Florida Psychological Association, 634 So.2d 610, 612 (Fla. 1994). See also Op. Att'y Gen. Fla. 79-78 (1979) ("As a general rule, claims against the county are subject to compromise, and the governing body impliedly possesses the necessary power and discretion

[5] Section 768.28, Florida Statutes, does not apply to claims arising under Florida's Public Sector Whistleblower Act, Section 112.3187, et seq., Florida Dept. of Education v. Garrison, 954 So.2d 84 (Fla. 1st DCA 2007), or to workers' compensation retaliation claims arising under Section 440.205, Florida Statutes, Bifulco v. Patient Business & Financial Services, Inc., 39 So.3d 1255, 1257-1258 (Fla. 2010).

– in the absence of bad faith, fraud, collusion, or other vitiating elements – to settle suits or claims against the county.").

C. Assessment.

To date, there is no authority on point that addresses whether Section 215.425(4)(b), Florida Statutes, applies to settlements by state, county and local governmental entities of employment discrimination and/or retaliation claims asserted against them. As set forth above, however, there are good arguments for the proposition that Section 215.425, Florida Statutes, as amended, does not apply to settlements of employment discrimination and/or retaliation claims asserted against state, county and local governmental entities.

III. Recent Court Decisions.

There have been several interesting and noteworthy court opinions during the survey period that impact public sector employers. For organizational purposes, these cases have been categorized into groups based upon the law or laws being discussed therein.

A. Public Sector Whistleblower Cases.

1. Florida Department of Children and Families v. Shapiro, -- So.3d --, 2011 WL 3111349 (Fla. 4th DCA 2011).

In Shapiro, The Florida Department of Children and Families (DCF) sought review of the decision of the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, which found in favor of the terminated employee, based on two claims of discrimination and one claim of whistleblower retaliation. The DCF appealed a judgment in favor of a terminated employee based on two claims of discrimination and one claim of retaliation, arguing that the trial court erred in failing to direct a verdict in its favor because the employee failed to prove a prima facie case to support each of the three claims. The appellate court agreed and reversed.

The employee was terminated for breaking DCF policies. The employee alleged that her subordinate co-worker bore hostility toward her, was rude, made racial and religious slurs and ultimately reported her to the Inspector General (IG) for violation of DCF policies, because of the employee's prior grand jury testimony against the subordinate. The investigation, in turn, led to her termination from DCF. During the trial, DCF moved for directed verdict arguing that the employee had failed to establish a prima facie case of discrimination, hostile work environment, or retaliation. The court denied the motion without prejudice. DCF renewed its motion and the trial court reserved ruling.

On the appeal, Florida Fourth District Court of Appeal ruled that although the comments by the subordinate were discriminatory and offensive to the employee, they did not establish that the workplace was permeated with discriminatory intimidation, ridicule, and insult. Thus, the trial court erred in not granting the DCF's motion for a directed verdict on the employee's hostile work environment claim and discrimination. The Court also ruled that the employee failed to

establish her prima facie case of causation under the Whistleblower Act, Sections 112.3187-112.31895, Florida Statutes. To establish causation, plaintiff must show that the protected activity and her termination were not wholly unrelated. Close temporal proximity between the protected activity and the adverse employment action would satisfy this requirement. In this case, however, the employee alleged that her termination occurred in 2006 as retaliation for her grand jury testimony in 2001. Notwithstanding a substantial delay between the two events, the plaintiff may present additional evidence tending to show causation. A plaintiff can establish causation under a "cat's paw" theory. Under the "cat's paw" theory, the decision maker acts in accordance with the harasser's decision when the decision maker fails to conduct an independent investigation, and instead rubber stamps the recommendations of the harasser. However, in this case, the lack of proof warranted a directed verdict for DCF and the trial court erred in denying DCF's motions.

B. Florida Civil Rights Act Cases.

1. Sean St. Louis v. Florida International University, 60 So.3d 455 (Fla. 3d DCA 2011).

In St. Louis, former employee brought action for racial discrimination and retaliation. This case involved an appeal and a cross-appeal from a final judgment on a jury verdict awarding the employee $72,241 in lost wages and benefits and $2.5 million in compensatory damages on state law racial discrimination and retaliation claims, brought by St. Louis against his former employer, Florida International University ("FIU"). Following the trial, FIU filed a Renewed Motion for Directed Verdict, a Motion for New Trial, or in the alternative, a Motion for Remittitur. The trial court denied all three motions, which FIU appealed. Furthermore, FIU filed a Motion to Conform Judgment to Statutory Caps, limiting St. Louis' award to $200,000, based on sections 760.11(5) and 768.28(5), Florida Statutes. The trial court granted the motion, which St. Louis then appealed.

St. Louis, a Trinidadian, man was hired by FIU as the Assistant Controller (later promoted to Associate Controller) of the Contracts and Grants Department, in 1997. In late 2003, St. Louis was temporarily reassigned to assist with FIU's response to the federal government's claim following the audit of the accounting for the research grants awarded to faculty members in FIU's Hemispheric Center for Environmental Technology (HCET), which resulted in a fine of $11.5 million for violations of federal accounting regulations. As a consequence of the HCET audit, FIU mandated a reorganization of its research grant structure. When St. Louis inquired about his old position, he learned that due to the reorganization, his position would be abolished, effective March 31, 2005. St. Louis subsequently was allowed to apply for a Director position in the newly created Post-Award Department. During his phone interview, St. Louis' comments led the committee to believe he was not the right person for the job. The position remained vacant for the next nineteen months, at which time, Aida Raus was hired not as a Director but as a Grants Financial Manager.

When he was not recommended for the Director of Post-Award Department position, St. Louis found employment elsewhere and resigned from FIU before his anticipated termination date. St. Louis, in his resignation letter, expressed his belief that the elimination of his position

had been provoked by racial animus, however, there was no record evidence showing any derogatory remarks regarding St. Louis' race. Ultimately, St. Louis filed a lawsuit against FUI, alleging racial discrimination for eliminating his position and retaliation for expressing such sentiments by not being recommended for the new Director in the Post-Award Department.

Because St. Louis failed to establish a prima facie case for both racial discrimination and retaliation, the Third District Court of Appeals, reversed the trial court's final judgment on the jury verdict. More specifically, St. Louis failed to satisfy the fourth element of the McDonnell Douglas framework, that similarly situated employees outside the employee's protected class were treated more favorably. When Reus, was hired, she was not hired as a Director, but as one of the three Grants Financial Managers. St. Louis claimed that because Reus was ultimately promoted to the Director, this qualified her as a similarly situated employee outside the protected class. The Court disagreed. Evidence of a person outside of St. Louis' protected class that had been hired for the same position approximately 19 months after St. Louis applied for the position, and approximately 18 months after St. Louis resigned, did not, without more, create an inference of discriminatory intent. Thus, the Court of Appeal concluded that the trial court erred by denying FIU's Motion for Directed Verdict on this claim.

St. Louis likewise failed to prove a prima facie case of retaliation. There was no evidence that the search committee was aware that St. Louis had complained of racial discrimination. Thus, St. Louis' retaliation claim failed and the trial court erred in not granting FIU's Motion for directed verdict.

2. <u>Miami-Dade County v. Eghbal</u>, 54 So.3d 525 (Fla. 3d DCA 2011).

Mansour Eghbal was a 69 year old employee of Miami-Dade County, who filed suit for age discrimination and retaliation in violation of the FCRA after he was passed over for four promotions for which he had applied. Specifically, Eghbal claimed that he had been denied a promotion because of his age and/or because he had filed a charge of age discrimination with the EEOC. The case proceeded to a jury trial. At trial, the jury found evidence for age discrimination with respect to one of the applications for promotion and evidence of retaliation with respect to another one of the promotion applications. Accordingly, it returned a verdict for Eghbal. The County moved for a judgment notwithstanding the verdict ("JNOV"), however, the trial court denied that motion. On appeal, the County argued that the Circuit Court had erred in denying its JNOV motion, as Plaintiff had not established a prima facie case of age discrimination or retaliation.

Turning first to the age discrimination claim, Florida's Third District Court of Appeal determined that Eghbal had presented sufficient evidence of age discrimination to establish his prima facie burden. Specifically, it ruled that Eghbal had established that he was 69 years old and therefore a member of a protected age class; that he was qualified for the positions he had applied for; that he was rejected for those positions; and that the positions for which he applied were filled by persons substantially younger than he was. Accordingly, the Court of Appeal affirmed the trial court's denial of the County's JNOV motion.

Next, the court of appeal evaluated whether Eghbal had established a prima facie case of retaliation under the FCRA. In particular, the Court of Appeal examined the causal relationship element of the prima facie case for retaliation, as this was what the County alleged had not been proven. The Court noted that Eghbal had testified that the decision makers who denied his applications for promotion were aware of his lawsuit because "when something happens like that this, my case, it spreads around immediately in the County." Moreover, the Court that observed that notes pertaining to one of the applications that Eghbal had submitted for a promotion revealed that Eghbal believed that he was being treated "extremely unfairly by the county." Based on this evidence, two of the three appellate court judges concluded that Eghabl had established a prima facie case.

The third judge on the appellate panel disagreed, and filed a dissent with respect to the majority's ruling on the FCRA retaliation claim. According to this judge, Eghbal had not presented sufficient evidence to establish that the decision makers who denied his applications for promotion had knowledge that he had filed any charges or lawsuits alleging age discrimination. As a result, he concluded that Eghbal had not established the causal relationship prong of his prima facie burden.

C. Public Employees Labor Relations Act Cases.

1. Sheriff of Broward County v. Stanley, 50 So.3d 640 (Fla. 1st DCA 2010).

Stanley worked as a certified detention deputy for the Sheriff's Office from February 2001 to December 2007, when he resigned to accept an outside position. During his employment at the Sheriff's Office, Stanley was a member of the Federation of Public and Private Employee's Union. In April or May, 2008, Stanley applied to be rehired by the Sheriff in his former position, at which time a human resources representative informed Stanley that a policy mandated that former employees who are rehired are paid at "step two," which was lower rate of pay than Stanley received before his resignation. While Stanley and the Union representative were in discussions with the Sheriff's Office regarding Stanley's pay rate, Stanley's application for rehire was deactivated. However, ultimately, Stanley accepted the lower "step two" salary, and the Sheriff reactivated his application. At the time Stanley was seeking approval for his re-employment, Sheriff Lamberti was running for re-election against a challenger named Israel. The Union endorsed Israel.

In October 2008, 500 Union members were picketing in front of the Sheriff's Office regarding the impasse in a wage dispute unrelated to Stanley. Stanley joined the picketing and learned about the Union's endorsement of Israel. Later that day, Stanley attended a debate, where he was photographed wearing a pro-Israel t-shirt he received from the Union. In November, 2008, Sheriff Lamberti was re-elected and shortly thereafter one of his lieutenants contacted Stanley and told him that the Sheriff was not going to re-hire him because of his support of Israel. Stanley filed an unfair labor practice charge with the Florida Public Employee Relations Commission ("PERC"), alleging that the Sheriff discriminated against him in his job application because of his political activities and Union involvement. After an evidentiary hearing, PERC issued a final order concluding that the Sheriff violated sections 447.501(1)(a)

and (b) for failing to rehire Stanley because of his Union activities. Moreover, PERC ordered the Sheriff to cease and desist from declining to re-hire Stanley. Sheriff Lamberti appealed PERC's final order.

During the evidentiary hearing, Stanley testified that, when informing him that he was not going to be re-hired, the lieutenant blamed the Union for getting Stanley involved in Israel's election campaign. The Sheriff argued that Stanley was not a public employee when the Sheriff declined to re-hire him, therefore, his actions did not violate section 447.501(1)(a). Florida's First District Court of Appeal agreed with Sheriff Lamberti and held that, contrary to the PERC's findings, at the time of his application for re-hire, Stanley was not a public sector employee. A "public employee" is defined by section 447.203(3), Florida Statutes as "any person employed by a public employer except appointed or elected persons, military employees, negotiating representatives, managerial or confidential employees, employees of the Florida Legislature, criminal inmates, fruit and vegetable inspectors, employee of the Public Employees Relations Commission, and undergraduate state university students who conduct part-time work for the university." Since Stanley was not a public employee at the time Sheriff declined to rehire him, the Court of Appeal ruled that PERC erred by finding the Sheriff violated section 447.501(1)(a).

Moreover, the Court of Appeal concluded that there was no competent substantial evidence showing that the Sheriff had declined to rehire Stanley because of an intent to discourage his involvement with the Union. Although photos taken by the Sheriff's Office showed Stanley with Union picketers, aside from the hearsay evidence, there was no record evidence that the Sheriff knew of the photos or based the decision not to re-hire Stanley on the existence of the photos. Accordingly, it reversed and vacated PERC's final order.

2. Communications Workers of America v. City of Gainesville, -- So.3d --, 2011 WL 1744371 (Fla. 1st DCA 2011).

In Communications Workers of America v. City of Gainesville, the question to be decided was whether the City of Gainesville's contribution to retiree health insurance premiums constituted a status quo benefit as a result of a past practice. The parties' collective bargaining agreements did not provide for health insurance for retirees. In 1995, however, the City had passed an ordinance with a formula under which the City agreed to pay a percentage of retiring workers' health care benefits. In 2008, the City adopted a superseding ordinance changing the methods of contributing to retirees' health benefits, this time underwriting health insurance premiums up to a set dollar amount and shifting to retirees the full amount of any increase in premiums occurring in retirement. When the City unilaterally changed its health care insurance premium contributions for retired employees, the Communications Workers of America ("CWA") filed unfair labor practice charges against City of Gainesville under section 447.501(1)(a) and (c), Florida Statutes. Specifically, the CWA asserted that the City had committed an unfair labor practice by unilaterally changing this health insurance premium contribution without bargaining over it.

Initially, a PERC Hearing Officer recommended dismissing the charges on the ground that retiree health care benefits were not negotiable because they did not vitally affect the terms and conditions of employment of employees. However, PERC rejected that recommendation

and remanded the case back to him for further deliberations. On remand, the Hearing Officer concluded that the City had committed an unfair labor practice by changing a benefit that had become a part of the status quo, and he issued a recommended order to that effect. Once again, however, PERC, rejected the Hearing Officer's recommended order. In doing so, it noted that the status quo doctrine required proof that a benefit had existed substantially unchanged for a significant period of time and that furthermore, the benefit in question was an unequivocal benefit that the employees could objectively expect to continue. Since the City had expressly and repeatedly warned its employees, through both the enactment of an ordinance and the publication of employee handbooks, that health insurance premium contributions were subject to change, it concluded that the employees had no objectively reasonable expectation in the continuation of this benefit. Accordingly, it dismissed the CWA's unfair labor practice charges. The CWA thereafter appealed PERC's final order.

The First District Court of Appeal, in a majority opinion, agreed with the Hearing Officer and reversed the decision of PERC. In doing so, it held that the question of whether the health care insurance premium contribution was a status quo item was a finding of fact, not a conclusion of law, and could not be overturned by PERC unless it was unsupported by substantial competent evidence. The majority determined that there was substantial competent evidence that a past practice had been established based on the formula under which the City made its contribution toward retirees' health insurance premiums from 1995 until 2008.

Notably, one member of the appellate panel dissented. That judge held that an established past practice must not only show that a practice has existed substantially unvaried for a significant period of time, but it must also show that the practice was unequivocal and that the bargaining unit employees could reasonably have expected the practice to remain unchanged. Since he concluded that there was not substantial competent evidence to establish that the bargaining unit employee could expect the practice to remain unchanged, he concluded that PERC's final order should have been affirmed.

3. Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School Board of Manatee County, 62 So.3d 1176 (Fla. 1st DCA 2011).

In Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School Board of Manatee County, the First District Court of Appeal recently affirmed in part and reversed in part a PERC final order dismissing a union's unfair labor practice charge alleging that a school board committed an unfair labor practice by improperly invoking the financial urgency provisions of Section 447.4095, Florida Statutes. See Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School District of Manatee County, Florida, 35 FPER ¶ 46 (2009). In its final order, PERC had addressed an issue of first impression involving a public employer's invocation and implementation of the financial urgency provision, which states:

> In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his representative and a bargaining agent or his 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 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. 447.403. An unfair labor practice charge shall not be filed during the fourteen days during which negotiations are occurring pursuant to this section.

See Section 447.4095, Florida Statutes (2010).

The Union alleged that the School Board violated Section 447.501(1)(a) and (c) Florida Statutes, when it invoked Section 447.4095, alleging a financial urgency and then subsequently resolved matters in dispute in collective bargaining negotiations pursuant to that statute. PERC found that the School Board's representative notified the Union that it was declaring a financial urgency under Section 447.4095, Florida Statutes, and based on the provision's express language, the Union was thereafter required to engage in negotiations over the impact of the financial urgency. PERC further found that because the Union refused to engage in such negotiations, the School Board's declaration of an impasse, and subsequent modification of the collective bargaining agreements at issue, pursuant to the impasse resolution procedures set forth in Section 447.403, Florida Statutes, were not unlawful.

On appeal, Florida's First District Court of Appeal agreed with PERC and rejected the Union's assertion that the School Board was required to prove the existence of a financial urgency before proceeding under Section 447.4095, Florida Statutes. Instead, the Court of Appeal ruled that a public employer may declare a financial urgency under Section 447.4095, Florida Statutes and proceed under its provisions. However, the Court of Appeal stated that a public employer cannot unilaterally abrogate a collective bargaining agreement in the absence of a compelling state interest. Once the fourteen-day period specified in Section 447.4095, Florida Statutes, has expired, a union is free to file an unfair labor practice charge with PERC disputing the employer's claim of financial urgency. PERC must then determine whether a financial urgency exists within the meaning of Section 447.4095, Florida Statutes and this provision must be construed in keeping with the Florida Constitution.

The Court of Appeal also ruled that a union that chooses not to participate in negotiations contemplated by Section 447.4095, Florida Statutes, runs the risk that PERC will find that a financial urgency existed and then dismiss its unfair labor practice charge. This would result in the changes to the contract implemented by the employer pursuant to Section 447.4095, Florida Statutes remaining in effect. However, a union need not participate in proceedings under Section 447.4095, Florida Statutes as a precondition to obtaining a decision on whether there was, in fact, a financial urgency.

In the instant case, the court held that PERC erred in holding that the Union waived its right to contest the validity of the School Board's declaration of financial urgency because it did not participate in negotiations under Section 447.4095, Florida Statutes. Accordingly, the Court of Appeal reversed this portion of the final order and remanded the case to PERC for further proceedings.

D. Florida Career Service Cases.

1. Thompson v. Department of Children and Families, 26 FCSR 203 (PERC 2011).

Luke Thompson was a permanent Career Service Employee who was hired by the Northeast Florida State Hospital ("NEFSH") on August 15, 2003, as a kitchen worker. NEFSH is a mental health treatment facility operated by the Department of Children and Families ("DCF"). After a few months, Thompson was promoted to the position of Health Services Worker ("HSW"), a position that had direct patient care duties. In September of 2004, Thompson was arrested for burglary and grand theft pertaining to incidents which had occurred prior to his date of hire. Thompson ultimately pled no contest to the charges and even though adjudication was withheld, he was sentenced to 10 years of probation. Thompson notified NEFSH of his adjudication and promotion.

In 2004 and 2005, NEFSH had two levels of security screenings for its employees. Employees who had direct patient care responsibilities had to be fingerprinted and subjected to a level 2 background check. Employees who did not have direct patient care responsibilities were also required to be fingerprinted, but were only subjected to a less intensive level 1 background check. Because Thompson was unable to pass a level 2 background screen due to his recent arrest and plea, he was no longer capable of working as a HSW. Accordingly, NEFSH demoted him to a service aide position that did not have direct patient care duties. Over the next two years, NEFSH promoted Thompson to positions which did not involve direct patient care. In 2007, however, NEFSH's Administrator designated the NEFSH as a level 2 facility. As a consequence, all NEFSH employees were now considered to hold positions of "special trust," regardless of whether they actually performed direct patient care duties. Additionally, all new NEFSH employees were required to take and pass a level 2 background check, and all existing NEFSH employees were required to undergo and pass a level 2 background rescreening every five years.

On November 4, 2010, Thompson was fingerprinted for his level 2 background rescreening. Thompson's 2004 arrest and probation status appeared in his prescreening report. Thompson was therefore ineligible to continue employment in any position of "special trust." Moreover, since all of NEFSH's positions required level 2 background checks, pursuant to Subsection 435.06(2)(c), Florida Statutes, DCF was statutorily obligated to terminate Thompson for failing to meet that facility's minimum security requirements. On December 15, 2010, DCF notified Thompson of its decision to terminate his employment, effective January 25, 2011. Although Thompson hired an attorney and was ultimately successful in getting both his probation terminated early and his prior criminal record sealed, no immediate action was taken by the Court before DCF dismissed Thompson from employment on February 10, 2011.

Thompson appealed his termination to the PERC on several grounds. First, he argued that DCF should be estopped from terminating him due to the exceptional set of circumstances existing in this case. Specifically, Thompson argued that DCF knew of his arrest and plea six years ago, yet it never told him he could be dismissed under the requirements of Subsection 435.06(2)(c), Florida Statutes. However, the Hearing Officer did not accept this argument.

Instead, he noted that a similar argument had been raised and rejected in White v. Agency for Personas with Disabilities, 23 FPER 244 (2008), wherein PERC upheld an agency's decision to dismiss a 26 year employee due to the employee's failure to pass a level 2 background check requirement, even though the agency implemented its level 2 background screening requirement decades after the employee had been hired. The Hearing Officer concluded that in the absence of contractual or other legal obligations, DCF was free to change its employment screening procedures, however it saw fit, in order to better ensure safety, even if those changes resulted in Thompson's termination.

Thompson next argued that he should not have been dismissed because a 2010 amendment to Chapter 435, Florida Statutes stated that "[t]he changes made in this act are intended to be prospective. It is not intended that persons who are employed or licensed on the effective date of this act be rescreened . . . ." Thompson therefore argued that he should not have been subjected to a level 2 background check. However, the Hearing Officer noted that what the above-quoted portion of the 2010 amendment to Chapter 435, Florida Statutes actually stated was that persons who were employed or licensed on or before the passage of the amendment were nevertheless still subject to being rescreened at "such time as they are otherwise required to be rescreened pursuant to law." Thus, he concluded, the 2010 statutory amendment to Chapter 435, Florida Statutes in no way supported Thompson's argument.

Finally, Thompson argued that since his attorney had ultimately been successful in getting his probation terminated and his criminal record sealed on April 20, 2010, DCF should have afforded him more time to achieve those results before firing him. However, the Hearing Officer noted that nothing in the law required DCF to do so. Moreover, the Hearing Officer also determined that the mere fact that Thompson's criminal record had been sealed did not excuse Thompson of his obligation to notify DCF of his prior arrest and plea, or that DCF was precluded from considering that prior arrest and plea in determining whether to continue to employ him. Accordingly, the Hearing Officer issued a recommended order finding that DCF had established cause to terminate Thompson. The Commission thereafter adopted the Hearing Officer's recommended order and dismissed Thompson's Career Service Appeal.

2. Carter v. Department of Corrections, 25 FCSR 263 (PERC 2010).

Robert Carter was a permanent Career Service Employee who was employed as a correctional officer by the Department of Corrections ("DOC") at its Putnam Correctional Institution ("PCI"). Carter was hired by DOC on July 7, 1995. During his career with DOC, Carter had received a supervisory counseling memorandum on April 17, 2007, for excessive use of sick leave; a supervisory counseling memorandum on May 27, 2008, for failure to follow instructions (i.e., for failing to report a sergeant for sleeping while on duty); and an April 30, 2009, supervisory counseling memorandum for failure to follow instructions (i.e., for failing to report a custodial hold). In addition to these supervisory counseling memoranda (which are not considered disciplinary action), Carter was once suspended for 20 days on November 11, 2009, for a security breach that occurred during a medical transport assignment. The disciplinary suspension arose out of an incident in which Carter had been transporting four inmates. When one of the inmates passed out during the transport, Carter, in violation of DOC policy, removed the inmate's restraints before the emergency unit and extra officers arrived at the scene. During

the investigation into the abovementioned security breach, the Warden of PCI relieved Carter of transport duties until the matter was resolved. Relieving correctional officers of assignments which are at issue in investigations into alleged security breaches is a standard DOC practice.

In March of 2010, Carter was suffering from high blood pressure and diabetes. He was also undergoing radiation treatments for prostate cancer. As a side effect of these radiation treatments, Carter needed to urinate frequently, approximately every 10 to 15 minutes. Although Carter advised his supervisor, Lieutenant Pendleton of his need for frequent urination, he did not request to be relieved of any duties or assignments due to his medical conditions, nor did he provide any documentation establishing that he was restricted from performing any of his job duties.

On March 17, 2010, when Carter reported to work for his shift, Lieutenant Pendleton instructed him to take a medical transport to the Lake Butler Reception Center, a facility about one hour away from PCI. Carter refused the order claiming that he could not go because that was what had gotten him into trouble when he had been suspended a few months earlier. In response, Lieutenant Pendleton repeated his order and explained to Carter that he needed Carter to take the medical transport because PCI was short staffed. Carter then responded by stating that if this was the only assignment Pendleton had to give him, then Pendleton should send him home. At no point during this verbal exchange did Carter explain that he was unable to perform the medical transport due to his need to frequently urinate, or for any other medical reason. Determining that Carter's refusal to obey a direct order from his immediate supervisor constituted insubordination, DOC dismissed Carter from employment. Carter thereafter filed a Career Service Appeal.

After conducting an evidentiary hearing, PERC's Hearing Officer issued a recommended order finding that DOC had good cause to dismiss Carter. The Hearing Officer rejected Carter's claim that Lieutenant Pendleton had no authority to order him to perform a medical transport because Carter had been prohibited from performing such transports during the investigation into his earlier security breach. The Hearing Officer concluded that once the investigation had ended and Carter had served his disciplinary suspension, Carter was subject to being ordered to perform medical transports. The Hearing Officer also rejected the notion that Carter's frequent need to urinate excused him performing transports. First, the hearing Officer noted that this was not an excuse that Carter even gave to Lieutenant Pendleton. Second, since Carter had never provided any medical documentation to demonstrate he was incapable of performing medical transport duties, the Hearing Officer concluded that while Carter's need to frequently urinate might have made his performance of transport duties more problematic, there was no evidence to suggest he was incapable of performing this duty.

The Hearing Officer also determined that mitigation of Carter's dismissal to a lesser form of discipline was not warranted. Although the Hearing Officer noted that Carter had been employed for 15 years and that the three prior supervisory counseling memoranda he had received were not disciplinary in nature, he nevertheless concluded that these memoranda highlighted Carter's performance deficiencies, which when coupled with his recent 20 day disciplinary suspension, nullified any argument in favor of mitigation of discipline. PERC later

adopted the Hearing Officer's Recommended Order in its entirety and dismissed Carter's Career Service Appeal.

3. Saavedra v. Department of Corrections, 25 FCSR 274 (PERC 2010).

Rubin Saavedra was permanent Career Service Employee who was employed as a staff development training consultant for DOC's Region IV on September 13, 2002. As a training consultant, Saavedra's duties included traveling to various correctional institutions throughout the state and conducting onsite training with various DOC employees. Another one of Saavedra's job duties included entering training attendee data, such as names and social security numbers, into DOC's training system computer program.

Between the dates of October 19 and 22, 2010, Saavedra was assigned to conduct a wide variety of training to employees working at DOC's Everglades Correctional Institution ("ECI"). The employees who were the recipients of such training included Martha Achon and Marlys Treto. This training was conducted in a classroom in ECI's training building.

On the first day of training, October 19, 2010, Saavedra asked attendee Achon if she would assist him by: (1) entering training attendee data into DOC's computer training system program; (2) answering the telephone in the training room; (3) making coffee; and (4) selling the coffee she made to other training attendees and then collecting the money. Although Achon agreed to do these things, she did not volunteer to do so. Saavedra then placed Achon in an adjacent room with a large glass window facing the classroom. Achon remained in this adjacent room from 8:00 a.m. until 4:30 p.m. on October 19, 2010. From this separate room, Achon could both see and hear the training, but she could not devote her full attention to the training while she was entering training attendee data or answering the training room telephone.

On the second day of training, October 20, 2010, Saavedra again asked Achon to enter training attendee date for him on the computer training system program; however, on this occasion, Achon refused to do so. Accordingly, Saavedra asked attendee Treto to do so and she agreed. Unlike Achon, Treto completed this task by entering training attendee data on DOC's computer training system program during training breaks and by staying late at the end of the day when he should have been watching a training video. Treto similarly assisted Saavedra with this data entry task on October 21, 2010. Saavedra thereafter executed paperwork giving both Achon and Treto full credit for attending this training.

DOC's training requirements are extremely strict. Attendees are not entitled to receive credit for attending training unless they are completely free from any distractions and are permitted to fully concentrate on the course material. When DOC learned that Saavedra had enlisted Achon and Treto to perform his data entry duties for him, it determined that these employees had not been able to attend training completely free from distraction. It further determined that Saavedra had knowingly falsified documentation stating that both Achon and Treto had successfully completed training as a reward for their assistance with his duties. Accordingly, DOC terminated Saavedra's employment. Saavedra thereafter filed a Career Service Appeal.

At the evidentiary hearing, both Achon and Treto gave sworn testimony. Achon testified that she was not able to fully concentrate on the training while she was performing data entry duties. By contrast, Treto admitted she watched a training video while she was simultaneously entering training attendee data on DOC's computer training system program; however, she contended that she was not distracted in doing so. Despite Treto's testimony, the Hearing Officer concluded that she did not observe this training video free from all distractions. He further concluded that DOC had established good cause for disciplining Saavedra and issued a recommended order dismissing Saavedra's Career Service Appeal. PERC thereafter adopted the Hearing Officer's recommended order without any changes.

E. Florida's Government in the Sunshine Cases.

1. Sarasota Citizens for Responsible Government, et al. v. City of Sarasota, 48 So.3d 755 (Fla. 2010).

In Citizens, a citizens group known as the "Sarasota Citizens for Responsible Government" ("SCRG"), filed suit against the Sarasota County Board of County Commissioners ("BOCC"), alleging that the BOCC had violated Florida's Government in the Sunshine Law in various ways related to negotiations about bringing a major league baseball team to the County.

In November of 2008, the BOCC instructed the Sarasota County Administrator, James Ley, to initiate negotiations with the Orioles to explore the possibility of having the Orioles conduct spring training in Sarasota. Ley, in turn delegated this task to Deputy County Administrator, David Bullock. In furtherance of the BOCC's directive to begin negotiations with the Orioles, Bullock, retained two consultants with baseball expertise, and consulted with various members of the County staff, including the County's Chief Financial Officer, the County Attorney, the County's Parks and Recreation Director, and a County Planning Coordinator. These consultations were not advertised or otherwise treated as a public meeting. As a result of these negotiations, the County ultimately entered into a memorandum of understanding (MOU) with the Orioles, which was approved by the BOCC at a public meeting conducted on July 22, 2009. The MOU obligated the Orioles, inter alia, to relocate to Sarasota for spring training. The MOU also called for the renovation of a the Ed Smith Stadium Complex, where the Orioles were obligated to conduct spring training activities, as well as the Orioles' minor league spring training facilities.

Seeking to nullify the MOU, the SCRG sued the City of Sarasota, Sarasota County and others, for alleged violations Section 286.011, Florida Statutes. Specifically, the SCRG argued that Bullock and the individuals he consulted with during his negotiations with the Orioles, constituted an advisory board or commission for purposes of the Government in the Sunshine Law, and therefore their discussions should have been properly noticed and conducted in public. The SCRG also argued that private briefings of individual BOCC members by County staff, in advance of the July 22, 2009, public meeting, violated Section 286.011, Florida Statutes. Finally, the SCRG claimed that e-mail discussions between members of the BOCC in advance of the July 22, 2009, public meeting, about matters to be discussed in that public meeting, violated Section 286.011, Florida Statutes.

The Circuit Court, however, disagreed. Following a bench trial, the Circuit Court determined that Bullock and his consultants were merely fact finders who had only gathered information and had not engaged in any decision making activity. Since only boards and commissions with the power to make or recommend decisions are subject to the Government in the Sunshine law, the Circuit Court ruled that the actions of Bullock and his consultants during the so-called negotiations with the Orioles, did not violate the law. Likewise the Circuit Court determined that the individual briefings received by members of the BOCC in advance of the July 22, 2009, public meeting did not constitute a violation of Florida's Government in the Sunshine Law because "public officials may call upon staff members for factual information and advice without being subject to the Sunshine Law's requirements." Lastly, the Circuit Court ruled that while any e-mails between individual members of the BOCC about matters to be decided at the July 22, 2009, public meeting might constitute violations of Section 286.011, Florida Statutes, those violations were nevertheless cured by the BOCC's actions at the July 22, 2009, public meeting wherein it voted to enter into a the MOU. The SCRG appealed the Circuit Court's ruling directly to the Florida Supreme Court.[6] However, the Florida Supreme Court agreed the Circuit Court on all points and affirmed its ruling.

F. Florida's Resign-to-Run Law.

1. Lewis v. City of Tampa, 64 So.3d 36 (Fla. 2d DCA 2011).

The Lewis case involved the question of whether the act of filling out an Oath of Candidate form constituted an automatic resignation from public employment. Marion Lewis was an employee of the City of Tampa Police Department who, in January of 2007, qualified to run for the position of Mayor of the City of Tampa. However, Lewis did not tender his resignation from the Tampa Police Department. Instead, he argued that the "resign-to-run law," codified at Section 99.012, Florida Statutes, did not require him to resign. In response to Lewis' refusal to resign, the City of Tampa filed a civil action for declaratory relief. In its lawsuit, the City raised two arguments: (1) Section 99.012, Florida Statues did require that Lewis must resign from his position with the Tampa Police Department in order to run for Mayor of the City of Tampa; and (2) that the Oath of Candidate that Lewis executed operated by law as an automatic resignation from employment. Both parties filed motions for summary judgment.

The Circuit Court denied the City's motion for summary judgment but ruled in favor of Lewis on the question of whether he was not required to resign in order to run for Mayor. The City appealed these rulings to Florida's Second District Court of Appeal, which reversed the Circuit Court and ruled that Lewis, in order to run for Mayor, was first required to resign from employment by Section 99.012, Florida Statutes. Notably, the Court of Appeal, in its decision, stated that it was not addressing the question of whether the Oath of Candidate form that Lewis filled out constituted an automatic resignation by operation of law. The Court of Appeal then remanded the case to the Circuit Court. Thereafter, the Circuit Court entered a final award of summary judgment in favor of the City. In doing so, the Circuit Court not only concluded that Section 99.012, Florida Statutes compelled Lewis to resign from employment, but that furthermore, his execution of the Oath of Candidate form, by operation of law, acted as his

[6] The published opinion does not explain how the SCRG was able to appeal directly to the Florida Supreme Court.

resignation from office. Lewis thereafter appealed the Circuit Court's award of summary judgment in favor of the City.

The Circuit Court had reached the conclusion that Lewis' execution of the Oath of Candidate form constituted a resignation by operation of law based on an earlier federal court decision, Baker v. Alderman, 766 F. Supp. 1112 (M.D. Fla. 1991). The Baker case had involved a property evaluator for Hillsborough County who had filled out an Oath of Candidate form in order to run for the position of County Property Appraiser. A portion of the Oath of Candidate form this property evaluator signed clearly stated that "he has resigned from office from which he is required to resign pursuant to Section 99.012, Florida Statutes." Based on this sworn affirmation, the District Court, in Baker, concluded that by signing the Oath of Candidate form, the property evaluator had resigned by operation of law.

On appeal in this case, however, the Second District Court of Appeal noted that shortly after Baker was decided, in 1992, the Florida Legislature amended Subsection 99.012(6), Florida Statutes to state that "[t]he name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State." The Court of Appeal thereafter concluded that this statutory amendment was intended to enforce Florida's resign-to-run law by removing a candidate from the ballot, as opposed to automatically dismissing the employee from employment by operation of law. Accordingly, the Court of Appeal determined that the Circuit Court erred by ruling that Lewis had resigned by operation of law when he executed the oath of Candidate form.

IV. Conclusion.

As set forth in the pages above, there were many interesting legal developments in Florida that impacted public sector employers during the 2010-2011 survey period. Although there were no monumental developments to report this year, it is anticipated that a wealth of important and interesting legal developments will continue to arise in Florida's public sector in the coming years.

FLORIDA CIVIL RIGHTS ACT (FCRA) AND FLORIDA COMMISSION ON HUMAN RELATIONS (FCHR)

By

Lawrence F. Kranert Jr., Tallahassee

We're All In It Together

Florida Commission on Human Relations
FCHR
FCRA

FCHR Mission

- **To prevent unlawful discrimination by ensuring people in Florida are treated fairly and given equal access to opportunities in employment, housing and public accommodations**
- **To promote mutual respect among groups through education and partnerships**
- **To endeavor to eliminate discrimination against, and antagonism between religious, racial, and ethnic groups and their members**

12 Commissioners

- **Appointed by the Governor**
- **Serve 4-year terms**
- **Meet quarterly**
- **Diverse Group of Commissioners**: 2 African-Americans (including Chairperson); 1 Native-American; 3 Hispanics; 1 Asian; 2 Caucasians
- **3 vacancies**

CHALLENGES

- **49.5 positions - down from 72 in FY 2006-07**
- **Budget:**
  - **FY 07-08: $5.8 million**
  - **FY 08-09: $5.15 million**
  - **FY 09-10: $4.4 million**
  - **FY 10-11: $4.3 million**
  - **FY 11-12: $3.8 million**

Jurisdictional Areas

EMPLOYMENT LAW
PUBLIC ACCOMMODATIONS
HOUSING
WHISTLEBLOWER

Federal Law

- **Title VII** - Civil Rights Act of 1964—prohibits employers with 15+ employees from discriminating against applicants and employees on the basis of race, color, sex, national origin, religion
- **ADA**--protects qualified individuals with a disability; Title III contains expansive definition of public accommodation
- **ADEA**—protects employees aged 40+
- **Title II** – Civil Rights Act of 1964--guarantees access to and enjoyment of places of public accommodation

Civil Rights "Titles"

Title I

- Barred unequal application of voter registration requirements.

  Did not eliminate literacy tests nor did it address economic retaliation, police repression, or physical violence against nonwhite voters. While the Act did require that voting rules and procedures be applied equally to all races, it failed to challenge the fundamental concept of voter "qualification."

- **Title II**

  Outlawed discrimination in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce; exempted private clubs without defining the term "private."

Title III

- Prohibited state and municipal governments from denying access to public facilities on grounds of race, religion, gender, or ethnicity.

Title IV

- Encouraged the desegregation of public schools and authorized the U.S. Attorney General to file suits to enforce said act.

Civil Rights "Titles"

Title V

Expanded the Civil Rights Commission established by the earlier Civil Rights Act of 1957 with additional powers, rules and procedures.

Title VI

Prevents discrimination by government agencies that receive federal funding. If an agency is found in violation of Title VI, that agency can lose its federal funding.

Title VII

Title VII of the Act, codified as Subchapter VI of Chapter 21 of 42 U.S.C. § 2000e [2] et seq., prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin (see 42 U.S.C. § 2000e-2[291]). Title VII also prohibits discrimination against an individual because of his or her association with another individual of a particular race, color, religion, sex, or national origin. An employer cannot discriminate against a person because of his interracial association with another, such as by an interracial marriage

Civil Rights "Titles"

- Title VIII

  Required compilation of voter-registration and voting data in geographic areas specified by the Commission on Civil Rights.

- Title IX

  Made it easier to move civil rights cases from state courts with segregationist judges and all-white juries to federal court. This was of crucial importance to civil rights activists who could not get a fair trial in state courts.

- Title X

  Established the Community Relations Service, tasked with assisting in community disputes involving claims of discrimination.

Florida Law

- **Chapter 760**, *Florida Statutes* - Florida Civil Rights Act of 1992 [employment, public accommodations; housing]
- Section 413.08, *Florida Statutes;* state version of Title III of the ADA
- Sections 112.3187-112.31895, *Florida Statutes*-Florida Public Whistle-blower's Act
- Home Rule: The state has not pre-empted the authority of local governments to enact anti-discrimination laws
  - Many local ordinances provide greater protection

Chapter 760 Jurisdiction

Patterned after Title VII—in addition to bases protected by federal law, FCRA protects against employment discrimination based on **marital status, age and disability**

Employment Discrimination
FS 760.01-.11

CANNOT

•limit, segregate, or classify employees or applicants that would deprive any individual of opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

•fail or refuse to refer for employment any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.

•exclude or to expel from its membership any individual because of race, color, religion, sex, national origin, age, handicap, or marital status, or limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Employment Discrimination
FS 760.01-.11

- discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or employment in, any program established to provide apprenticeship or other training.
- discriminate against any other person seeking a license, certification, or other credential to engage in a profession or trade, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.
- print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.
- discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.

Exemptions

- Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.
- Observe the terms of a bona fide seniority system, or a system which measures earnings by quantity or quality of production, which is not designed, intended or used to evade the FCRA.
- Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age group.
- Take or fail to take any action on the basis of marital status if that status is prohibited under its antinepotism policy.
- The prohibitions do not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. Nor does it prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.

Employment – Public Accommodation Critical Times

- Claims must be filed with FCHR within 365 days of the act giving rise to the charge, or 300 days with EEOC
- 180 days to investigate the claim
- 60 days after filing to amend without Commission approval
- 35 days after determination Cause / No cause to make election for DOAH
- 90 days after PRO to have Commission enter final Agency Order
- 30 days after Commission Order to Appeal
- 1 year to bring civil action after determination of Cause
- 2 year limitation after filing of charge for back pay

Florida Fair Housing Act [FS 760.20-.37]

CANNOT

- refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.
- discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion.
- make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, national origin, sex, handicap, familial status, or religion or an intention to make any such preference, limitation, or discrimination.
- represent to any person because of race, color, national origin, sex, handicap, familial status, or religion that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- induce any person to sell or rent any dwelling for profit by a representation regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, national origin, sex, handicap, familial status, or religion.

Florida Fair Housing Act [FS 760.20-.37]

- make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter; a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or any person associated with the buyer or renter.
- Refuse to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises or refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.
- to discriminate in land use decisions or in the permitting of development based on race, color, national origin, sex, disability, familial status, religion, or, except as otherwise provided by law, the source of financing of a development or proposed development.

Florida Fair Housing Act [FS 760.20-.37]

- deny a loan or other financial assistance to a person applying for the loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him or her in the fixing of the amount, interest rate, duration, or other term or condition of such loan or other financial assistance, because of the race, color, national origin, sex, handicap, familial status, or religion of such person or of any person associated with him or her in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or because of the race, color, national origin, sex, handicap, familial status, or religion of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.
- discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, national origin, sex, handicap, familial status, or religion.

Exemptions

- Any single-family house sold or rented by its owner, provided the private individual owner does not own more than three single-family houses at any one time. In the case of the sale of a single-family house by a private individual owner who does not reside in such house at the time of the sale or who was not the most recent resident of the house prior to the sale, the exemption granted applies only with respect to one sale within any 24-month period.
- Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his or her residence.
- Covered multifamily dwellings which are intended for first occupancy after March 13, 1991.
- Religious organizations, associations, or societies, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of any dwelling which it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

Exemptions

- A private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.
- Nothing requires any person renting or selling a dwelling constructed for first occupancy before March 13, 1991, to modify, alter, or adjust the dwelling in order to provide physical accessibility except as otherwise required by law.
- No provisions regarding familial status apply with respect to housing for older persons.
  - 55+
  - 62+

Housing Critical Times

- 365 days to file after the act giving rise to the complaint
- 100 days to investigate by FCHR
- Cause determination
  - Attorney General within 20 days after Election of Rights received
    - Circuit Court
    - DOAH
  - FCHR within 30 days of service of the Notice of Determination
  - Civil Action by private Counsel
- Civil actions must be filed within 2 years after the act claimed
- No cause determination 30 days to elect FCHR [may be extended]
- Exhaustion of Administrative remedies NOT required

Chapter 760 Jurisdiction-- Public Accommodations

Chapter 760 prohibits discrimination in places of public accommodation, such as hotels, arenas, theaters and "facilities principally engaged in selling food for consumption on the premises"

"Discrimination"--denial of full and equal enjoyment of the goods, services, facilities and benefits offered by a place of public accommodation includes: physical barriers, slow service, refusal of service, use of amenities, request for photo i.e. or prepayment

Section 509.092, F.S.

- Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, physical disability, or national origin.
- A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. **760.11.**

Section 413.08, F.S.

An individual with a **disability** is entitled to full and equal accommodations, advantages, facilities, and privileges in all public accommodations.

Title II of Civil Rights Act of 1964

- All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.

Public Accommodations
FS 760.08 & 760.01 (11) [verbatim text]

Discrimination in places of public accommodation —

- All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.
- "Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation
  - Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.
  - Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.
  - Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.
  - Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

Title II Public Accommodations consist of:

(1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests. (5 room exception)

(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;

(3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) Any establishment which is physically located within the premises of any establishment otherwise covered by this section.

Title III, ADA

- A public accommodation may not discriminate against an individual or entity because of the known disability of a person with whom the individual or entity is known to associate.

Title III Public Accommodations

- inn, hotel, motel, or other place of lodging, (5 room exception)
- restaurant, bar, or other establishment serving food or drink;
- motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- auditorium, convention center, lecture hall, or other place of public gathering;
- bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

There's More!

- terminal, depot, or other station used for specified public transportation;
- museum, library, gallery, or other place of public display or collection;
- park, zoo, amusement park, or other place of recreation;
- nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation

Chapter 760 Jurisdiction-- Public Whistle-blower's Act

PWA protects employees of State Agencies of the *executive branch:*

- who disclose acts or suspected acts of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty by an employee;
- who are asked to participate in an investigation, hearing or inquiry;
- who refuse to participate in retaliatory action

Whistle Blower Critical times

- 60 days after the event giving rise to the complaint to file with FCHR
- 90 days to investigate the charge and issue a fact finding report
- 15 days after filing to determine reinstatement issue with a 45 day stay of personnel action if appropriate
- 60 days after fact finding to terminate case [time for agency head to accept conclusions of fact finding]

Service & Support animals

- "Service animal" means an animal that is trained to perform tasks for an individual with a disability. The tasks may include, but are not limited to, guiding a person who is visually impaired or blind, alerting a person who is deaf or hard of hearing, pulling a wheelchair, assisting with mobility or balance, alerting and protecting a person who is having a seizure, retrieving objects, or performing other special tasks. A service animal is not a pet.
- An individual with a disability is entitled to full and equal accommodations, advantages, facilities, and privileges in all public accommodations. This section does not require any person, firm, business, or corporation, or any agent thereof, to modify or provide any vehicle, premises, facility, or service to a higher degree of accommodation than is required for a person not so disabled.
- An individual with a disability has the right to be accompanied by a service animal in all areas of a public accommodation that the public or customers are normally permitted to occupy.
- Documentation that the service animal is trained is not a precondition for providing service to an individual accompanied by a service animal. A public accommodation may ask if an animal is a service animal or what tasks the animal has been trained to perform in order to determine the difference between a service animal and a pet.

Emotional Support Animals

- Trained to perform a specific task for the benefit of an individual with psychiatric, cognitive or mental disabilities
- Relieve stress, depression, anxiety and reduction of stress induced pain in situations affected by stress
- Generally waivers are required in 'no pet' housing
- Animal must be necessary to ameliorate and help with certain conditions covered under the DSM4 or ICD9
- No details of the condition need be disclosed
- Documentation of the need may come from:
  - Psychiatrists
  - Licensed clinical psychologists
  - Licensed clinical social workers
  - Licensed marriage and family therapists

Horse

DOG

Service Animal

Cases of Interest

- Staub vs. Proctor Hospital
  - Cat's paw
  - adverse action influenced, but not made by supervisor
  - Lack of reasonable investigation
- Thompson vs. North American Stainless, LP
  - Anti-retaliation
  - Zone of interests

fin

AN OVERVIEW OF THE IMPASSE RESOLUTION PROCESS

By

Stephen A. Meck, Tallahassee

Questions Concerning Impasse Resolution

By Stephen A. Meck, General Counsel
Public Employees Relations Commission

1. When does impasse occur?

Section 447.403(1), Florida Statutes (2010):

If, after a reasonable period of negotiation concerning the terms and conditions of employment to be incorporated in a collective bargaining agreement, a dispute exists between a public employer and a bargaining agent, an impasse shall be deemed to have occurred when one of the parties so declares in writing to the other party and to the commission.

* * * *

Cases

IBPO, Local 621 v. City of Hollywood, 8 FPER ¶ 13334 (1982).

Hollywood Fire Fighters, Local 1375, IAFF, AFL-CIO v. City of Hollywood, 8 FPER ¶ 13333 (1982).

2. What do the parties do then?

(a) Mediation.

Section 447.403(1), Florida Statutes (2010):

... When an impasse occurs, the public employer or the bargaining agent, or both parties acting jointly, may appoint, or secure the appointment of, a mediator to assist in the resolution of the impasse. If the Governor is the public employer, no mediator shall be appointed.

(b) Appoint a Special Magistrate or Waive and proceed directly to the Legislative Body.

Section 447.403(2)(a), Florida Statutes (2010):

If no mediator is appointed, or upon the request of either party, the commission shall appoint, and submit all unresolved issues to, a special magistrate acceptable to both parties. If the parties are unable to agree on the appointment of a special magistrate, the commission shall appoint, in its discretion, a qualified special magistrate. However, if the parties agree in writing to waive the appointment of a special magistrate, the parties may

proceed directly to resolution of the impasse by the legislative body pursuant to paragraph (4)(d). Nothing in this section precludes the parties from using the services of a mediator at any time during the conduct of collective bargaining.

(c) Appointment of a Special Magistrate.

Florida Administrative Code Rule 60CC-3.004:

Appointment of Special Magistrate.

(1) When negotiations reach impasse and no mediator has been appointed, or upon the request of either party, the Commission shall, through the Chairman, provide for the appointment of a special magistrate.

(2) The parties may agree to the appointment of an individual who will be appointed by the Chairman if the Chairman finds that such individual is qualified pursuant to Rule 60CC-3.004, F.A.C.

(3) If the parties do not jointly request the appointment of a specific individual, the Chairman or his designated agent shall furnish the names and biographies of seven individuals listed on the Special Magistrate Roster.

(a) Within 20 days after the date of the letter transmitting the list of choices, each party shall notify the Chairman in writing of its rejection of three choices or its preference for one choice.

(b) Where the parties both indicate a preference for the same choice, that individual shall be appointed by the Chairman.

(c) Where the parties both reject the same choice, the Chairman shall appoint one of the remaining individuals.

(4) If the parties are unable to agree upon an acceptable special magistrate from the panel of three furnished by the Chairman or his designated agent, the Chairman shall appoint a special magistrate, at his discretion, from the Special Magistrate Roster.

Questions Concerning Impasse Resolution

By Stephen A. Meck, General Counsel
Public Employees Relations Commission

3. Can the parties continue to negotiate?

Cases

(a) IBPO, Local 621 v. City of Hollywood, 8 FPER ¶ 13334 (1982).

(b) Hollywood Fire Fighters, Local 1375, IAFF, AFL-CIO v. City of Hollywood, 8 FPER ¶ 13333 (1982).

4. What is considered by the Special Magistrate?

Florida Administrative Code Rule 60CC-3.005:

Issues Before Special Magistrate.

Within ten (10) days after the date of appointment of a special magistrate, each party shall serve upon the special magistrate a written list of issues at impasse, simultaneously serving a copy of the list upon each other party.

Section 447.403(3), Florida Statutes:

The special magistrate shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on any and all unresolved contract issues. The hearings shall be held at times, dates, and places to be established by the special magistrate in accordance with rules promulgated by the commission. The special magistrate shall be empowered to administer oaths and issue subpoenas on behalf of the parties to the dispute or on his or her own behalf.

* * * *

Questions Concerning Impasse Resolution

By Stephen A. Meck, General Counsel
Public Employees Relations Commission

Section 447.405, Florida Statutes:

Factors to be considered by the special magistrate.

- The special magistrate shall conduct the hearings and render recommended decisions with the objective of achieving a prompt, peaceful, and just settlement of disputes between the public employee organizations and the public employers. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:

(1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.

(2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.

(3) The interest and welfare of the public.

(4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:

(a) Hazards of employment.

(b) Physical qualifications.

(c) Educational qualifications.

(d) Intellectual qualifications.

(e) Job training and skills.

(f) Retirement plans.

(g) Sick leave.

(h) Job security.

(5) Availability of funds.

Section 447.409, Florida Statutes (2010):

Records.

- All records that are relevant to, or have a bearing upon, any issue or issues raised by the proceedings conducted by the special magistrate shall be made available to the special magistrate by a request in writing to any of the parties to the impasse proceedings. Notice of such request must be furnished to all parties. Any such records that are made available to the special magistrate must also be made available to any other party to the impasse proceedings, upon written request.

Florida Administrative Code Rule 60CC-3.006:

Proceeding Before Special Magistrate.

(1) Upon appointment by the Commission, through the Chairman, the special magistrate shall set, and notify all parties of, the time and place of the hearing(s). In appropriate circumstances, the special magistrate may, after conferring with the mediator, defer conducting hearings, pending satisfactory resolution of the impasse, for a reasonable length of time.

(2) All motions, objections, or other requests for ruling shall be made to the special magistrate either in writing, with copies thereof being simultaneously served upon all other parties to the hearing and proof of such service being given to the special magistrate, or orally during a hearing. The special magistrate shall permit such response to a motion, objection or other request for ruling as he believes is reasonable and just.

(3) Any party directly involved in the proceedings shall have the right to appear at the hearing in person, by counsel, or by other representative, and any such party and the special magistrate may call, examine, and cross-examine witnesses, and offer documentary and other evidence for introduction into the record. Witnesses shall be examined orally under oath. Stipulations of fact may be introduced in evidence with respect to any issue. Compliance with the rules of evidence shall not be required.

(4) The special magistrate may issue subpoenas when requested by a party, or upon his own motion.

(5) In the event of any misconduct at any hearing before a special magistrate, the special magistrate shall submit an affidavit describing such misconduct for action by the Commission.

(6) The special magistrate may permit the submission of a written memorandum in support of a party's position after the close of the hearing upon such conditions as he may reasonably impose, provided that the request for permission to file such post-hearing memorandum was made before the close of the hearing.

5. What happens after the hearing?

Section 447.403(3), Florida Statutes:

… Within 15 calendar days after the close of the final hearing, the special magistrate shall transmit his or her recommended decision to the commission and to the representatives of both parties by registered mail, return receipt requested. Such recommended decision shall be discussed by the parties, and each recommendation of the special magistrate shall be deemed approved by both parties unless specifically rejected by either party by written notice filed with the commission within 20 calendar days after the date the party received the special magistrate's recommended decision. The written notice shall include a statement of the cause for each rejection and shall be served upon the other party.

(a) Insulated Period.

Cases

Boca Raton Fire Fighters, Local 1560 v. City of Boca Raton, 4 FPER ¶ 4040 at 88 (1978).

Jacksonville Association of Fire Fighters, IAFF, Local 122 v. City of Jacksonville, 15 FPER ¶ 20327 at 676-78, 681 (1989).

6. How is an impasse legislatively resolved?

Section 447.403(4), Florida Statutes (2010):

(4) If either the public employer or the employee organization does not accept, in whole or in part, the recommended decision of the special magistrate:

(a) The chief executive officer of the governmental entity involved shall, within 10 days after rejection of a recommendation of the special magistrate, submit to the legislative body of the governmental entity involved a copy of the findings of fact and recommended decision of the special magistrate, together with the chief executive officer's recommendations for settling the disputed impasse issues. The chief executive officer shall also transmit his or her recommendations to the employee organization;

(b) The employee organization shall submit its recommendations for settling the disputed impasse issues to such legislative body and to the chief executive officer;

(c) The legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the rejected recommendations of the special magistrate;

(d) Thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues; and

(e) Following the resolution of the disputed impasse issues by the legislative body, the parties shall reduce to writing an agreement which includes those issues agreed to by the parties and those disputed impasse issues resolved by the legislative body's action taken pursuant to paragraph (d). The agreement shall be signed by the chief executive officer and the bargaining agent and shall be submitted to the public employer and to the public employees who are members of the bargaining unit for ratification. If such agreement is not ratified by all parties, pursuant to the provisions of s. 447.309, the legislative body's action taken pursuant to the provisions of paragraph (d) shall take effect as of the date of such legislative body's action for the remainder of the first fiscal year which was the subject of negotiations; however, the legislative body's action shall not take effect with respect to those disputed impasse issues which establish the language of contractual provisions which could have no effect in the absence of a ratified agreement, including, but not limited to, preambles, recognition clauses, and duration clauses.

Section 447.309(1), Florida Statutes (2010):

Collective bargaining; approval or rejection.

(1) … Any collective bargaining agreement reached by the negotiators shall be reduced to writing, and such agreement shall be signed by the chief executive officer and the bargaining agent. Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3). However, with respect to statewide bargaining units, any agreement signed by the Governor and the bargaining agent for such a unit shall not be binding until approved by the public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3).

Questions Concerning Impasse Resolution

By Stephen A. Meck, General Counsel
Public Employees Relations Commission

Section 447.309(4), Florida Statutes (2010):

(4) If the agreement is not ratified by the public employer or is not approved by a majority vote of employees voting in the unit, in accordance with procedures adopted by the commission, the agreement shall be returned to the chief executive officer and the employee organization for further negotiations.

Cases

(a) Boca Raton Fire Fighters, Local 1560 v. City of Boca Raton, 4 FPER ¶ 4040 at 88 (1978).

(b) Hollywood Fire Fighters, Local 1375 v. City of Hollywood, 11 FPER ¶ 16001 (1984), rev'd on other grounds, 476 So. 2d 1340 (Fla. 1st DCA 1985).

(c) Volusia County Fire Fighters Association v. Volusia County, 32 FPER ¶ 89 (2006).

(d) Hollywood v. Hollywood Municipal Employees, 468 So. 2d 1036, 1038-39 (Fla. 1st DCA 1985).

(e) CWA v. City of Gainesville, 20 FPER ¶ 25226 (1994)

(f) ATU v. Sarasota County, CA-2010-069, CA-2010-109, and CB-2010-028.

(g) Hillsborough County Police Benevolent Association v. City of New Port Richey, 10 FPER ¶ 15191 (1984).

Special Warning: Bargaining Considerations

(a) It may not be advisable to have public officials participating in negotiations. See In re Village of North Palm Beach, 17 FPER ¶ 22131 (1991).

(b) An Attorney General opinion has critiqued disclosure of information discussed in shade meetings conducted pursuant to Section 447.605, Florida Statutes. See AGO 2003-09.

THE SPECIAL MAGISTRATE PROCESS

By

Thomas W. Young III, Port Charlotte

THE SPECIAL MAGISTRATE PROCESS
(What works and what doesn't)

I. Introduction – anticipated outcomes of today's presentation

A. Understanding the process

B. Improving the effectiveness of advocates' presentations to the special magistrate

C. Accepting reasonable expectations of advocates and special magistrates

II. Declaring Impasse

A. Pursuant to §447.403(1), Florida Statutes, impasse may be declared after "reasonable "period of negotiations.

B. Deadlock is not required.

C. Impasse is "official" when declared in writing to other party and the Commission.

III. Special Magistrate or not?

A. Mediation prior to special magistrate is optional.

B. Special magistrate process is mandatory unless waived in writing.

C. Pros and cons of bypassing

IV. Selecting the Special Magistrate

A. Per Rule 60CC- 3.003, PERC maintains the roster; qualifications are indicated; 40 magistrates on the roster.

B. Rule 60CC-3.004 governs appointment of Special Magistrate. Parties may agree and jointly request a special magistrate, and PERC will appoint if the individual selected is deemed qualified.

C. If no such request, PERC will provide list of 7. Within 20 days of receipt of list, each party shall notify PERC of three rejections, or one preference .

D. If the parties are unable to agree on special magistrate, PERC Chair appoints from the roster.

V. Pre-Hearing

A. Per Rule 60CC-3.005., within 10 days after the date of appointment of a special magistrate, each party shall serve upon the special magistrate and upon each other party a written list of issues at impasse.

B. Under §447.403(3)and Rule 60CC-3.006, the special magistrate sets hearing date, place and time and notifies all parties.

VI. The Hearing

A. Under Rule 60CC-3.006, special magistrate has authority to hear motions, objections, or other requests for ruling which must be made in writing prior to hearing ,or orally at hearing.

B. Special magistrate has subpoena power.

C. Each party has right to appear at hearing in person, by counsel, or by other representative.

D. Any party and the special magistrate may call, examine, and cross-examine witnesses, and offer documentary and other evidence for introduction into the record.

E. Witnesses are examined orally under oath.

F. Party declaring impasse goes first unless parties agree otherwise.

G. Stipulations of fact may be introduced in evidence with respect to any issue.

H. Compliance with the rules of evidence is not required.

I. Under §447.409, special magistrate has independent authority to request records relevant to the dispute.

a. Request to be in writing to the party from whom records sought and notice of such request must be furnished to all parties.

b. Any such records that are made available to the special magistrate must also be made available to any other party to the impasse proceedings, upon written request.

VII. Presenting the case

A. Pursuant to 447.405, the SM‘s recommendations shall be made with the objective of achieving a “just” settlement of the disputes.

B. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:

1. Comparison of the annual employment income of public employees in question with the annual income maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.
2. Comparison of annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.
3. The interest and welfare of the public.
4. Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:
    - Hazards of employment.
    - Physical qualifications.
    - Educational qualifications.
    - Intellectual qualifications.
    - Job training and skills.
    - Retirement plans.
    - Sick leave.
    - Job security.
5. Availability of funds

VIII. Other possible issues at hearing

A. Mandatory v. permissive subjects

B. Whether "financial urgency" exists

IX. Briefs

A. Under 60CC-3.006, special magistrate may permit the submission of a written memorandum in support of a party's position after the close of the hearing upon such conditions as he or she may reasonably impose, BUT request for permission to file post-hearing memorandum must be made before the close of the hearing.

B. File a brief ("written memorandum") or not?

X. The recommendation

A. By statute and rule, recommended decision is to be issued to parties and Commission within 15 days after the close of the hearing.

B. Rule 60CC-3.007 provides that special magistrate will review and consider all of the relevant evidence which has been presented during the hearing(s), and any

oral or written arguments provided by the parties, and prepare a recommended decision.

C. Decision limited to only that evidence presented at the hearing(s) in light of factors in § 447.405.

D. Recommended decision shall include findings of fact and recommendations for settlement of each issue in dispute.

XI. Legislative Body hearing

A. Pursuant to 447.403(3), each recommendation shall be deemed approved unless it is specifically rejected by written notice filed with the Commission. The written notice shall contain a statement of the cause for each rejection.

B. Within 10 days after rejection, the CEO shall transmit a copy of the SM's recommendation to the legislative body.

C. Both parties shall also file with the legislative body their recommendations for settling the disputed impasse issues.

D. The legislative body shall "forthwith" conduct a public hearing at which the parties shall be required to explain their positions.

E. The legislative body shall take such action as it deems to be <u>in the public interest, including the interest of the employees</u>

XII. Reasonable expectations – Advocates

A. The SM should not simply "split the baby" – he should try to solve the problem.

B. The recommendations should make sense, and offer insightful analysis that demonstrates an understanding of the parties' positions and the realities of bargaining in Florida public sector.

C. The SM should aggressively discourage delay of the proceedings at all stages.

XIII. Reasonable expectations – Special Magistrate

A. Professional behavior

B. Organized presentation

C. No surprises or "ambushes"

D. Well organized and well thought out briefs

XIV. Closing Comments

I strongly believe in the collective bargaining process. Despite recent attempts in this and other states to diminish or eliminate collective bargaining for public employees, I continue to believe that collective bargaining can and should be part of the solution, not part of the problem.

I believe that the special magistrate has the potential to add value to the process by providing a third perspective to the resolution of collective bargaining disputes – ideally, this perspective should be buttressed by balanced reasoning resulting in a recommendation that is fair and just for the employees, is fiscally responsible, and does not result in a diminishing of the services provided to the citizens represented by the public employer.

The process is best served by focused presentations and solution-oriented recommendations. All of us have a part of that.

THE SPECIAL MAGISTRATE PROCESS

Thomas W. Young, III
37th Annual PELR Forum Lake Buena Vista, Florida
September 23, 2011

I. Introduction – Anticipated Outcomes

- A. Understanding the process
- B. Improving the effectiveness of their presentations to the special magistrate
- C. Awareness of reasonable expectations of advocates and special magistrates

II. Declaring Impasse

- Pursuant to §447.403(1), Florida Statutes, Impasse may be declared after "reasonable "period of negotiations
- Deadlock is not required
- Impasse is "official" when declared in writing to other party and the Commission

III. Special Magistrate or not?

- Mediation prior to special magistrate is optional
- Special magistrate process is mandatory unless waived in writing (NOTE: waiver of special magistrate process triggers "insulated period")
- Pros and cons of bypassing

IV. Selecting a Special Magistrate

- Per Rule 60CC- 3.003, PERC maintains the roster; qualifications are indicated; 40 magistrates on the roster
- Rule 60CC-3.004 governs appointment of Special Magistrate. Parties may agree and jointly request special magistrate and PERC will appoint if deemed qualified.
- I f no such request, PERC will provide list of 7. Within 20 days of receipt of list, each party shall notify PERC of three rejections or one preference .
- If the parties are unable to agree on special magistrate, PERC Chair appoints from the roster

V. Pre-hearing

- Per Rule 60CC-3.005., within 10 days after the date of appointment of a special magistrate, each party shall serve upon the special magistrate and upon each other party a written list of issues at impasse.
- Under §447.403(3)and Rule 60CC-3.006, the special magistrate sets hearing date, place and time and notifies all parties

VI. The Hearing

- Under Rule 60CC-3.006, special magistrate has authority to hear motions, objections, or other requests for ruling which must be made in writing prior to hearing ,or orally at hearing
- Special magistrate has subpoena power
- Each party has right to appear at hearing in person, by counsel, or by other representative
- Any party and the special magistrate may call, examine, and cross-examine witnesses, and offer documentary and other evidence for introduction into the record
- Witnesses are examined orally under oath
- Party declaring impasse goes first unless parties agree otherwise

The Hearing (cont.)

- Stipulations of fact may be introduced in evidence with respect to any issue
- Compliance with the rules of evidence is not required.
- Under §447.409, special magistrate has independent authority to request records relevant to the dispute. Request to be in writing to the party from whom records sought and notice of such request must be furnished to all parties. Any such records that are made available to the special magistrate must also be made available to any other party to the impasse proceedings, upon written request.
- NOTE: misconduct during hearing is reportable by special magistrate to the Commission by affidavit

VII. Presenting the Case

- Pursuant to 447.405, the SM 's recommendations shall be made with the objective of achieving a "just" settlement of the disputes. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:
  - (1) Comparison of the annual employment income of public employees in question with the annual income maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.
  - (2) Comparison of annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.
  - (3) The interest and welfare of the public.

Presenting the Case (cont.)

- (4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:
  - (a) Hazards of employment.
  - (b) Physical qualifications.
  - (c) Educational qualifications.
  - (d) Intellectual qualifications.
  - (e) Job training and skills.
  - (f) Retirement plans.
  - (g) Sick leave.
  - (h) Job security.
- (5) Availability of funds

VIII. Other Issues

- Mandatory v. permissive subjects
- Whether "financial urgency" exists

The remedy concerning these issues is at PERC through ULP. Be prepared for a possible stay if ULP filed (less likely on financial urgency cases)

IX. Briefs (Written Memoranda)

- Under 60CC-3.006, special magistrate may permit the submission of a written memorandum in support of a party's position after the close of the hearing upon such conditions as he or she may reasonably impose, BUT request for permission to file post-hearing memorandum must be made before the close of the hearing
- File a brief ("written memorandum") or not?

X. The Recommendation

- By statute and rule, recommended decision is to be issued to parties and Commission within 15 days after the close of the hearing
- Rule 60CC-3.007 provides that special magistrate will review and consider all of the relevant evidence which has been presented during the hearing(s) and any oral or written argument provided by the parties, and prepare a recommended decision
- Decision limited to only that evidence presented at the hearing(s) in light of factors in § 447.405
- Recommended decision shall include findings of fact and recommendations for settlement of each issue in dispute

XI. Legislative Body Hearing

- Pursuant to 447.403(3),each recommendation shall be deemed approved unless it is specifically rejected by written notice filed with the Commission. The written notice shall contain a statement of the cause for each rejection.
- Within 10 days after rejection, the CEO shall transmit a copy of the SM's recommendation to the legislative body.

LEGISLATIVE BODY (Continued)

- Both parties shall also file with the legislative body their recommendations for settling the disputed impasse issues.
- The legislative body shall "forthwith" conduct a public hearing at which the parties shall be required to explain their positions.
- The legislative body shall take such action as it deems to be in the public interest, including the interest of the employees

XII. Reasonable Expectations - Advocates

A. The SM should not simply "split the baby" – he should try to solve the problem.
B. SM should not act as a mediator unless specifically invited to do so by both parties.
C. The recommendations should make sense, and offer insightful analysis that demonstrates an understanding of the parties' positions and the realities of bargaining in Florida public sector.
D. The SM should aggressively discourage delay of the proceedings at all stages.

XIII. Reasonable Expectations – Special Magistrate

- A. Professional behavior
- B. Organized presentation
- C. No surprises or "ambushes"
- D. Well organized and well thought out briefs

XIV. Closing Comments

- I strongly believe in the collective bargaining process. Despite recent attempts in this and other states to diminish or eliminate collective bargaining for public employees, I continue to believe that collective bargaining can and should be part of the solution, not part of he problem.

CLOSING COMMENTS (Continued)

- I believe that the special magistrate has the potential to add value to the process by providing a third perspective to the resolution of collective bargaining disputes – ideally, this perspective should be buttressed by balanced reasoning resulting in a recommendation that is fair and just for the employees, is fiscally responsible, and does not result in a diminishing of the services provided to the citizens represented by the public employer .

CLOSING COMMENTS (Continued)

(In other words, the special magistrate process should not be simply another hoop to jump thru to get to the legislative body.)

- The process is best served by focused presentations and solution-oriented recommendations. All of us have a part of that.

Speaker Information

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SENATE BILL 88 AND OTHER LEGISLATIVE ACTIONS - HOW DO THESE AFFECT COLLECTIVE BARGAINING

By

Thomas M. Gonzalez, Tampa

Senate Bill 88 and Other Legislative Actions – What Do They Mean for Collective Bargaining

Thomas M. Gonzalez
Thompson, Sizemore, Gonzalez & Hearing
Tampa, Florida

I. Bills Affecting Collective Bargaining that Passed in 2011

A. Senate Bill 88 (Public Employee Compensation)

i. Examples of bonuses or severance pay which led Senate Bill 88

1. Former Okaloosa County Sheriff Charlie Morris paid bonuses in excess of $1 million over a five-year period to select employees.[1] Morris is serving federal prison time for receiving kickbacks from the bonuses.

2. Former Hillsborough County Administrator Pat Bean's contract provided her one year salary and benefits, which could total $455,000, if she was fired for a reason short of committing a crime.[2]

3. Former Miami-Dade County manager George Burress received a severance package of one year base salary of $326,340, deferred compensation of $22,000, unused sick time of $79,892, accumulated vacation pay of $78,777, an expense allowance of $3,000 a month and a car allowance of $600 a month.[3]

ii. SB 88, signed into law on June 17, 2011, limits the amount of severance pay and/or bonuses a public employer may pay a public employee. The law amends § 215.425, Florida Statutes, by: deleting a provision which previously allowed counties, municipalities, or special districts to give bonuses as long as there were policies in place; creating requirements for policies, ordinances, rules, or resolutions designed to implement a bonus scheme; prohibiting governmental units from contracting to give severance pay to an officer, agent, employee or contractor, absent certain exceptions; defining "severance pay"; and prohibiting confidentially provisions in contracts or agreements which involve extra compensation. The law also amends § 125.01, Florida Statutes; deletes a provision in § 166.021, Florida Statutes; deletes a provision in § 112.061, Florida Statutes; and repeals § 373.0795, Florida Statutes.

iii. Florida Statutes prior to SB 88 (provisions deleted by SB 88 are italicized)

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[1] Tom McLaughlin, *State regulates bonuses for public employees after Okaloosa County controversy*, NEWSHERALD, June 23, 2011, http://www.newsherald.com/articles/state-94710-gaetz-okaloosa.html.
[2] Bill Varian, *Poking holes in golden parachutes*, ST. PETERSBURG TIMES, May 15, 2011, http://www.tampabay.com/news/politics/poking-holes-in-golden-parachutes/1169748.
[3] Martha Brannigan & Matthew Haggman, *Outgoing county manager gets pay and benefits package*, THE MIAMI HERALD, March 18, 2011, http://www.miamiherald.com/2011/03/18/2122653/outgoing-county-manager-gets-pay.html.

1. Florida Statutes § 215.425
    a. No extra compensation shall be made to any officer, agent, employee or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature. However, when adopting salary schedules for a fiscal year, a district school board or community college district board of trustees may apply the schedule for payment of all services rendered subsequent to July 1 of that fiscal year.
    b. *The provisions of this section do not apply to Extra compensation given to state employees who are included within the senior management group pursuant to rules adopted by the Department of Management Services; to extra compensation given to county, municipal, or special district employees pursuant to policies adopted by county or municipal ordinances or resolutions of governing boards of special districts or to employees of the clerk of the circuit court pursuant to written policy of the clerk; or to* a clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49.

2. Florida Statutes § 125.01(1)(bb), and § 166.021(7), which provided the legislative and governing body of a county and the governing body of the municipality, respectively, the power to:
    a. *Notwithstanding the prohibition against extra compensation set forth in §215.425, provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years*.

3. Florida Statutes § 110.1245(2)
    a. The Department of Management Services (DMS) and other state agencies paying bonuses with funds specifically appropriated by the Florida Legislature for bonuses must develop a plan for the awarding lump-sum bonuses. The plan must include at a minimum:
        - A statement that the bonuses are subject to specific appropriation by the Florida Legislature
        - Requirement that the employee be employed prior to July 1 and continuously be employed through the date of the bonus distribution
        - The employee cannot have been on leave without pay consecutively for more than 6 months during the year
        - The employee cannot have received disciplinary action during the period of July 1 through the date of the bonus distribution
        - The employee must have demonstrated a commitment to the agency mission
        - The employee must demonstrate initiative to work and exceeded job expectations

- The employee must have displayed agency values of fairness, cooperation, respect, commitment, honesty, excellence and teamwork.
- There must be a periodic evaluation of the employee's performance
- There must be a process for peer input that is fair, respectful to employees and has an affect on the outcome of the bonus distribution
- There must be a division of the agency by work unit for the purpose of peer input and bonus distribution
- A limitation on bonus distributions equal to 35 percent of the agency's total authorized positions. The Office of Policy and Budget in the Executive Office of the Governor may waive the requirement if there is a showing of exceptional circumstances

b. This section was not changed by SB 88.

iv. Case law and Attorney General Opinions Interpreting § 215.425, Florida Statutes, prior to SB 88

1. No violation of § 215.425, Fla. Stat.

a. Brown v. City of Jacksonville Beach, 696 So. 2d 946 (Fla. 1st DCA 1997)
- Appellant, the department head of a municipal government, entered into a retirement contract for extra retirement income, essentially amending his previous employment contract, while he was still employed and not receiving retirement benefits. Id. at 946, n.1, n.2.
- Court reversed summary judgment and found the Appellant's retirement contract did not violate § 215.425, Florida Statutes, because the Appellant was still rendering services on the date the parties executed the retirement contract. Id. at 946-47.

b. AGO 2009-03 (2009), Payment of leave as wages; payment to beneficiaries
- Stating municipalities would have the authority to adopt a program under its constitutional home rule powers for payment of accrued annual and sick leave to the beneficiaries of a deceased municipality employee without violating § 215.425, Florida Statutes.

c. AGO 2008-09 (2008), Municipalities, compensation in lieu of group insurance
- Finding the city would be permitted to adopt an ordinance allowing its elective officials and employees to opt out of the city's group health insurance plan and receive compensation in the amount of unused premium without violating § 215.425, Florida Statutes.
- Additionally, unless the city's charter or personnel rules prohibited otherwise, the city may limit the optional program to its elected officials

d. AGO 97-21 (1997), Use of leave for resignation or early retirement
- Finding § 215.425, Florida Statutes, would not prevent a school district from making a lump-sum payment as part of an alteration to the current

pension plan to provide an early retirement option to employees who are not receiving retirement benefits at the time.

e. AGO 75-279 (1975), Public Employees Collective Bargaining
   - Finding a collective bargaining agreement providing a salary increase, which was entered into, ratified, and approved two months after the start of the budgeted school year, did not violate § 215.425, Florida Statutes, and the employee could either receive the contracted for monthly salary increase with a supplement for the first two months in the first paycheck after the approval and ratification or receive pro rata monthly salary increase for the remaining ten months.

2. Violation of § 215.425, Fla. Stat.

   a. AGO 2007-26 (2007), Property Appraiser, severance pay
      - Stating in the absence of a county ordinance a property appraiser may not make a severance payment in lieu of notice.
      - The opinion, however, stated that if the property appraiser was authorized to adopt policies regarding salary and compensation, the property appraiser could adopt policy regarding such payments if the policy was prospective in application. Additionally, the policy would have to be for current employees and part of the compensation benefits earned after the policy was adopted.

   b. AGO 92-49 (1992), Retired Police Officer/cost of living adjustment
      - Concluding § 215.425, Florida Statutes, prohibits the board of trustees for the pension board from granting a cost of living allowance to a retiree receiving benefits from the pension fund.

   c. AGO 91-95 (1991), Tax collectors, payment of severance pay
      - Finding in the absence of a statute, collective bargaining agreement, or personnel policy or regulation authorizing such payments, severance payments in lieu of notice, where the public employer wanted to immediately discharge the employee but keep the employee on the payroll for the normal term after notice of termination, violated § 215.425, Florida Statutes.
      - Finding a bonus to an employee for services which had already been performed violates § 215.425, Florida Statutes, unless there is a preexisting contract with a provision that made this payment part of the employee's salary.

   d. AGO 91-37 (1991), Retired employee, payment of unused sick leave
      - Finding a city commissioner was not permitted to pay a retiree the monetary equivalent of his unused sick leave in excess of the city system which only allowed payment for 120 hours of leave.

v. Florida Public Employees Relations Commission opinions interpreting former § 215.425, Florida Statutes

1. Alachua County, 28 FPER ¶ 33158 (2002)
   a. County fire chiefs, captains and bureau chiefs were paid on a salary basis regardless of the number of hours worked. The fire department had an adjusted hours leave practice ("AHLP"), which existed for twenty-one years, where the fire chiefs, captains and bureau chiefs accumulated hour-for-hour leave time for work performed in excess of their normally scheduled hours.
   b. In the first negotiation session, the district chief proposed to incorporate the AHLP into the CBA. In the second negotiation, the deputy county manager told the union representative no authority existed for AHLP and that it must be stopped immediately. A legal memorandum was issued to all county employees stating the practice of tracking hours and taking time off from work was falsification of records, and the accumulation of AHLP was stopped. The union objected to the memorandum and demanded bargaining.
   c. The County argued it was within its rights to unilaterally eliminate the AHLP to conform with County policy because § 215.425, Florida Statutes, prohibits payment of extra compensation absent a properly promulgate policy or ordinance.
   d. PERC stated the AGO opinions cited by the County did not address the precise issue at stake which was whether § 215.425 prohibited bargaining unit employees from accumulating and using adjusted leave.
   e. PERC found the employees who utilized AHLP did not receive additional pay or compensation, but rather received value for the hours they worked in excess of their normal schedule by taking time off to offset those hours. Although this was a benefit, it was not "extra compensation" and therefore the County could not unilaterally eliminate the AHLP to conform with County policy.

2. Manatee County, 23 FPER ¶ 28192 (1997)
   a. Union alleged the County committed an ULP by unilaterally altering the manner in which the sick, vacation and compensatory time was deducted from the employee's leave back.
   b. The Hearing Officer rejected the County's argument that the hour for hour deduction from the employee's leave bank was extra compensation prohibited by § 215.425.
   c. Even if it was in violation of existing law and the County had to take immediate action to bring it in conformance with the law, it would still have to notify the Union and initiate bargaining. Accordingly, the County committed a ULP by unilaterally changing the manner in which it deducted the annual, sick and compensatory hours from the employee's leave bank.

vi. Legislative History of SB 88

1. Various attorney general opinions interpreting § 215.425, Florida Statutes, were reviewed and the legislature found the key issue was "whether the benefits were benefits that were anticipated as part of the initial contract or hiring policy or whether they were additional payment for services over and above that fixed by contract or law when the services were rendered." BILL ANALYSIS AND FISCAL IMPACT STATEMENT (April 14, 2011). Benefits that were anticipated during the hiring process were part of the employee's salary or payments for services and therefore did not violate § 215.425. (*Id*.) Additional benefits not anticipated when the employee was hired, however, were found to be extra compensation prohibited by § 215.425. (*Id*.)

2. In the Effect of Proposed Changes section, the legislature states SB 88 "deletes current provisions allowing counties, municipalities, or special districts to give bonuses as long as they have policies in place" and "creates requirements for any policy, ordinance, rule, or resolution designed to implement a bonus scheme." (*Id*.)

vii. Florida Statutes § 215.425, as amended, Extra compensation claims prohibited; bonuses; severance pay

1. (1) No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature. However, when adopting salary schedules for a fiscal year, a district school board or community college district board of trustees may apply the schedule for payment of all services rendered subsequent to July 1 of that fiscal year.
2. (2) This section does not apply to:
    a. (a) A bonus or severance pay that is paid wholly from nontax revenues and nonstate-appropriated funds, the payment and receipt of which does not otherwise violate part III of chapter 112, and which is paid to an officer, agent, employee, or contractor of a public hospital that is operated by a county or a special district; or
    b. (b) A clothing and maintenance allowance given to plainclothes deputies pursuant to § 30.49
3. (3) Any policy, ordinance, rule, or resolution designed to implement a bonus scheme must:
    a. (a) Base the award of a bonus on work performance;
    b. (b) Describe the performance standards and evaluation process by which a bonus will be awarded;
    c. (c) Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
    d. (d) Consider all employees for the bonus.

4. (4)
    a. (a) On or after July 1, 2011, a unit of government that enters into a contract or employment agreement, that contains a provision for severance pay with an officer, agent, employee, or contractor must include the following provisions in the contract:
        - 1. A requirement that severance pay provided may not exceed an amount greater than 20 weeks of compensation.
        - 2. A prohibition of provision of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in §443.036(29), by the unit of government
    b. (b) On or after July 1, 2011, an officer, agent, employee, or contractor may receive severance pay that is not provided for in a contract or employment agreement if the severance pay represents the settlement of an employment dispute. Such severance pay may not exceed an amount greater than 6 weeks of compensation. The settlement may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement.
    c. (c) This subsection does not create an entitlement to severance pay in the absence of its authorization.
    d. (d) As used in this subsection, the term "severance pay" means the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated. The term does not include compensation for:
        - 1. Earned and accrued annual, sick, compensatory, or administrative leave;
        - 2. Early retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112; or
        - 3. Any subsidy for the cost of a group insurance plan available to an employee upon or disability retirement that is by policy available to all employees of the unit of government pursuant to the unit's health insurance plan. This subparagraph may not be constructed to limit the ability of a unit of government to reduce or eliminate such subsidies.
5. (5) Any agreement or contract, executed on or after July 1, 2011, which involves extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract.

B. Senate Bill 2100 (Florida Retirement System)

i. Signed into law on May 26, 2011, SB 2100 makes changes to the Florida Retirement System ("FRS"). Specifically, the law:
    1. Requires public employees, not including DROP participants, to contribute 3% of pre-tax gross salary to fund the retirement benefits
    2. Eliminates cost-of-living adjustment (COLA) for services earned on or after July 1, 2011. The previous 3% COLA, however, will be reinstated on June 30, 2016.
    3. Defines the "average final compensation" for purposes of calculation of retirement benefits to mean the average of the 8 highest fiscal years of credible

services for public employees enrolling in the pension plan on or after July 1, 2011. The "average final compensation" for public employees enrolling prior to July 1, 2011, is the average of the 5 highest fiscal years of credible services.

4. Public employees enrolling on or after July 1, 2011, will vest 100% in public employer contribution after completing 8 years of credible service. Public employees enrolling prior to July 1, 2011, will vest 100% in public employer contribution after 6 years of credible service.
5. Increases the normal retirement age and years of credible service for public employees enrolling on or after July 1, 2011, as follows:
    a. For Special Risk Class: normal retirement age to 60 and years of credible service to 30.
    b. For all other classes: normal retirement age to 65 and years of credible service to 33.
6. Reduces the interest accrual rate for public employees enrolling in DROP on or after July 1, 2011, to 1.3%. Public employees enrolled before July 1, 2011, remains at 6.5%.

C. Senate Bill 736 (Education Personnel)

i. SB 736, signed into law on March 24, 2011, reforms the evaluation of instructional personnel and school administrators, compensation, and employment practices.

ii. Reform in Performance Evaluation for Instructional Personnel and School Administrators
    1. Components of the evaluation system will be divided in three parts: performance of students, instructional practice or leadership, and professional responsibility. The evaluation system will differentiate in ratings of highly effective, effective, needs improvement and unsatisfactory.
    2. 50% of the evaluation will be based on student performance over a 3-year period.
    3. For teachers and other instructional personnel, the remaining 50% will be based on the Florida Educator Accomplished Practices and professional responsibilities.
    4. For administrators, the remaining 50% will be based on specified indicators including the recruitment and retention of effective or highly effective teachers, increase in the percentage of teachers evaluated as effective or highly effective, leadership practices that result in improved student outcomes, and professional responsibilities.

iii. Reform in Compensation
    1. By July 1, 2014, School Boards must establish a new performance salary schedule that provides for annual salary increases based on the performance evaluation
    2. Current teachers and administrators have the option to remain on their current salary schedule or move to the new performance-based compensation schedule.
        a. If the employee opts to move to the performance-based schedule they must relinquish their professional service contract in exchange for an annual contract. The option is irrevocable.

b. An employee who moves to a new district must relinquish their professional service contract in exchange for an annual contract

3. School Boards are prohibited from using advanced degrees to set the salary schedule for personnel hired on or after July 1, 2011, unless the advanced degree is held in the individual's area of certification
4. Additional salary supplements may be earned based on assignment to high priority location, certification and teaching in critical teaching shortage areas, or assignment of additional academic responsibilities.

iv. Reform in Employment

1. Eliminates professional service contracts and tenure for all personnel who did not have a professional service contract on July 1, 2011. Instead, the employees will be employed on an annual contract.
2. Changes the criteria for renewing contracts by tying the renewal to the performance evaluations. School Boards will be prohibited from renewing annual contracts if the individual receives: two consecutive unsatisfactory evaluations; two unsatisfactory evaluations within a 3-year period; three consecutive needs improvement evaluations; or a combination of unsatisfactory and needs improvement evaluations
3. Provides that instructional personnel with an annual contract may be suspended or dismissed at any time for just cause
4. Provides that professional service contracts will not be automatically renewed under certain circumstances
5. Provides that just cause under professional service contracts includes unsatisfactory performance on the performance evaluation

II. Bills Affecting Public Bargaining that were Proposed but not Passed in 2011

A. Senate Bill 830 (Labor and Employment)

i. SB 830 died on calendar after it was indefinitely postponed and withdrawn from consideration

ii. Proposed changes of SB 830:

1. Prohibit state employee wage deductions from being made, directly or indirectly, for the purpose of any political activity
2. Create a new statute prohibiting unions from, directly or indirectly, collecting dues or other funds paid for by the employee to make political contributions or expenditures unless the union received express written consent from the employee. The written consent must be executed yearly and must be accompanied by a detailed account of all political contributions or expenditures made by the union in the preceding two years. The employee's consent may be revoked at any time and the employee would be provided a pro rata reduction. A union could not require authorization as a condition of membership.

3. Prohibit public employers from deducting or collecting money from employees for political activity

B. House Bill 1023 (Labor Organizations)

i. HB 1023 died in the Government Operations Subcommittee

ii. Proposed changes
1. Amend § 447.307, Florida Statutes, to add subsection (5), which would:
   a. Require certified bargaining agents representing less than 50% of the employees eligible for representation to recertify as the exclusive collective bargaining representative of all employees in the unit or have their certification revoked
   b. The section would not apply to employee organizations representing law enforcement officers or firefighters

COLLECTIVE BARGAINING AGREEMENTS, WAIVERS AND STATUS QUO: NAVIGATING THE MAZE

By

Deborah C. Brown, Gulfport

Collective Bargaining Agreements, Waivers, and Status Quo: Navigating the Maze

By Deborah C. Brown

Probably no issue causes more consternation (and litigation) in Florida public sector labor relations than claims of refusal to bargain/unilateral change. In these materials, we will review the framework of the obligation to bargain at each of the various stages of the parties' relationship, from pre-certification to pre-contract, during a contract term, and post-expiration prior to impasse resolution, including post-contract expiration waiver issues.

A. Pre-Certification

Unlike private employers under the National Labor Relations Act, the Florida statutory scheme makes the obligation to bargain co-extensive with certification of the union as the exclusive bargaining agent. The rationale for this distinction was explained in Lake Worth Utilities, et al v. City of Lake Worth, 11 FPER ¶16024 (1984), wherein the Commission stated:

> In contrast to the NLRA scheme, under PERA a public employer's obligation to bargain does not commence until an employee organization is certified by the Commission as the exclusive collective bargaining representative of an appropriate unit of the employer's employees. The Florida Legislature has decreed that the majority status of the organization, standing alone, is insufficient to trigger the employer's bargaining obligation. See *City of Winter Park v. LIUNA, Local 517*, 409 So.2d at 47; *ATU v. School Board of Clay County*, 5 FPER at 234.

Id. at 86-87.

This was explained in even more detail by the First District Court of Appeal in City of Ocala v. Marion County PBA, 392 So.2d 26, 32 (Fla. 1st DCA 1980), wherein the court remarked[1] that PERC's view that the duty to bargain arises only after certification is supported by § 447.309(1), Florida Statutes (1977). That statute provides in relevant part that the parties shall bargain "[a]fter an employee organization has been certified pursuant to the provisions of this part…". The Commission went on to quote the First DCA in its Lake Worth decision, explaining:

> "Under the statutory plan set forth in Section 447.307, Florida Statutes, the rights attendant to exclusive collective bargaining representative status and the corresponding duty to bargain collectively arise upon formal certification by the Commission. Certification and the duty to bargain do not arise directly from voluntary recognition by a public employer, or from a presumption of majority status based upon a long contractual relationship between the parties . . . .

[1] And cited with approval from In re Palm Beach Junior College, 4 FPER ¶ 4081 (1978), and Palm Beach Junior College, 4 FPER ¶ 4069 (1978).

> The duty of a public employer to bargain collectively with a certified exclusive collective bargaining representative is coextensive with certification. . . . ."

Id. at 87.

In this regard, therefore, the public employer's obligations in Florida are different that those of a private employer under the NLRA. As explained in Lake Worth (quoting Palm Beach Junior College, 4 FPER 4081 (1978):

> The obligation to bargain imposed by Section 447.309(1) arises out of certification of the organization as an exclusive bargaining agent, rather than, as in the private sector, as a result of the organization's maintenance of majority status.

Id. at 87.

Based on this, the Lake Worth Commission opined that:

> By making a public employer's duty to bargain "coextensive with certification," the Legislature has added an element of certainty to a collective bargaining relationship. Commission certification of an employee organization as the exclusive representative of a unit of a public employer's employees clearly signals the onset of the employer's collective bargaining obligation, which continues until such time as the certification is revoked by the Commission. See *City of Ocala v. Marion County PBA*, 392 So. 2d at 31-33. By following the statutory guidepost of formal certification, a public employer need entertain little, if any, doubt as to the initial and terminal points of its obligation to bargain with an employee organization certified by the Commission to represent a unit of its employees.

Id. at 87.[2]

This then begs the question of whether unilateral changes at the pre-certification stage are even actionable. The answer is a qualified yes. Unilateral changes can be challenged at the pre-certification stage, but typically not under a refusal to bargain theory because, as noted, no obligation to bargain exists. Rather, the framework for such a challenge is either in the context of election objections, or as an unfair labor practice over election conditions.

As to the first, an election objections case, the Commission's test for evaluating alleged objectionable election conduct is "whether a particular event or action, when viewed objectively from the perspective of voters, reasonably appears to have interfered with the employees' freedom of choice."[3] The moving party must demonstrate that the

[2] *See also*, Federation of Public Employees v. Village of Miami Shores, 5 FPER ¶ 10200 (1979) (obligation to bargain arises out of certification of employee organization).

[3] *See* Hillsborough County Police Benevolent Association v. City of Temple Terrace, 7 FPER ¶ 12030 (1980).

objectionable conduct was "significant" and the tendency to influence the outcome of the election must be "substantial."[4]

As explained in International Brotherhood of Police Officers, Local 440 v. Broward County Sheriff's Department, 8 FPER ¶13314 (1982)

> … the Commission continues to judiciously enforce the legislative policy of protecting the freedom of employees to select collective bargaining representatives of their own choosing. *Central Florida Professional Fire Fighters Association, Local 2057, IAFF v. Orange County Board of County Commissioners*, 8 FPER ¶13203 (1982); *Hillsborough County PBA v. City of Winter Haven*, 7 FPER ¶12129 (1981). In furtherance of that policy, the Commission attempts "to provide a laboratory in which an experiment may be conducted, under circumstances as nearly ideal as possible, to determine the uninhibited desires of employees. . . . ' *General Shoe Corp*., 77 NLRB 124, 21 LRRM 1337 (1948). When the "laboratory conditions" necessary for an election have been significantly disrupted, the Commission has consistently ordered the election rerun regardless of whether the disruption was or was not intentional. See *CWA v. Palm Beach County*, 7 FPER ¶12239 (1981); *Hillsborough County PBA v. City of Temple Terrace*, 7 FPER ¶12030 (1981). The deciding factor, as set forth in *City of Temple Terrace*, is:
>
> > . . . whether a particular event or action, when viewed objectively from the perspective of the voters, reasonably appears to have interfered with the employees' freedom of choice. 7 FPER at 64.

Id. at 540 (footnote omitted). PERC can direct a hearing to resolve post-election objections when necessary.[5]

In the second circumstance, namely unfair labor practices surrounding elections, a challenge to a unilateral change is typically brought as an alleged violation of under a general restraint or coercion theory under Section 447.501(1)(a) or a theory of improper encouraging/discouraging union membership under 447.501(1)(b).[6]

Illustrative of a Section 447.501(1)(a) theory based on unilateral changes is found in Teamsters Local Union 385 v. City of Deland, 26 FPER ¶ 31147 (2000), in which the union filed not only election objections but also claimed a section 447.501(1)(a) violation based on the City's timing of an announcement of a new pay plan. In this case, the City ultimately prevailed on the unfair labor practice charge, having persuaded the Hearing Officer that the pay plan

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[4] *See* Professional Ass'n of City Employees v. City of Jacksonville, 27 FPER ¶ 32187 (2001); District 6, International Union of Industrial Service Transport Health Employees v. St. Lucie County School Board, 25 FPER ¶ 30159 at p. 334 (1999).

[5] *See* International Association of EMTs & Paramedics v. Emergency Medical Services Alliance, 31 FPER ¶ 141 (2005).

[6] Sections 447.501(1)(a), (b) and (e) are all possible vehicles for challenging election conditions in addition to election objections, but the latter two are not discussed herein because the focus of this paper is limited to bargaining and unilateral change issues.

announcement objected to by the union was not motivated by anti-union animus. Nonetheless, and after a remand and supplemental recommended order, the election itself was set aside based on those same facts regarding the new pay plan. As explained by the Commission:

> …Even though a pay increase is not motivated by anti-union desires, it may nonetheless be objectionable conduct affecting the results of an election. *See In re Canaveral Port Authority,* 24 FPER ¶ 29083 at 131 (1998). Implicit in the statutory mandate to order representation elections is the understanding that they will be conducted in an atmosphere that does not inhibit employees' freedom of choice, regardless of the motivation for conduct that may be disruptive of the election. Id. The "free speech" proviso of Section 447.501(3), Florida Statutes, is consistent with this mandate. See *North Broward County Hospital District v. PERC,* 392 So.2d 556, 565-666 (Fla. 1st DCA 1980)(the maintenance of conditions necessary for a fair election necessitates the setting aside of an election affected by the preelection "promise of benefits" proscribed by § 447.501(3)).
>
> The determinative issue in deciding whether an employer's announced pay increase during a pending election interfered with the laboratory conditions surrounding the election is whether voters could have reasonably concluded that the announcement was intended to influence their vote. *See Hillsborough County PBA v. City of Temple Terrace,* 7 FPER ¶ 12030 at 64-65 (1980). The City's motivations are largely irrelevant to the issue of whether the announcement could have reasonably affected the election outcome. *Id.*; *see also LIUNA, Local 1101 v. The School Board of Alachua County,* 10 FPER ¶ 15216 at 444 (1984) (intent is not a dispositive factor in determining whether preelection conduct affects an election).
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> Regardless of the dismissal of the unfair labor practice charge, the announcement of a pay plan change upon the inception of a union campaign or election, when viewed objectively from the perspective of the voters, may reasonably interfere with an election's results. *See generally In re Canaveral Port Authority,* 24 FPER ¶ 29083 (1998). The hearing officer's ultimate finding that the employees reasonably would have concluded that the July pay plan announcement shortly prior to the scheduled election was intended to influence their votes and, therefore, interfered with the election is supported by competent substantial evidence. In addition to the hearing officer's analysis of this issue in his supplemental recommended order, there was no showing that the final announcement of the pay changes mere days before the election could not have been reasonably delayed until after the election.

Id. at 268-269. Thus, a rerun election was ordered even absent a violation by the employer.

B. Post-Certification and Pre-Contract

From the above, it is thus clear that the obligation to bargain, and thus the obligation to maintain the status quo pending bargaining, attaches at certification. The next step, therefore, is to determine exactly what the status quo is. At the post-certification but pre-contract stage, the status quo is defined by the past practices established and in effect with respect to wages, hours, and other terms and conditions of employment (i.e., mandatory subjects of bargaining).

1. Wages, Hours and Terms and Conditions

The phrase "wages, hours, and terms and conditions of employment" is broad and has been interpreted over the years to encompass a wide variety of subjects. With respect to wages, mandatory subjects have been held to include base salary increments,[7] holiday compensation,[8] incentive pay,[9] salary schedules,[10] shift differential,[11] and supplemental compensation.[12] The term "hours" has also been broadly defined and generally includes, by way of example, overtime,[13] the starting time of a shift,[14] and work schedule.[15] The area in which the most difficulty has arisen has been in defining what are "terms and conditions" of employment. Nearly every action a public employer takes with respect to its employees has some impact on terms and conditions of employment. What public employers have seen is that even though a subject may be permissive, it is also mandatory to the extent that the decision has any effect on the bargaining unit. Terms and conditions of employment have been construed very broadly to include such subjects as absenteeism policies,[16] call-back provisions,[17] grievance procedures,[18] clothing allowances,[19] disciplinary and personnel regulations,[20] discipline and discharge,[21] cost of dues deductions,[22] and health insurance.[23] This list is by no means exhaustive.

Sometimes, however, the issue of deciding what is a mandatory subject is not quite so clear. For example, in United Teachers v. Dade County School Board, 500 So.2d 508 (Fla. 1986), the Florida Supreme Court recognized that numerous distinctions, not just those of procedures, exist between public and private sector bargaining. In that case, bargaining was

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[7] *See* Nassau Teachers Association, FTP-NEA v. School Board of Nassau County, 8 FPER ¶ 13206 (1982).
[8] *See* Teamsters Local 444 v. City of Winter Park, 5 FPER ¶ 10089 (1979).
[9] *See* Local 2266, IAFF v. City of St. Petersburg Beach, 10 FPER ¶ 15211 (1984));
[10] *See* Pasco Classroom Teachers Association v. School Board of Pasco County, 3 FPER 9 (1976), aff'd., 353 So.2d 108 (Fla. 1st DCA 1977).
[11] *See* Pinellas County PBA v. City of St. Petersburg, 3 FPER 205 (1977).
[12] *See* In re Levy County Education Association, 11 FPER ¶ 16096 (1985), aff'd. 492 So.2d 1140 (Fla. 1st DCA 1986).
[13] *See* Sarasota Professional Fire Fighters v. City of Sarasota, 13 FPER ¶ 18033 (1986).
[14] *See* (Hialeah IAFF, Local 1102 v. City of Hialeah, 9 FPER ¶ 14364 (1983).
[15] *See* IBFO, Local 621 v. City of Hollywood, 7 FPER ¶ 12295 (1981).
[16] *See* ATU, Local 1596 v. Orange-Seminole-Osceola Transportation Authority, 12 FPER ¶ 17134 (1986).
[17] *See* Pinellas County PBA v. City of St. Petersburg, 3 FPER 205 (1977).
[18] *See* In re Communication Workers of America, 4 FPER ¶ 4135 (1978).
[19] *See* Pinellas County PBA v. City of St. Petersburg, 3 FPER 205 (1977).
[20] *See* Pinellas County PBA v. City of St. Petersburg, 6 FPER ¶ 11277 (1980).
[21] *See* In re Palm Beach County Association of Educational Secretaries and Office Personnel, 10 FPER ¶ 15177 (1984).
[22] *See* Edison Community College v. Edison Community College Faculty Federation, Local 3515, FEA/United, 4 FPER ¶ 4269 (1978).
[23] *See* Pinellas County PBA v. City of Dunedin, 8 FPER ¶ 13102 (1982).

sought over the Florida "Master Teacher Program," which provided merit stipends for outstanding teachers. In United Teachers, the Florida Supreme Court determined that the enabling statute providing the stipends did not violate the constitutional mandate for collective bargaining by legislatively removing the subject from the bargaining table. Rather, the court stated that its analysis of the situation "must encompass not only the legislature's, the State Board of Education's, or the local school board's constitutional authority to make education policy decisions, but also must focus on the impact such decisions have on public employees' constitutionally guaranteed collective bargaining rights."[24] Under that analysis, the court rejected the union's claim of a right to bargain over the stipends.

More recently, the Fourth District Court of Appeal took a similar approach with respect to funds distributed under the Florida Lead Teacher Program. In School District of Martin County, Florida v. Public Employees Relations Commission and Martin County Education Association, 15 So. 3rd 42 (Fla. 4th DCA 2009), the Court reversed PERC's determination that unilateral changes in the distribution method for these funds affected the employees' terms and conditions of employment. In so holding, the Court relied in part of a retroactive amendment to the controlling statue that specifically excluded these funds from collective bargaining.

These cases can be viewed as a loosening of the otherwise rigid application of the Article I, Section 6 right to engage in bargaining as manifested in the prior Florida Supreme Court decision to strike down an exclusionary clause that removed retirement benefits from the scope of bargaining. *See* City of Tallahassee v. PERC, 410 So.2d 487 (Fla. 1981). In City of Tallahassee, the Florida Supreme Court, after observing that public employees have the same bargaining rights as private employees, went on to note that the right to collective bargaining must be construed expansively due in part to the absence of the strike. At the time City of Tallahassee v. PERC was decided, the Act excluded the subject of retirement from collective bargaining. When the issue of the negotiability of pensions was submitted to PERC in the form of a petition for a declaratory statement, the Commission stated that the Act removed from public employers the obligation to negotiate over pension plans to the extent that retirement matters are controlled by state statute or local ordinance and that the public employer had no obligation to negotiate over a change in the ordinance or statute affecting pension plans even if it was done when the collective bargaining agreement was in effect.

These portions of the statute, however, were found by the Florida Supreme Court to be unconstitutional, in that the "practical effect . . . was to eliminate a significant facet of the collective bargaining process."[25] The result, the court said, was "an abridgement of the right to collective bargaining" as guaranteed by Florida's constitution.[26]

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[24] Id. at 511.
[25] Id. at 489.
[26] Id. at 489.

2. The Prohibition on Unilateral Change

The doctrine of unilateral change, which prohibits public employers from unilaterally altering the wages, hours, and terms and conditions of employment[27] without first bargaining over those proposed changes. PERC case law summarizes this concept as follows:

> Absent clear and unmistakable waiver, exigent circumstances, or legislative body action after bargaining impasse, changes in the status quo of wages, hours, and terms and conditions of employment, cannot be made by a public employer without providing notice to the employees' bargaining agent, and an opportunity to conduct meaningful negotiations, before implementing the change. *See e.g.*, The Florida School for the Deaf and the Blind Teachers United v. The Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985), *affd.*, 483 So.2d 58 (Fla. 1st DCA 1986). Such unilateral changes constitute a per se violation of Section 447.501(1)(a) and (c), Florida Statutes. *Id*.

See School Maintenance Employees v. Duval County School Board, 25 FPER ¶30036 at 62 (1998).[28] This prohibition even applies to situations in which the employer's unilateral change benefits employees.[29]

The prohibition on unilateral change is an expansive concept. Originally, the doctrine was limited to a prohibition against employers making unilateral changes in working conditions "during negotiations."[30] This concept was expanded in 1979 and now arguably prohibits employers from making unilateral changes to virtually any "wages, hours, and terms and conditions of employment."[31] In accomplishing this change, PERC reasoned as follows:

> The same policy considerations underlying the prohibition of unilateral changes during negotiations are equally applicable to unilateral changes in subjects not covered by an existing agreement. Terms and conditions not discussed by the parties in negotiations nevertheless continue to be terms and conditions of employment and, by virtue of Section 447.309(1), an employer must negotiate with the certified bargaining agent prior to changing them. The obligation to bargain imposed by Section 447.309(1), extends to all terms and conditions of employment. To conclude that terms and conditions of employment upon which the parties fail to reach

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[27] For a summary of PERC decisions through 2005 detailing the designation of subjects as mandatory or permissive bargaining subjects, see *Scope of Bargaining*, 2nd ed. (PERC Sept. 2005), available at http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf

[28] *See also* School Board v. Indian River County Education Ass'n, 373 So.2d 412 (Fla. 4th DCA 1979); School Board of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979).

[29] *See* Bradford Education Association v. Bradford County School District, 21 FPER ¶ 26017 (1994)(school district violated its bargaining obligation by unilaterally inserting wage-supplement provision in collective agreement and implementing that provision).

[30] Palowitch v. Orange County School Board, 3 FPER 280 (1977), *affd*., 367 So.2d 730 (Fla. 4th DCA 1979).

[31] *Id.*; *see also* School Board of Indian River County v. Indian River County Education Association, Local 3617, AFT/FEA United, 373 So.2d 412 (Fla. 4th DCA 1979).

agreement lose their status as such and somehow become management prerogatives leads to an absurd and fruitless result.

Palowitch, 3 FPER 280 (1977).

3. At the Pre-Contract Stage, Past Practice Defines the Status Quo

The prohibition against unilateral changes applies once the union is certified and even before an agreement is reached. *See, e.g.*, Canaveral Port Authority, 25 FPER ¶ 30279 (1999), in which the Commission explained that it is "well settled that an employer must maintain the status quo during negotiations" and that when "no contract exists, the employer maintains the status quo by continuing its practices with regard to conditions of employment." Id. at 553-554 citing Pinellas County PBA v. City of St. Petersburg, 3 FPER 205 (1977).

So at the pre-contract phase, determining the status quo is a matter of past practice. Illustrative in this regard is Pasco County Professional Firefighters, Local 4420, International Association of Fire Fighters v. Pasco County Board of County Commissioners, 33 FPER ¶ 225 (2007). In Pasco, the issue at hand was, in part, a change payroll processing procedures. Since there was no contract, the Commission instead looked to the County's practice. As explained by the Commission, "[t]o constitute an established practice, it must be demonstrated that the practice was unequivocal, that it existed substantially unvaried for a significant period of time, and that the bargaining unit employees could reasonably have expected the practice to continue unchanged." Id. at 512-513 citing Hillsborough County Police Benevolent Association, Inc. v. City of Tampa, 15 FPER ¶ 20028 (1988), aff'd. without opinion, 522 So.2d 919 (1989); Manatee Education Association v. Manatee County School Board, 7 FPER ¶ 12017 (1980). In Pasco, the ability to submit changes to time sheets after submission, which in turn directly impacted the timing of receipt of overtime pay, was a bona fide past practice improperly changes without bargaining. Thus, the prior practice was reinstated.

In all fairness, once cannot conclude from this that past practice is irrelevant once a contract is reached. Even when the parties reach an agreement, if they do so without discussing a mandatory subject, the subject remains mandatory and must still be negotiated prior to a change in the "status quo" unless the union has waived its right to negotiate.[32] Moreover, the test for "a status quo benefit is disjunctive; that is, each fact contains a separate requirement. Thus a past practice cannot become a status quo term and condition of employment unless it is both unequivocal and has existed substantially unvaried for a significant period of time, and could reasonably be expected by employees to remain unchanged."[33]

Remember though (and as explained in more detail below) that a past practice generally cannot prevail as the "status quo" in the face of clear and precise contract language to the contrary; it is determined by objective factors and a subjective belief based on the passage of

[32] *See* School Board of Indian River County v. Indian River County Educational Association, Local 3617, AFT/FEA United, 373 So.2d 412 (Fla. 4th DCA 1979).

[33] *See* Communication Workers of America, AFL-CIO, CLC, et al v. City of Gainesville, 36 FPER ¶ 56 at p. 106 (2010).

time alone is not sufficient.[34] Further, under Canaveral Port Authority, 25 FPER ¶ 30279 (1999), "[i]t was not sufficient for [the union] to merely show what the practice was immediately prior to the change. Rather, [the union] was required to prove that the altered policy had existed substantially unvaried for a significant period of time." Id. at 554 citing Industrial and Public Employees, Local 1998 v. DeSoto County, 13 FPER ¶ 18215 (1987). In Canaveral, therefore, the union failed to show how long a call-back practice was in effect; absent such evidence, the Commission declined to "infer that the policy was unequivocal, had existed substantially unvaried for a significant period of time, and the employees objectively expected the policy to remain unchanged." Id. at 554.

C. Status Quo During Contract Term and After Expiration

Once a contract is reached and covers the subject at issue, determining the status quo arguably becomes easier. That is because the status quo, both during the contract term and at expiration, is determined, in the first instance, by reference to the contract language. As noted above, past practice becomes relevant only if the agreement is silent on the issue. This was illustrated in the recent decision in Florida Police Benevolent Association v. Sheriff of Orange County, 36 FPER ¶ 348 (2010), affd., 2011 WL 3452864 (Fla. 1st DCA 8/9/11), wherein the Court affirmed a unilateral discontinuance of steps following contract expiration. In so holding, the Court explained:

> Following the expiration of a collective bargaining agreement, an employer is prohibited from unilaterally altering the status quo of wages, hours, and the terms and conditions of employment. *See City of Winter Springs v. Winter Springs Prof'l*, 885 So.2d 494, 498 (Fla. 1st DCA 2004); *Nassau Teachers Ass'n, FTP–NEA v. Sch. Bd. of Nassau Cnty.*, 8 FPER ¶ 13206 (1982); *Duval Teachers United v. Duval Cnty. Sch. Bd.*, 6 FPER ¶ 11149 (1980). The status quo can be established either by an explicit contract provision or by an existing past practice. *See Central Fla. Prof'l Fire Fighters, Local 2057 v. Bd. of Cnty. Comm'rs of Orange Cnty.*, 9 FPER ¶ 14372 (1983). When terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision. *See Royal Palm Bch. Prof'l Fire Fighters Ass'n, IAFF, Local 2886 v. Vill. of Royal Palm Bch.*, 14 FPER ¶ 19304 at 672–73 (1988). **If the contract provision is explicit, no extrinsic evidence of past practice to determine the status quo will be considered.** *Id.* at 673. Instead, the employees' reasonable expectations as to the continuation of certain benefits should properly be founded upon the precise contractual language, rather than upon a past practice. *Id.*

[34] *See, e.g.*, Communication Workers of America, AFL-CIO, CLC, et al v. City of Gainesville, 36 FPER ¶ 56 at p. 107 (2010) *citing* Royal Palm Beach Professional Firefighters v. Village of Royal Palm Beach, 14 FPER ¶ 19304 (1988); *see also*, Jacksonville Association of Firefighters, Local 1222 v. City of Jacksonville, 12 FPER ¶17188 (1986) citing Florida Public Employees Council 79, AFSCME v. State of Florida, 10 FPER ¶ 15208 at p. 417 (1984), affd., 472 So, 2d 1184 (Fla. 1st DCA 1985).

Id. at p. 1 (emphasis added).[35]

Thus, the Court affirmed the Commission's rejection of the hearing officer's original conclusion that a violation occurred, agreeing that the hearing officer had reached "an erroneous conclusion of law" that had been reached "by determining the status quo based on extraneous evidence of the parties' past practice, rather than on the explicit terms embodied in the bargaining agreements. *See Escambia Cnty. Educ. Ass'n, FTP–NEA v. Sch. Bd. of Escambia Cnty.*, 10 FPER ¶ 15160 at 301 (1984)." Because the contract language in Sheriff of Orange County "limited the employees' merit step pay increases, "if any," following the expiration of the agreements, to those subsequently negotiated by the parties," no violation was found. Id. at p.2. *See also*, Coastal Florida Police Benevolent Association, Inc. v. Sheriff of St. Lucie County, 35 FPER ¶ 90 (G.C. Sum. Dism. 2009), an unfair labor practice charge over the Sheriff's failure to pay step increases was dismissed. In that case, the contract language did not guarantee step increases for the third year, but rather provided for a reopener. The salary schedules were delineated by date, and the union exercised its right to reopen, thus negating any objective expectation the employees may have had in receiving a step increase.[36]

Even when a contract has been reached, it is important to remember that other factors can affect whether an obligation to bargain exists or has been extinguished.[37] Several of these are discussed below.

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[35] The court distinguished Sheriff of Orange County from another case in which the contract between the parties had been silent on the issue at hand (health insurance), explaining that in *Communications Workers of America, AFL–CIO, CLC v. City of Gainesville*, 36 Fla. L. Weekly D973 (Fla. 1st DCA May 9, 2011), "the collective bargaining agreement made no mention whatsoever of the health insurance benefits in dispute, and PERC rejected the hearing officer's ruling that the City had engaged in unfair labor practices by refusing to bargain over changes it had made to health insurance benefits for its employees upon retirement." The Court then held that "[b]ecause the parties' collective bargaining agreements did not address the issue, we held the labor unions were free to show, as a factual matter, that the City's furnishing the benefits to its employees amounted to an established past practice." *See* id. at D974 ("The status quo depends both on the provisions of collective bargaining agreements and on the content of established past practices."). Since the Court was persuaded the hearing officer's finding of fact was correct, it reversed PERC's ruling. Id. at D973. Id. at p. 2.

[36] *But see*, Office and Professional Employees International Union v. City or Ormand Beach, 36 FPER ¶ 333 (2010)(memorandum of understanding postponing step increases not waiver of entitlement; step increases ordered); *cf*., Utility Workers Union of America v. City of Lakeland, 35 So.3d 1023 (Fla. 2nd DCA 2010)(city's alteration of the status quo by failing to provide newly-unionized employees with annual wage adjustment constituted an unfair labor practice).

[37] Note also that contract language alone will not suffice when the change at issue is the failure to follow settlement terms. Recently addressed by PERC and related to the doctrine of unilateral change is the proper analysis to be used when the issue is an employer's failure to follow the terms of a grievance settlement as opposed to a contractual provision. While the Hearing Officer recommended that a charge under Section 501(1) (a), (c), and (f) be dismissed because a one-time violation of one portion of a larger settlement agreement did not demonstrate that the settlement agreement had been repudiated, the Commission disagreed. The Commission held that the Hearing Officer's reliance on found on cases involving contractual language changes misplaced, and that in the context of a settlement, the failure to comply with any portion will constitute a failure to bargain in good faith. *See* United Faculty of Florida v. University of South Florida Board of Trustees, 36 FPER ¶ 61 (2010).

D. Zipper Clauses and Waivers

The Commission has indicated that where a subject and/or its impact has already been negotiated, no further obligation will be found, even where each and every potential impact was not recognized or addressed. For example, in Federation of Public Employees, District 1, MEBA v. City of Sunrise, 20 FPER ¶ 25177 (G.C. Sum. Dism. 1994), the General Counsel dismissed a charge that the City had unlawfully laid off seven employees without notice and the opportunity to bargain impact. Relying on Federation of Public Employees v. City of Pompano Beach, 9 FPER ¶ 14111 (1983), the General Counsel determined that the negotiation and inclusion of a comprehensive layoff and recall provision in the contract eliminated the obligation to bargain further on that issue.[38] This position was recently re-affirmed in International Union of Painters and Allied Trades, AFL-CIO, Local Union 1010 v. City of Deerfield Beach, Case No. CA-2011-008 (8/18/11). In that case, the issue was whether an obligation to impact bargain over layoffs existed. While couched in terms of waiver, the gist of the decision was that since the parties had negotiated a specific contract provision on the subject matter of layoffs. While that language may not have addressed every conceivable layoff issue or impact, it was nonetheless sufficient, when combined with the zipper clause, to negate any further obligation to bargain the issue.

Note though that there remains an obligation to bargain when the agreement contains a reopener clause. In that regard, it has been stated: "It is well established that 'either party may refuse to bargain further with respect to subjects covered by the written terms of a negotiated contract during the contract's life in the absence of a reopener clause.'" *See* Port Everglades Authority v. Port Everglades Firefighters, 11 FPER ¶ 16004 (G.C. Sum. Dism. 1984) *citing* Orange County PBA v. City of Orlando, 6 FPER ¶ 11016 (1979).[39]

The subject of waivers generally, and their effect in a post-contract expiration situation deserves some special attention. The Commission has long held that a contractual waiver must be clear and unmistakable to be effective. This test has been approved by the Florida Supreme Court in Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221, 1224 (Fla. 1985), aff'g in relevant part, 425 So. 2d 133 (Fla. 1st DCA 1983), aff'g, 7 FPER ¶ 12300 (1981). The Court held that, since a waiver of bargaining rights implicates constitutional rights as well as statutory rights, it cannot be accomplished without clear and specific waiver language. 475 So. 2d at 1225-1227. Hence, the Commission has held that a clear and unmistakable waiver of bargaining rights is only demonstrated by contractual language which unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. Local 2226, IAFF v. City of St. Petersburg Beach, 10 FPER ¶ 15211 (1984). A waiver of this type must be stated with such precision that simply by reading the pertinent provision employees will be reasonably alerted that the employer has the power to change the terms and conditions of employment. Florida Public Employees Council 79,

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[38] *See also*, Florida Public Employees Council 79, AFSCME, AFL-CIO v. State Of Florida, 31 FPER 71 (2005)9Chareg dismissed where layoffs already addressed in agreement); Florida Public Employees Council 79, AFSCME v. State of Florida, 21 FPER ¶ 26215 (1995)(Where the potential impact of a management decision, such as a layoff, has already been considered in a contract with a zipper clause, no further bargaining required); LIUNA, Public Employees, Local 678 v. City of Melbourne, 19 FPER ¶ 24026 (1992)(same).

[39] *See also* Florida State Lodge, Fraternal Order of Police, Ocala Local 129 v. City of Ocala, 24 FPER ¶ 29335 (1998) (stating: "*Absent a reopener provision* or proof of financial urgency, a union is not obligated to negotiate changes to contractual provisions merely upon a request to do so by the public employer.")(italics added)

AFSCME v. State of Florida, 10 FPER ¶ 15208 at 417 (1984), aff'd, 472 So. 2d 1184 (Fla. 1st DCA 1985).

The issue of interest in recent years has been the extent to which a waiver of bargaining rights operates as the post-expiration status quo, this and in essence, continuing to operate as a waiver until a new agreement is reached. Two recent cases with conflicting outcomes help to illustrate this point. In the first, United Faculty of Florida v. Florida State University Board of Trustees, 34 FPER ¶159, per cur. affd., 9 So. 3d 622(Fla. 1st DCA 2009), the Commission approved dismissal of an unfair labor practice charge by the UFF complaining about the employer's granted of administrative discretionary salary (ADI) adjustments after the parties' agreement had expired. The Commission held that contractual language concerning a waiver allowing discretionary pay increases survived the expiration of a collective bargaining agreement as the status quo. The union had opposed this position, claiming that PERC "had adopted National Labor Relations Board (NLRB) precedent holding that waivers are negotiated provisions giving the employer the power to act unilaterally and as such are permissive subjects of bargaining that do not become part of the status quo surviving expiration of the contract." Id. at 326 citing Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985) and Duval Teachers United v. Duval County School Board, 7 FPER ¶12056 (1980). In rejecting this argument, the Commission instead concluded that under its own precedent, a waiver that concerns itself with a mandatory subject of bargaining does indeed survive contract expiration.[40]

In the second case, United Faculty of Florida v. University of Central Florida Board of Trustees, 36 FPER ¶ 60 (2009), the opposite result occurred, with the waiver over granting similar ADI increases being determined not to have survived expiration. A closer read, though, reveals that the decision did not hinge on whether waivers generally survive contract expiration, but rather on a different principle of contract interpretation, that is, the controlling nature of express contract language. In UCF, The parties negotiated different language for the ADI provision in the last two collective bargaining agreements. Prior to that time, the contractual language did not have a specific date deadline for notice concerning an ADI increase. In interpreting this new language, the Commission noted that the hearing officer agreed in his analysis that the UFF had attempted to use this language to limit the University's discretion to award ADI increases. Thus, in UCF, the last amended ADI notice provision expires at the same approximate time as the expiration of the agreement and set two standards of notice of the awarding of an ADI increase. The notice had to be given both at least fourteen days prior to the effective date of any ADI increase and no later than August 7, 2007. Id. at 125. Because the agreement's expiration occurred after August 7, 2007, the University could no longer provide the required notice to the UFF. Consequently, the Commission found a restriction placed upon the continuation of ADI increases after the August 2007 date, regardless of the fact that the contractual provision did not expressly state that ADI increases could not be given after that date. Id. at 124-125. A violation was therefore found.

[40] Id. at 326 citing Volusia County Firefighters Association, Local 3574 v. Volusia County, 22 FPER ¶ 27066 (1996) and International Association of Fire Fighters, Local 2266 v. City of St. Petersburg Beach, 13 FPER ¶18116 (1987). In a different case, Pinellas Lodge 43, Fraternal Order of Police, v. Sheriff of Pinellas County, 34 FPER ¶ 73 (2008), PERC had touched on the issue but declined to consider whether to adopt the NLRB's position on waivers not surviving contact expiration.

Another recent case where a waiver was not found is the recent decision in Polk Education Association v. School District of Polk County, 36 FPER ¶ 260 (2010). In that case, the Commission first reaffirmed its use of the term "status quo period" to refer to the "hiatus that occurs between agreements." Id. at 544. As explained by the Commission, "if the agreement expires and another has not been executed, the terms of the first contract survive the contract's expiration." Id. at 544. Also important was the Commission's reaffirmation that the "status quo" is "established by the precise terms of the agreement, and not by past practice." Id. at 544-545 citing Royal Palm Beach Professional Firefighters Association v. Village of Royal Palm Beach, 14 FPER ¶ 19304 (1988). This principle applies "even if the parties' practice does not conform to the agreement." Id. at 545. Thus, when contractual language gave the school district some discretion to change health plans but that discretion was limited by both a comparability element and a "no-cost" to employees element, changes not falling within these criteria were found to be unlawful.

Although no waiver was found in UCF, this issue of post-contract waivers generally is a common one when step plans are in place and continue to present challenges. The case law has been mixed, with some instances showing post-contract expiration increases not required while others hold the opposite. *Compare* Florida Police Benevolent Association v. Sheriff of Orange County, 36 FPER ¶ 348 (2010), affd., 2011 WL 3452864 (Fla. 1st DCA 8/9/11) with City of Delray Beach v. Professional Firefighters of Delray Beach, Local 1842, International Association of Firefighters, 636 So. 2d 157 (Fla. 4th DCA 1994)(Mere reference to years of contract insufficient to stop step adjustments after contract expired); IAFF, Local 754 v. City of Tampa, 34 FPER ¶ 82 (2008) (PERC determined that a municipal employer committed an unfair practice by failing to pay merit/step increases to eligible members of a rank-and-file bargaining unit of fire suppression personnel after the parties' contract expired in 2007. But after City of Winter Springs v. Winter Springs Professional Fire Fighters, 885 So. 2d 494 (Fla. 1st DCA 2004), these disputes will presumably lessen as contract language becomes more clear.

E. Status Quo and Statute of Limitations

A final issue worth mentioning is the interplay between the statute of limitations and status quo. In the context of bargaining, in order to be an effective demand (or at least to be potentially actionable by the Union), an alleged change giving rise to the potential bargaining obligation must have occurred within the last six (6) months, the PERC statute of limitations. *See* Central Florida PBA v. City of Casselberry, 25 FPER ¶ 30305 (1999). In City of Casselberry, the Commission dismissed a charge alleging an unlawful unilateral change in the promotional process and refusal to bargain impact. In so holding, the Commission held that, by failing to timely challenge the change, which the Union knew or should have known about, the change had now become the "status quo" and no impact bargaining obligation remained. Id. at 634. A recent PERC decision (not yet final) affirmed this approach on timeliness but couched it as both a timeliness and waiver issue when rejecting a challenge to enforcement of pre-employment agreements by an employer. *See* Cape Coral Fraternal Order of Police, Lodge No. 33 v. City of Cape Coral, Case No. CA-2011-001 (HORO 7/22/11).

In closing, PERC case law continues to evolve on the issue of post-contract expiration waivers, but recent pronouncements suggest waivers will continue to survive expiration unless contractually limited in some fashion. Past practice's role in establishing status quo will be material only in circumstances where contract language is ether ambiguous or silent on the issue at hand. And the bargaining fun will continue…

FINANCIAL URGENCY UNDER SECTION 447.4095

By

David C. Miller, Miami

FINANCIAL URGENCY UNDER SECTION 447.4095

By David C. Miller, Esquire[1]

> **447.4095 Financial Urgency.** – 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 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.[2]

1. Introduction.

Until about 2008, public sector labor law practitioners in Florida had had little occasion to think about the "Financial Urgency" law. It was an obscure section added to the Public Employees Relations Act[3] in 1995 in the wake of a string of financial exigency and underfunding court decisions in the early 1990s.[4] In May 2008, the School District of Manatee County, facing a large budget shortfall, declared financial urgency and, pursuant to the procedure prescribed by Section 4095, modified the collective bargaining agreement between itself and the labor organization representing its teachers.[5] That action and the events that followed it were the first of what have been and promise to be many more battles over the meaning, application, and constitutionality of this short and, until recently, little-noticed bit of labor law.

Section 4095 provides a method for modifying an existing collective bargaining agreement "[i]n the event of a financial urgency . . .," whatever that may be – the law does not say.[6] The parties "shall meet as soon as possible to bargain the impact of the financial urgency."[7] If a dispute exists after 14 days, impasse occurs by action of law, either party shall notify the Commission, and the matter will proceed through the regular statutory impasse resolution mechanism.[8] What is not "regular," of course, is that this impasse resolution, with the public employer holding the ultimate authority to impose modifications of the contract, is occurring within the term of a contract, rather than at the end of negotiations for a new contract. Moreover, because this is impact bargaining, public employers have been implementing the modifications prior to the completion of the impasse resolution mechanism.[9] Thus, Section 4095 permits the forced modification of a labor contract that would not otherwise be subject to modification without the agreement of the labor organization. Obviously, union opposition has been energetic.

In 2009, when the Public Employees Relations Commission issued its final order in the Manatee County case, Section 4095 was virtually a blank slate. Only a few agency and court decisions had even referred to the section and none had interpreted it.[10] Since then, there have been more than a dozen declarations of financial urgency filed with the Commission[11] and a small number of court, administrative, and arbitration decisions interpreting the section.

Authoritative interpretation of Section 4095 is still mostly in the future. However, some important questions have been answered and the outlines of what it means and how it will be applied are appearing.

2. *Manatee County*.

Review was sought of the Commission's final order in March 2009 in the First District Court of Appeal. Oral argument occurred in February 2010. The court did not issue its decision until June 2, 2011. There was a little something for everyone in the court's decision, including for the Commission, to which the case was remanded for a determination of whether a financial urgency existed justifying the employer's declaration.[12]

The union had refused to participate either in financial urgency bargaining or the impasse proceedings that followed it. The union took the position that the School District had to make an initial showing that a bona fide financial urgency existed prior to the declaration. It further argued that the standard of determination should be the same as for financial exigency, i.e., that there was no reasonable alternative means of preserving the contract.[13] The Commission had not addressed the question in its decision. Instead, it held that, because the union had refused to participate, the School District's modification of the contract was lawful.[14] The court viewed this ruling as requiring the union to participate in the bargaining process in order to preserve its legal right to challenge the employer's modification of the contract, which, it stated, would abrogate the constitutional right of collective bargaining.[15] The court ruled that the union could refuse to participate, wait out the 14-day period, and then file an unfair labor practice charge challenging the existence of the financial urgency.[16] Moreover, the court stated that there must exist a compelling state interest in order for the public employer to abrogate a collective bargaining agreement.[17] The court deferred to the Commission the initial opportunity to determine what constitutes financial urgency and whether addressing it is a compelling state interest.[18]

The court, affirming the Commission, rejected the union's argument that the public employer must prove the existence of a financial urgency before resorting to Section 4095.[19] The court stated that such a delay "could effectively eliminate the ability to address the financial urgency [and] frustrat[e] the obvious purpose of the statute."[20] Further, while the court held that a union's refusal to participate in the Section 4095 process did not foreclose it from challenging the employer's actions, the court did not hold that the financial urgency bargaining was not mandatory. The Commission had stated, in its final order, that "[b]ased on the express language of [Section 4095], the [union] was thereafter required to engage in an insulated period of negotiations over the impact of the financial urgency."[21] The court did not overrule that holding, but merely held that refusal to participate did not foreclose a challenge to the existence of financial urgency.

Under *Manatee County* (and the surviving portions of the Commission's underlying decision), the employer must show a compelling state interest, even under financial urgency, to modify a labor contract. However, the employer need not prove that interest, or a financial urgency (if that is not one and the same thing), exist before invoking Section 4095. The parties are required to engage in bargaining the impact of the financial urgency. The union may refuse to participate without waiving its ability to contest the employer's actions. *Manatee County* does not define financial urgency. We must wait for the Commission to decide that, subject to the almost-certain appeals.

3. Other Decisions.

While the First District was considering *Manatee County*, the financial condition of many public employers in Florida continued to be bleak, leading several to resort to Section 4095.[22] Litigation of these actions has resulted in a number of court, agency, and arbitration decisions that, taken together, begin to fill in details of the interpretation of the statute. Few, however, are final.

In one that is final, Section 4095 survived a direct constitutional challenge. The City of Miami declared financial urgency in 2010 and modified certain collective bargaining agreements in August of that year. The City's fire union challenged the constitutionality of the statute on grounds that it was vague and that it was an unfettered grant of discretion to abrogate a contract in violation of the constitutional right of collective bargaining, the contracts clause, the prohibition on grants of unrestricted discretion, due process, and equal protection.[23] The complaint sought a declaration that the statute was void and an injunction prohibiting Section 4095 negotiations.[24] The court denied the injunction and dismissed the complaint, ruling that Section 4095 was constitutional.[25] The final judgment was affirmed, per curiam, by the Third District Court of Appeal.[26] Thus, a precedential determination of Section 4095's constitutionality is yet to come.

A trio of Commission hearing officer recommended orders were issued in summer 2011, all of which addressed numerous aspects of Section 4095 going far beyond the somewhat limited treatment given in the factually unusual Manatee case. The most wide-ranging of these involved the City of Lake Worth.[27] Most significantly, the hearing officer articulated what is apparently the first definition of financial urgency: "[A] financial urgency is a financial condition calling for immediate attention, not necessarily the condition of financial emergency or bankruptcy . . . ."[28] The hearing officer went on to state that Section 4095 should be narrowly construed, but that, by its plain language, it did not require a finding of financial exigency or emergency, as had been urged by the unions.[29] The hearing officer also rejected the "no reasonable alternative" standard that had been argued by the unions.[30]

The hearing officer considered a large amount of evidence regarding the City's financial condition and the many ways it had attempted to address the problem other than by modifying the labor contracts.[31] The hearing officer found the financial circumstances "dire" and found that the City had demonstrated that labor costs contributed significantly to the financial urgency.

Other significant items from this recommended order include:

It was the city manager who had declared financial urgency, without the action of the City's legislative body, as had been the case elsewhere (notably in the Manatee case and in the widely publicized City of Miami cases). The hearing officer noted that the statute did not designate a body or official who must make the declaration and found the manager's action lawful.

The union asserted that it had accepted the City's final offer and, therefore, there were no items in dispute and the impasse proceedings could not go forward. The hearing officer found that the union's acceptance was a sham and intended to avoid impasse and imposition and did not support a charge of bad faith bargaining when the City refused to acknowledge it.[32]

The union had also charged the City with refusal to provide information. However, the hearing officer found that the information requested was related to attempting to disprove the existence of financial urgency. Since, under the Commission's final order in the Manatee case,

the employer was not required to prove financial urgency, the hearing officer found the information request was not related to bargaining and, therefore, any refusal could not be the basis of a charge. The hearing officer did not have the benefit of *Manatee County*, released the next day by the court, which may vitiate this holding.[33]

The union also charged the City with bad faith because, it alleged, the City took a fixed bargaining position and did not change it. The hearing officer found that the City gave good faith consideration to the union's proposals. She also noted that employers are not required to retreat from their positions and, in the totality of the circumstances, she found no bad faith bargaining by the City.[34]

Recommended orders have been issued in two City of Miami financial urgency unfair labor practice cases, filed separately by the police and fire bargaining agents.[35] Both cases define financial urgency consistently with the *Lake Worth* recommended order. The hearing officer in the police case adds expressly that "a close examination of the employer's complete financial picture" is required and the determination must be case by case.[36] These hearing officers did have the benefit of *Manatee County* and engaged in an analysis of whether the employer had a compelling state interest in modifying the contracts.[37] Both also rejected adopting the "no reasonable alternative" standard for determining financial urgency, although the hearing officer in the fire case found that Miami's financial condition would meet that standard anyway.[38]

There is a significant discussion in the Miami fire case regarding the nature of the bargaining under Section 4095.[39] The union charged that the City acted unlawfully when it implemented the contract modifications before completing the impasse proceedings all the way through legislative imposition hearings. The union argued that "impact bargaining typically does not apply when changes are made to mandatory subjects of bargaining . . . ."[40] Therefore, presumably, the meaning of "bargain the impact" in Section 4095 must be different from the meaning of "impact bargaining" that is a term of art in Florida public labor law. The hearing officer rejected this notion. He observed that the Legislature is presumed to know the special meaning of "impact bargaining" and that it fit the obvious purpose of the financial urgency statute for the employer to be able to avoid delay in addressing the urgency. He noted that the *Manatee County* court had also observed that delay would frustrate "the obvious purpose of the statute."[41] The hearing officer then went on to state: "[T]he City only had to give Local 587 a reasonable time to negotiate the impacts of the financial urgency before implementing the changes necessitated by the financial urgency . . . ."[42]

Because impact bargaining heretofore has meant bargaining over the effects of the implementation of a management prerogative, it has been unclear how to conceptualize impact bargaining relating to mandatory subjects of bargaining, as the union pointed out. The hearing officer's formulation suggests that the financial urgency stands in the shoes of the management prerogative and that the employer's response to it – the specific modifications of the contract – are the impacts to be bargained.

Finally, Miami's fire union also filed a grievance and went to arbitration based on a provision of the contract relating to funding.[43] As a part of that grievance, the union argued that the City's invocation of financial urgency was not justified. The arbitrator stated, "But <u>that</u> question – the reasonableness of the invocation – is an unfair labor practice question, and is not abitrable."[44] The arbitrator relied on a Fourth District Court of Appeal case which had vacated an arbitrator's award finding a public employer had misapplied Section 4095.[45] The court held

that matters under the Commission's jurisdiction were outside the scope of authority of arbitrators.[46]

4. Notes From the Front Lines.

Labor lawyers are beginning to gather guidance about Section 4095 from the courts, from their own experiences, and from the experiences of other practitioners. Following are some of the issues, tactics, and considerations that have arisen.

Probably the most valuable information we have so far is a working definition of financial urgency, albeit only in hearing officers' recommended orders, i.e., a financial condition requiring immediate attention. The "no reasonable alternative" or financial exigency standard has been ruled out as a threshold level, but the employer will have to demonstrate a compelling state interest if the financial urgency is challenged. The hearing officers also all have considered the totality of the employer's financial condition in determining the existence of the financial urgency. Although not expressly articulated as a factor of analysis, the hearing officers also have looked at the steps taken by the employer to meet the urgency short of modifying labor contracts.

From a practice standpoint, just as useful is the decisions' approval of the employer implementing the modifications before the impasse procedures have been completed. This is a recognition that urgency, after all, is urgent and requires "immediate attention," not attention six months to a year from now after evidentiary hearings, briefings, and legislative meetings. In the same vein, the Commission has shown a recognition that injunctions staying special magistrate proceedings are incongruous in a financial urgency context. It was previously not uncommon for the Commission to stay impasse proceedings during the pendency of a related unfair labor practice charge. This afforded endless opportunity for delay if that was a party's desire. Anecdotally, the Commission is declining such requests in circumstances in which the financial urgency declaration appears, prima facie, to be in good faith.

Implementation before imposition does carry risks, however. The impasse process will take weeks or months under the best of circumstances. If the chief executive officer has implemented the slate of proposed modifications made during Section 4095 bargaining, he or she should make quite clear to the legislative body the consequences if those modifications are not eventually imposed – i.e., rescission, back pay, and possibly creative new unfair labor practice charges. Similarly, the employer's bargaining team must be careful to ensure that all the contract modifications necessary to address the financial urgency are on the bargaining table so that they can be items of impasse before the special magistrate and at the legislative imposition hearing.

In the current economic and political climate, labor organizations are aware that the status quo is likely to be preferable to the wage and benefit reductions that employers want to achieve through bargaining and, if necessary, impasse. Therefore, they have evolved tactics to stave off impasse or even prevent it from being used to effect reductions. One example of this was illustrated in the *Lake Worth* case discussed above. The labor organization purported to accept the employer's proposals so that they would not be in dispute and, thus, not be able to be brought before the legislative body for imposition. Of course, the bargaining agent would have to bring them before the bargaining unit for a vote, but rejection would be inevitable. The outcome would be to move the bargaining process back to square one and to preserve the status quo – unreduced. A variation on this tactic is for the bargaining agent to postpone acceptance until the special magistrate stage, then either agree to distasteful proposals during the hearing or to accept the special magistrate's recommendations of bargaining unit proposals. Either way, the expected

result is rejection of ratification and preservation of the status quo. The employer must be prepared to reject the special magistrate's favorable recommendations in order to be able to impose the needed reductions.

A bargaining tactic that is being seen, especially from public safety units, is to loudly and publicly reject wage and benefit cuts and suggest layoffs instead. Layoffs, of course, are a statutory management right. The labor organization gambles that the employer will not be able to tolerate the decline in the standard of service and the political consequences that attend it and will instead moderate the reductions and look elsewhere for savings or revenue. One theory surfacing in the financial urgency unfair labor practice litigation is that contract modifications cannot be justified until the employer has resorted to large layoffs. Hand in hand with this theory is that financial urgency cannot be justified until the employer has raised taxes to the maximum level. These theories are based on the "no reasonable alternative" standard, however, which has so far not gained any traction.

5. Conclusion.

Two years ago, this writer paraphrased an expert in the field who said that if you need to act quickly to avoid something, that was urgency, but if you were already knee-deep in it, you had left urgency behind.[47] Florida public sector labor law is knee-deep in financial urgency now.

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[2] § 447.4095, Fla. Stat. (2011) (hereinafter "Section 4095").

[3] Florida Statutes Chapter 447, Part II.

[4] Act effective July 1, 1995, ch. 95-218, § 2, Fla. Laws 1943, 1943-44.

[5] *Manatee Educ. Ass'n v. School Dist. of Manatee County*, 35 F.P.E.R. ¶ 46 (2009), *aff'd in part, rev. in part, remanded*, 62 So. 3d 1176 (Fla. 1st DCA 2011) (the First District decision is hereinafter referred to as "*Manatee County*").

[6] Section 4095; *see also* Fla. S. Comm. on Govt'l. Ops., SB 888 (1995) Staff Analysis (March 27, 1995) (noting that "financial urgency" is undefined).

[7] Section 4095.

[8] Id.; § 447.403, Fla. Stat.

[9] *See, e.g., Walter E. Headley, Jr., Miami Lodge # 20, Fraternal Order of Police v. City of Miami*, Case No. CA-2010-119, slip. op. at 20 (Florida Public Employees Relations Comm., Hearing Officer's Recommended Order July 1, 2011); *see also City of Jacksonville v. Jacksonville Supervisors Ass'n*, 791 So. 2d 508 (Fla. 1st DCA 2001) (holding that implementation of changes to terms of employment subject to impact bargaining may be implemented by the public employer before completion of the impasse procedure.)

[10] *See, generally,* David C. Miller, "Financial Urgency and the Public Employer's Authority to Make Unilateral Changes to Terms and Conditions of Employment of Bargaining

Unit Employees," presented to the 35th Annual Florida Public Employment and Labor Law Forum, October 22-23, 2009. This writer predicted at the time that more and more public employers were likely to have to resort to Section 4095 as the economic crisis continued. Unfortunately, that prediction has proven accurate.

[11] This statement is based on the writer's personal knowledge and research. The Commission does not keep statistics on financial urgency declarations. Some public employers have declared financial urgency multiple times.

[12] The case, renumbered CR-2011-002, had been remanded by the Commission for a further evidentiary hearing. As of this writing, the case had been continued for 30 days by motion of the parties, who were conferring on the issues to be presented.

[13] *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993).

[14] 35 F.P.E.R. ¶ 46.

[15] *Manatee County* at 1178.

[16] *Id.*

[17] *Id*.

[18] *Id*. at 1181, 1183.

[19] *Id*. at 1181.

[20] *Id*.

[21] 35 F.P.E.R. ¶ 46.

[22] *See, e.g., Miami Ass'n of Fire Fighters, Local 587 v. City of Miami,* Case Nos. CA-2010-124, CB-2010-077 (Florida Public Employees Relations Comm'n Hearing Officer's Recommended Order July 7, 2011); *City of Lake Worth v. IBEW Local 359*, 36 F.P.E.R. ¶ 22 (2010).

[23] *Miami Ass'n of Fire Fighters, Local 587 v. City of Miami*, Case No. 10-27577CA20 (Fla. 11th Jud. Cir. Ct.) (Complaint at 3-4).

[24] *Id*. at 4.

[25] *Id*. (Final Judgment, May 26, 2010), *aff'd*, Case No. 3D10-1458 (Fla. 3d DCA Nov. 17, 2010) (per curiam).

[26] Case No. 3D10-1458 (Fla. 3d DCA Nov. 17, 2010) (per curiam).

[27] *Public Employees Union, et al. v. City of Lake Worth*, Case Nos. CA-2010-087, -091, -114, -126, slip op. (Florida Public Employees Relations Commission Hearing Officer's Recommended Order June 1, 2011).

[28] *Id*. at 35.

[29] *Id*. at 34.

[30] *Id*.

[31] *Id*. at 34-35.

[32] *Id*. at 40.

[33] *Id*. at 33.

[34] *Id*. at 36-37.

[35] *Miami Ass'n of Fire Fighters Local 587, supra* n. 22; *Fraternal Order of Police, supra*, n. 9.

[36] *Fraternal Order of Police, supra*, n. 9, at 24.

[37] *Id.* at 22-23; *Miami Ass'n of Fire Fighters Local 587, supra* n. 22, at 22.

[38] *Fraternal Order of Police, supra*, n. 9, at 22; *Miami Ass'n of Fire Fighters Local 587, supra* n. 22, at 21.

[39] *Miami Ass'n of Fire Fighters Local 587, supra* n. 22, at 23-26.

[40] *Id*. at 25.

[41] *Id*. (quoting *Manatee County* at 1181.

[42] *Id*. at 26.

[43] *In the Matter of the Arbitration Between the Int'l Ass'n of Firefighters, Local 587, and the City of Miami*, Case No. AAA 32 390 00428 10 (June 6, 2011) (Lurie, Arb.)

[44] *Id*. at 17.

[45] *CWA v. Indian River County Sch. Dist.*, 888 So. 2d 96 (Fla. 4th DCA 2004).

[46] *Id.* at 100.

[47] Miller, supra, n. 10.

Financial Urgency Under Section 447.4095

David C. Miller, Esq.
Bryant Miller Olive

37th Florida Public Employment & Labor Relations Forum
September 22-23, 2011

Section 4095

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 which shall not exceed 14 days, a dispute exists ... an impasse shall be deemed to have occurred .... The parties shall then proceed pursuant to ... s. 447.403.

- **Enacted 1995 – first interpreted by PERC in 2009**
- **More than a dozen declarations in last 2 years**
- ***MEA v. School Dist. Manatee County* – PERC decision, 1st DCA decision**
- **Other decisions – Lake Worth, City of Miami ULP HOROs, City of Miami arbitration award**
- **Practical experience**

Manatee County

Manatee Education Ass'n v. Sch. Dist. Manatee County, 62 So. 2d 1176 (Fla. 1st DCA 2011) (affirming in part, reversing in part 35 F.P.E.R. ¶ 46 (2009)).

1st DCA remanded to PERC to develop a standard for determining existence of "financial urgency"

Bryant Miller Olive

Manatee County

District faced large shortfall, needed relief from labor costs

Results from voluntary bargaining too slow

Declared Section 4095 financial urgency

Union refused to participate in bargaining, or special magistrate selection or proceedings

Magistrate recommended District proposals, District rejected

Union refused to attend imposition hearing

District implemented proposals

Bryant Miller Olive

Manatee County

Union filed ULP, argued District had to prove existence of financial urgency before invoking Section 4095

Proper standard for determining existence of ULP was "no reasonable alternative means of preserving the contract" – *Chiles v. UFF*, 615 So. 2d 671 (Fla. 1993) (standard for financial exigency)

PERC held that employer need not prove financial urgency before invoking Section 4095

Because union boycotted process, District's actions were "not unlawful"

Bryant Miller Olive

Manatee County

1st DCA had the case for more than 2 years; oral argument was February 2010 – decision was released June 2, 2011

- **Compelling state interest required**
- **Employer need not prove financial urgency before invoking Section 4095**
- **Union refusal to participate does not waive its ability to contest the modification of its contract by challenging the existence of financial urgency**
- **Remand to PERC to develop standard**

Bryant Miller Olive

Other Decisions

City of Miami – constitutional challenge

Lake Worth – PERC HORO pre-1st DCA decision (by 1 day)

City of Miami – 2 PERC HOROs post-1st DCA

City of Miami – arbitration award

Bryant Miller Olive

City of Miami – Constitutional Challenge

Union filed dec action in Circuit Court, arguing Section 4095 violates:

- **Right of collective bargaining**
- **Contracts clause**
- **Prohibition on grant of unfettered discretion in execution of legislative power**
- **Deprivation of property without due process**
- **Equal protection**

Bryant Miller Olive

City of Miami – Constitutional Challenge

- Trial court injunction hearing order became the final judgment finding Section 4095 to be constitutional
- 3rd DCA issued a PCA in November 2010

Bryant Miller Olive

Lake Worth HORO

- "[A] financial urgency is a financial condition calling for immediate attention, [and] not necessarily a financial emergency or bankruptcy . . . ."

Bryant Miller Olive

Lake Worth HORO

- Rejected the "no reasonable alternative" test
- Considered large amount of evidence relating to City's financial condition and its non-labor costs efforts to address the problem
- City Manager declared the urgency – OK
- "Bargaining from a fixed position" charge not sustained
- Refusal to provide information charge not sustained

Bryant Miller Olive

Miami HOROs

- Use same standard for financial urgency
- Require "close examination of the employer's complete financial picture"
- Employer must demonstrate a compelling state interest
- Reject "no reasonable alternative" standard
- Discussion of nature of impact bargaining under Section 4095 – new paradigm

Bryant Miller Olive

Miami Arbitration

- Existence of financial urgency within PERC's exclusive jurisdiction
- *CWA v. Indian River Sch. Dist*., 888 So. 2d 96 (Fla. 4th DCA 2004)

Bryant Miller Olive

Section 4095 In Practice

- Analyze the employer's entire financial picture using the "requires immediate attention" standard
- Is there a compelling state interest?
- Did the employer avail itself of other means to address its financial problems or is it relying solely or mainly on modifying the labor contract?
- The layoffs dilemma

Bryant Miller Olive

In Practice

Injunctions staying impasse – "frustrate the obvious purpose of the statute"

Implementation before imposition

- **What happens if what the employer implements is not what is eventually imposed?**
- **Is everything that was implemented preserved as an item at impasse for consideration by the special magistrate and legislative body?**

Bryant Miller Olive

In Practice

Be aware of procedural traps for the unwary in the impasse procedure

- **Bargaining agent accepts, bargaining unit rejects**
- **Special magistrate recommendations must be rejected to reach imposition hearing**
- **Effective date of imposed items**

Bryant Miller Olive

If your foot's in the air, that's urgency; if you've already stepped in it, you've left urgency behind.

Florida is knee-deep in financial urgency now.

Bryant Miller Olive

WHAT IS HAPPENING IN MIAMI? THE LITIGATION OF SECTION 447.4095

By

Michael Mattimore, Tallahassee
Donald D. Slesnick, Miami

What is Happening in Miami?

The Litigation of Section 447.4095

37th Annual Public Employment Labor Relations Forum
September 22-23, 2011

MICHAEL MATTIMORE
DONALD D. SLESNICK, II

Miami's Financial State

- $53,000,000 budget shortfall in 2009
- Facing a $116,000,000 shortfall in 2010
- Unemployment rate increase from 5.3% (Oct 07) to 14.1% (Dec 10)
  - Worst since Hurricane Andrew in 1992
- 26.5% of City's residents in poverty
  - Nearly double the national average

The Issue

- Wage, pension, and health care costs of City employees were INCREASING
  - Projected to consume 101% of 2011 budget
- City contended money for anything (equipment, gas, utilities, etc) but wages and benefits
  - City's pension contribution in 2011 = $43,177 per worker
- Unions proposed wage increases and the City responded they could not fulfill unsustainable pension obligations and rising health insurance costs

Union Suggestions

- Raise ad valorem taxes to the maximum legal limit of 10 mils
- Implement a fire suppression fee of $225 per single family household
- Fast track plan for red light cameras and increase number from 80 to 200

Options?

Option 1	Option 2
• Layoff approximately 1,300 employees (1/3rd of City's workforce)	• Address the contracts and pension costs through the contracts themselves

Option 2: Declaring Financial Urgency

- City declared financial urgency in the summer of 2010
  - Negotiated for 14 days pursuant to § 447.4095, Florida Statutes
  - Informed unions in writing of statutory impasse
  - Unilaterally changed the collective bargaining agreement
  - Continued with Special Magistrate to negotiate impact of changes

Union Reaction

- Filed Grievance alleging contract violations
- Lawsuits in Circuit Court
- Unfair labor practice charges with the Public Employees Relations Commission

Grievance

- IAFF filed class grievance six days after City's declaration of financial urgency
  - Article 18.18

    The City hereby knowingly, intelligently, and unequivocally waives its right not to fund any year of this agreement. The only exception to this waiver is in the case of a "true fiscal emergency," which is unanticipated at this time.

    In order for the City to establish "a true fiscal emergency" so as to lawfully not fund any year or years of this agreement, the City must demonstrate that there is no other reasonable alternative means of appropriating monies to fund the agreement for that year or years.

Union Allegations

- Process in 447.4095 not applicable due to language contained in Article 18.18 of the parties' CBA
- Alleged City waived its right not to fund any year of the agreement without following process in Article 18.18
- City must show a true financial emergency before refusing to fund the agreement

City Allegations

- Article 15.3 forecloses the grievance and arbitration procedure when same grievable issue is pursued in another forum
  - "The Union and its members agree that an appeal to any other forum to resolve an issue that would otherwise be subject to this grievance procedure under this Agreement would preclude the use of said Grievance Procedure to resolve such alleged grievable issues."
- Grievance raises issues of whether there was a bona fide financial urgency with is within exclusive jurisdiction of PERC
- Grievance premature because no defunding action was taken when City notified Union that it was invoking § 447.4095

Outcome?

- Arbitrator Mark I. Lurie issued an opinion on June 6, 2011 denying the Union's grievance and finding:

(1) The City did not violate the CBA

(2) Union could not prove Article 18.18 constituted a broad waiver which would prevent City from invoking § 447.4095

(3) The CBA cannot supersede § 447.4095, Florida Statutes, by requiring a different standard for declaring financial urgency

(4) Union did not seek appeal to any other forum to resolve issues otherwise subject to grievance procedure
  - Constitutionality and legality of § 447.4095 and lawfulness of invoking the statute were issues beyond scope of grievance procedure
  - Breach of contract claim raised in Grievance was not raised in any other forum

(5) Arbitrator had jurisdiction.
  - Subject of grievance is one of contract interpretation, whether Article 18.18 precluded the invocation of § 447.4095.

(6) Grievance not premature
  - Invocation of § 447.4095 alone was enough to make issue ripe for arbitration.

Circuit Court Lawsuits

- *Miami Association of Fire Fighters, Local 587, of the International Association of Fire Fighters of Miami, Florida v. City of Miami*, Case No. 10-27577-CA 20
- *Miami Association of Fire Fighters, Local 587, of the International Association of Fire Fighters of Miami, Florida v. City of Miami*, Case No. 10-49873-CA 10
- *Fraternal Order of Police v. City of Miami*

Case No. 10-27577-CA 20

- Filed May 11, 2010, ten days after the City's declaration of financial urgency
- IAFF sought a declaratory judgment declaring the statute void and unenforceable
  - The term "financial urgency" is unconstitutionally vague
  - Improperly provides employers with unfettered discretion to trigger contract renegotiations
- Sought injunction prohibiting negotiations pursuant to § 447.4095

Outcome?

- Decided May 26, 2010
  (1) § 447.4095 is not unconstitutionally vague
  (2) § 447.4095 does not provide the City unfettered discretion in violation of the Florida Constitution
  (3) Denied declaratory and injunctive relief
  (4) Affirmed per curiam by 3rd DCA November 17, 2010

Case No. 10-49873-CA 10

- Filed September 14, 2010 after the City acted to modify the CBA on August 31, 2010
- Alleged constitutional violations of
  - Article I, §6 (Right to Work)
  - Article I, §9 (Due Process)
  - Article I, §10 (Prohibiting Laws)
    - Claimed City Commission's actions impermissibly constituted a law impairing contract rights
- Alleged statutory violations of
  - 286.011 (Sunshine Law)

Outcome?

- Granted City's Motion to Dismiss recognizing PERC's exclusive jurisdiction
- Appeal Pending
  - Briefs still being exchanged

Fraternal Order of Police v. City of Miami

- Alleges Sunshine violation related to executive session
- City's Motion to Dismiss based on PERC preemption denied
- WRIT of Prohibition filed with Third District Court of Appeal
  - Reply brief pending

PERC Unfair Labor Practices

- Miami Association of Fire Fighters, Local 587, of the International Association of Fire Fighters of Miami, Florida, Case No. CA-2010-124
- Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Case No. CA-2010-119

FOP ULP Allegations CA-2010-119

- City violated § 447.501(1)(a) and (c) by improperly declaring financial urgency and invoking procedures in § 447.4095 to alter the status quo
  - No "urgency" and balancing the budget is not a proper basis for declaring financial urgency
- Assuming proper invocation of § 447.4095, City unlawfully failed to follow its procedures by unilaterally altering the CBA before completion of 447.403 impasse procedures
- City engaged in bad faith bargaining because it never intended to reach an agreement with FOP during bargaining for a successor agreement

IAFF ULP Allegations CA-2010-124

- Alleged City of Miami violated 447.501(1)(a) and (c), Fla. Stat. , by unilaterally altering terms and conditions through invocation and application of Section 447.4095, Fla. Stat.
- City imposed changes to terms and conditions that were different from the specific terms discussed during negotiations
- City failed to properly invoke the financial urgency statute or demonstrate compelling state interests required by Chiles

City of Miami ULP Allegations CB-2010-077

- City alleged IAFF violated Section 447(2)(a) and (c), Fla. Stat. by avoiding PERC's authority for purposes of Section 447.4095, Fla. Stat., by avoiding timely impasse resolution through multiple forum litigation, and by requiring City to prove a "financial urgency" before bargaining
- Consolidated with the IAFF's ULP

Outcome?

- PERC hearing officers issued recommended orders on July 1, 2011 (FOP) and July 7, 2011 (IAFF) finding:

(1) City lawfully invoked § 447.4095. City satisfied compelling state interest test from Chiles

(2) City only had to give union a reasonable time to negotiate impacts of financial urgency before implementing changes. It did not have to wait for completion of impact bargaining process.

(3) Provided articles are subject to negotiations, the imposed changes to the employee terms and conditions may be different from the specific terms of each article discussed during negotiations.

(4) No temporal preconditions on initiating § 447.4095 (can declare financial urgency while simultaneously engaged in negotiations for a successor contract)

(5) § 447.4095 can be used to alter the status quo

(6) Union could process the grievance to an arbitrator because it did not prevent City from invoking § 447.4095 and using provision to alter contract and not contrary to public policy

(7) Union permitted to litigate in multiple other forums with continued participating in the § 447.4095 process and legitimate arguments (unconstitutionality) in other forums
- Hearing Officer recommended Union be awarded attorneys fees and costs for defending against this charge

(8) Evidence failed to show that Union refused to negotiate until the City proved a financial urgency despite not making concessions and making financial requests

PERC's final decision on these Recommended Orders is still pending

Questions?

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DRUG TESTING

By

Paul A. Donnelly, Gainesville

DRUG TESTING STATUTES

By Paul A. Donnelly[1]
Donnelly & Gross, PA

I. Florida Drug-Free Workplace Act. Program based on rules adopted by the Division of Worker's Compensation

A. Overview

1. Florida's Drug-Free Workplace Act, Chapter §§ 440.101 and .102, Fla. Stat., (the "Act")[2] was passed in 1991 and became effective January 1, 1992.

2. The Act is administered by the Florida Agency for Health Care Administration (AHCA). § 440.101(2).

3. The purpose of the Act is to discourage drug use and promote drug-free workplaces "in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees."

4. The Act was amended effective January 7, 2003, as follows:

   a. Clarifying that an employer is required to implement drug testing of employees and job applicants in order to qualify as having a drug-free workplace, and

   b. Requiring construction, electrical and alarm system contractors to implement drug-free workplace programs in order to qualify for contracts with the State of Florida.

5. In 1998, the Florida Legislature passed a law wherein the Department of Insurance must give "specific identifiable consideration" to those employers who implement a drug free workplace program. § 627.0915.

6. If an employer implements a drug-free workplace in accordance with the Act, which includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to law or to rules developed by AHCA, employees may be required to submit to drug testing under prescribed circumstances. If a drug or alcohol is found to be present in the

[1] The author acknowledges the assistance of Rebecca L.A.Wood, Law Clerk with Donnelly & Gross, PA.
[2] All references are to West's Florida Statutes Annotated, 2009, unless otherwise noted.

employee's system, the employee may be terminated and forfeits his or her eligibility for medical and indemnity benefits. § 440.101(2).

7. The adoption of the Act by employers is optional, § 440.102(2), but the Act establishes an incentive in the form of a workers compensation premium credit provision for employers certified as providing a drug-free workplace. This means that employers may receive a discount on workers compensation premiums and may deny workers compensation and medical benefits to any employee who refuses to submit to a drug or alcohol test, or who tests positive for drugs or alcohol. § 440.101(2), § 440.102(2). *See also* § 627.0195, Fla. Stat..

8. If an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in § 440.102, the employer will not be eligible for the discounts provided under Fla. Stat. § 627.0915. However, because Florida is an at-will employment state, it is not necessary for an employer to adopt the Act's drug-free workplace program before testing an employee suspected of drug abuse after a workplace injury.[3]

B. <u>Drug Testing Under the Act</u>

1. The Act does not require random testing, but employers may conduct random testing if they so choose. § 440.102(4)(b).

2. The Act permits testing for numerous categories of drugs (including alcohol). § 440.102(1)(c) & (2) Administrative regulations require urine samples to be used for drug tests and blood samples to be used for alcohol tests. *See* Fla. Admin. Code R. 59A-24.004.

3. Chapter 440.102(4)(a) of the Act requires that the employer conduct four types of drug tests:

a. Job applicant…test is a condition of hire

b. Reasonable-suspicion…drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of

[3] *See West's F.S.A. § 440.09(7)(a), see also* Laguerre v. Palm Beach Newspapers, Inc. 20 So.3d 392, (FL 4th DCA 2009)

experience. Among other things, such facts and inferences may be based upon:

(1) Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.

(2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

(3) A report of drug use, provided by a reliable and credible source.

(4) Evidence that an individual has tampered with a drug test during his or her employment with the current employer.

(5) Information that an employee has caused, contributed to, or been involved in an accident while at work.

(6) Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

§ 440.102(1)(n)

c. Routine fitness-for-duty…as part of a routinely scheduled examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group

d. Follow-up…at least once a year for two years for employees who have completed a drug treatment program

4. § 440.09(3) provides:

Compensation is not payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician; or by the willful intention of the employee to injure or kill himself, herself, or another.

5. The Act amended F.S.A. § 440.09 so as to permit employers to require an injured employee to submit to a test for the presence of drugs and to further provide: “If the injured worker refuses to submit to a drug test, it shall be presumed in the absence of clear and convincing evidence to the

contrary that the injury was occasioned primarily by the influence of drugs." F.S.A. § 440.09(7)(c).

C. Notice Requirements for Employees and Job Applicants

On a one-time basis only, prior to testing, an employer must give employees and job applicants a written notice containing a general statement of the employer's policy on employee drug use, § 440.102(3)(a) which must identify:

a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.

b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

c. A statement advising the employee or job applicant of the existence of this section.

d. A general statement concerning confidentiality.

e. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.

f. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department.

g. The consequences of refusing to submit to a drug test.

h. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.

i. A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is

unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.

j. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.

k. A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.

l. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.

m. A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

D. <u>Employee Protections</u>

1. Within five (5) days of being informed of a confirmed positive test, an employee may rebut the presumption of drug use by submitting information explaining or contesting the test results, and explaining why the result does not constitute a violation of the employer's policy. § 440.102(5)(i). If the explanation or challenge is unsatisfactory, the employer must provide the employee a copy of the positive test result and a written explanation of its decision, which documentation will be kept confidential and retained by the employer for at least one year. § 440.102(5)(j).

2. An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer. § 440.102(5)(k)

3. An employer cannot take disciplinary action solely on the basis of an employee's voluntary effort to seek treatment for drug and alcohol problems. § 440.102(5)(n)

4. If drug testing is conducted based on reasonable suspicion, the employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year. § 440.102(5)(o).

5. All positive specimens shall be preserved by a certified laboratory for at least 210 days, or until any administrative or legal challenge by the employee is concluded. The employee may also have the specimen retested by another certified laboratory at the employee's expense. § 440.102(5)(g).

6. Confidentiality provisions. § 440.102(8).

E. Employer Protections

1. An employee or job applicant whose drug test result is confirmed as positive in accordance with the Act shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state, or local handicap and disability discrimination laws. § 440.102(7)(a).

2. An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with the Act is considered to have discharged, disciplined, or refused to hire for cause. § 440.102(7)(b).

3. Nothing in the Act shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules. § 440.102(7)(d).

4. If an employee or job applicant refuses to submit to a drug test, the employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in the Act. § 440.102(7)(f).

F. Public Employees in Safety-Sensitive or Special Risk Positions

1. Public employers who employ individuals in safety-sensitive or special risk positions are required to remove an employee from that position if the employee enters an employee assistance or drug rehabilitation program. § 440.102(11)

2. "Safety sensitive position" means a position in which drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening procedures, work with confidential information or documents pertaining to criminal investigations, or work with controlled substances; a position subject to 110.207 (a position requiring a security background check); or a position in which a momentary lapse of attention could result in injury or death to another person. § 440.102(1)(o)

3. "Special risk position" means a position requiring certification under Chapter 633 or Chapter 933, i.e., firefighters and law enforcement officers. § 440.102(1)(p)

G. Collective Bargaining Rights

1. Drug-free workplace program requirements are a mandatory topic of negotiations with any certified bargaining unit for non-federal public sector employers. § 440.102(13)(b).

2. Drug-free workplace program requirements in a collective bargaining agreement must not violate statutory and constitutional dictates. *Communications Workers of America, Local 3170 v. City of Gainesville*, 697 So.2d 167 (Fla. 1st DCA 1997).

H. Notable Cases

1. Workers' compensation drug-free workplace statutes are designed to accomplish twin goals: discouraging drug abuse and maximizing industrial productivity by eliminating the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. *Hall v. Recchi America Inc.*, 671 So.2d 197 (Fla. 1st DCA) (1996), *reh'g denied, aff'd* 692 So.2d 153. The First Circuit also held in *Hall* also held that the Act's then irrebutable presumption that any confirmed drug use was causally related to a workplace injury was unconstitutional because it violated due process protections. Instead, the *Hall* court reasoned that determinations of whether the presence of alcohol or drugs in an employee's body had a causal relation with the employee's workplace injury should be made on a case-by-case basis rather than through a statutory presumption. The *Hall* case dealt with a situation in which a claimant was denied Workers' Compensation benefits because he tested positive for trace elements of marijuana after suffering a workplace injury. A doctor testified that tests indicated that the employee had ingested the marijuana more than five days before the accident and that the drug could have played no part in the accident because its effects usually last less than

six hours. The Florida Supreme Court affirmed the decision, and the Act was later amended to include a rebuttable presumption.

2. A Workers' Compensation claimant's refusal to provide second urine sample for drug test after first sample was below acceptable temperature range, disqualified her for benefits; walk-in clinic was not required to allow claimant to return within 24 hours for second test when specimen was not within acceptable temperature range. *Van Duyn v. Truck Driver Services, Inc.*, 805 So.2d 1107 (Fla. 1st DCA 2002).

3. In *Temporary Labor Source v. E.H.*, 765 So.2d 757 (Fla. 1st DCA 2000), *review denied*, 786 So.2d 1189 (Fla. 2001), the court held that although nearly any drug test is admissible to prove a drug defense under F.S.A. § 440.09(3), only a drug test that is taken in strict accordance with the Florida Administrative Code rules will create any presumption against compensability as stated in F.S.A. § 440.09(7)(b).

4. *European Marble Co. v. Robinson*, 885 So. 2d 502 (Fla. 1st DCA 2004) held that the presumption in F.S.A. § 440.09(7), that a claimant's injury was occasioned primarily by the intoxication of claimant, does not arise unless the statutorily required Florida Administrative Code rules for drug testing are followed, and these rules apply as well to blood-alcohol tests.

5. Because employer's drug free workplace program did not satisfy statutory requirements for such programs, denial of benefits was impermissible under workers' compensation statute providing that, if employer implements drug free workplace program and if drug is found in employee's system, employee shall forfeit his eligibility for benefits. Employer is not entitled to absolute denial of all benefits when employee tests positive for drug use after injury even if employer has substantially complied with statutory drug free workplace program requirements. *Gustafson's Dairy, Incorporated/Professional Administrators, Inc. v. Phillips*, 656 So.2d 1386 (Fla. 1st DCA) (1995).

5 When a symptom of the claimant's injury is caused in part by the habitual use of alcohol, treatment for that symptom is not compensable. *Herrera v. Atlantic Interior Construction*, 772 So.2d 587 (Fla. 1st DCA 2000) (citing F.S.A. § 440.02(1)).

6. The provisions of the drug-free workplace statutes may be utilized by a municipality to establish a drug-free workplace. *Op.Atty.Gen*. 98-38, June 5, 1998.

7. Medical assistant possessed sufficient qualifications to collect workers' compensation claimant's blood for testing, for purpose of determining whether employer operated qualified drug-free workplace program;

statutory list of persons qualified to collect specimens in not all-inclusive. In addition, physician authorized to evaluate workers' compensation claimant's blood test results contracted with hospital's testing department, which contracted with employer, thus satisfying requirement of Workers' Compensation drug-free workplace program statute. *Stepanek v. Rinker Materials Corp*., 697 So.2d 200 (Fla. 1st DCA) (1997).

II. Florida Public Sector Drug-Free Workplace Act, 112.0455, Fla. Stat.

A. Overview

1. Chapter § 112.0455 (the "Drug-Free Workplace Act") aims to promote drug-free workplaces within government through fair and reasonable drug-testing methods for the protection of public employees and employers, and by encouraging employers to provide assistance and confidential testing results to employees with drug problems. § 112.0455(2).

2. "Employer" means any agency within state government that employs individuals for salary, wages or other remuneration. § 112.0455(5)(h).

3. "Employee" means any person who works for salary, wages or other remuneration from an employer. § 112.0455(5)(g).

4. "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of such substances. § 112.0455(5)(a).

B. Drug Testing of Employees

1. Public employers do not have a legal duty to request an employee or job applicant to undergo drug testing. § 112.0455(4).

2. However, under § 112.0455(7), an employer is authorized to conduct four types of testing (please note these are the same as those *required* by § 440.102(4)(a)):

   a. Job applicant

   b. Reasonable suspicion

   c. Routine fitness-for-duty

   d. Follow-up

C. Notice Requirements

The notice requirements of § 112.0455(6) closely parallel the requirements under § 440.102(3).

D. Discipline Remedies

An executive branch employee who is disciplined or a job applicant for another position who is not hired because of positive drug-test results, may file an appeal with the Public Employees Relation Commission (PERC). § 112.0455(14)(a).

E. Employee and Employer Protections

1. The employer and employee protection requirements of § 112.0455(8), (9) and (10) generally parallel the provisions of § 440.102(5), (6) and (7).

2. No employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:

    a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or

    b. The employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of an employee assistance program or an alcohol and drug rehabilitation program. § 112.0455(8)(n).

F. Confidentiality Provisions

The notice requirements of § 112.0455(11) closely parallel the requirements under § 440.102(8).

G. Notable cases

1. Alert to portion of refrigerator by narcotics search dog inside prison employee's apartment on prison property provided factual basis for reasonable suspicion to test both residents of apartment for drugs pursuant

to statute, and fact that only one resident was required to submit to such testing did not defeat propriety of testing. *Mitchell v. Department of Corrections*, 675 So.2d 162 (Fla. 4th DCA 1996), *rehearing denied*.

2. Test in which, through variation of mass spectrometry, prison employee's shoulders, arms, and hands were vacuumed, and resulting sample was analyzed for narcotics or explosives residue, was not "drug test" for purposes of statute requiring that employee drug tests be based on reasonable suspicion; whole statutory scheme relating to drug tests was intended to protect employees from unwarranted intrusive drug testing requiring samples of bodily fluids and tissues. *Mitchell v. Department of Corrections*, 675 So.2d 162 (Fla. 4th DCA 1996), *rehearing denied*.

3. Area transportation manager could not be terminated based on positive result on drug test, where manager was not a special risk employee, manager was not afforded an opportunity for a second test, manager did not review his medical history with a medical reviewing officer, it was not clear that any drug use violated school board's policy of using drugs at school because there was no indication of where alleged drug use took place, and manager made unrefuted allegations that proper testing procedures were not followed. *McIntyre v. Seminole County School Bd.*, 779 So.2d 639 (Fla. 5th DCA 2001).

H. Developing Case on Random Drug Testing

On March 22, 2011, Governor Scott signed Ex. Order 11-58 mandating the pre-employment and random drug testing of all employees under the executive branch.

On May 31, 2011, AFSCME, represented by the ACLU, filed a federal lawsuit to stop the drug testing. (The initial Plaintiff, Richard Flamm, was dropped from the lawsuit because as a Fish and Wildlife employee, he would not be tested.)

On June 10, Governor Scott suspended implementation of 11-58 for all agencies except the Department of Corrections. Most DOC employees are already drug tested. The order will extend the tests to administrative personnel.

LAWSUIT

The complaint alleges that suspicionless testing violates the 4th Amendment, except under special circumstances, such as those involving safety sensitive employees.

The complaint largely relies on Chandler v. Miller, 520 U.S. 305 (1997) where candidates for high office in Georgia were subject to drug tests. The U.S.

Supreme Court held that "hypothetical hazards" were not enough to justify the mandatory drug-testing of candidates. The danger must be "concrete."

GOVERNOR SCOTT

"Look, the private sector does this all the time. Our taxpayers expect out state employees to be productive, and this is exactly what the private sector does."

It is important to distinguish between the public sector and the private sector due to the 4th Amendment protections that public sector employees have by virtue of having the government as an employer.

III. Omnibus Transportation Testing Act of 1991 (OTETA), 49 U.S.C. § 31306

A. Overview.

1. Title 49, Section 31306(b) of OTETA requires commercial motor carriers to conduct the following types of drug and alcohol testing of commercial vehicle operators:

    a. pre-employment;

    b. reasonable suspicion (under 49 C.F.R. § 382.307(c), based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver, *made by a supervisor or company official who is trained in accordance with 49 C.F.R. § 382.603*);

    c. random, and;

    d. post-accident (mandatory for accidents involving loss of human life).

2. OTETA is administered by the United States Secretary of Transportation and the Department of Transportation (DOT). 49 U.S.C. § 31306(b).

3. "Controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 802) specified by the Secretary of Transportation.

4. The Fourth Amendment is not violated when individual occupying safety-sensitive position is randomly chosen pursuant to OTETA to take drug test, assuming no abuse thereof. *Parry v Mohawk Motors of Mich., Inc*., 236 F.3d 299 (6th Cir. 2000), *cert denied* (2001) 533 US 951, 150 L Ed 2d 752, 121 S Ct 2594.

5. In order to establish federal Department of Transportation-regulated employee's ineligibility for state unemployment benefits because of positive drug or alcohol test result pursuant to 49 USCS § 31306, there must be clear and convincing evidence that testing was conducted according to federal guidelines; because no evidence was produced that truck driver was informed of his right to request drug testing of split specimen within 72 hours, misconduct for purposes of unemployment benefits as required by Miss. Code Ann. § 71-5-513A(1)(b) was not established and state's decision to deny truck driver unemployment benefits was improper. If employer wishes to disqualify employee for failing federally-regulated drug test pursuant to 49 USCS § 31306 in which split specimen was taken, it must produce clear and convincing evidence that split specimen was reconfirmed positive or that employee declined to discuss result with medical review officer pursuant to 49 C.F.R. § 40.33(c); doing so will satisfy misconduct requirement of Miss. Code Ann. § 71-5-513A(1)(b) *Southwood Door Co. v Burton* (2003, Miss) 847 So. 2d 833 (Miss. 2003).

6. The scope of the preemption language contained in 49 U.S.C. § 31306(g) is broad, and any state law provisions, enforcement of which would obstruct deterrent effect of statute or nationwide uniformity of testing rules, are therefore pre-empted. *Keaveney v Town of Brookline* 937 F.Supp 975 (D.C. Mass. 1996). Therefore, claims by drivers of commercial vehicles that town's drug and alcohol testing policy violated their rights under state law were preempted by 49 U.S.C. § 31306(g), which required covered employers to institute testing, and testing policy pursuant to federal regulations.

B. <u>Testing and Lab requirements</u>

1. The Secretary of DOL, at 49 U.S.C. § 31306(c)(2), has developed laboratory and testing procedures, incorporating the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, establishing:

   a. a comprehensive standards for every aspect of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards requiring the use of the best available technology to ensure the complete reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimens collected for controlled substances testing;

   b. the minimum list of controlled substances for which individuals may be tested; and

c. appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section.

2. The DOL further requires, at 49 U.S.C. § 31306(c)(3)–(8), that employers and laboratories involved in testing under OTETA:

a. have the capability and facility, at the laboratory, of performing screening and confirmation tests;

b. provide that any test indicating the use of alcohol or a controlled substance in violation of law or a Government regulation be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance;

c. provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a second confirmation test done independently at another certified laboratory if the individual requests the second confirmation test not later than 3 days after being advised of the results of the first confirmation test;

d. ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations that may be necessary and in consultation with the Secretary of Health and Human Services;

e. provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section; and

f. ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

C. Notable cases

1. Contractual agreement that requires employer to reinstate employee truck driver who has twice tested positive for marijuana use, but who has not operated vehicle under influence of drugs, does not run contrary OTEATA's public policy, implementing regulations promulgated by Department of Transportation (DOT), or any other law or legal precedent, and thus courts may properly enforce labor arbitration award that orders such reinstatement. *Eastern Associated Coal Corp. v UMW, Dist. 17* (2000) 531 US 57, 148 L Ed 2d 354, 121 S Ct 46 (2000).

2. Discharge of driver after finding that his urine contained certain level of cannabinoids did not breach collective bargaining agreement, even if cutoff level for initial drug testing for marijuana metabolites in company drug and alcohol policy was higher than that found in driver, where applicable government regulation under 49 U.S.C. § 31306 was amended after collective bargaining agreement was adopted to lower cutoff level, and company policy stated that it was subject to change as required by government regulations. Guthrie v Central Distributing Co., 74 F.Supp.2d 657 (S.D. W. Va 1999), aff'd, 217 F3d 838 (4th Cir. 2000).

3. There is no implied private cause of action under OTETA. *Parry v. Mohawk Motors of Michigan, Inc*., 236 F.3d 299 (6th Cir. 2000) *reh'g denied* (2001 US App LEXIS 2087), *cert denied*, 533 US 951 (2001).

IV. Federal Drug-Free Workplace Act of 1988, 41 U.S.C. § 701

A. Overview

1. The Drug Free Workplace Act, 41 U.S.C. § 701, et seq., requires mandatory compliance by certain federal contractors and grant recipients.

2. 41 U.S.C. § 701 applies to federal contractors, while 41 U.S.C. § 702 Applies to federal grant recipients. The provisions of the two statutes are virtually identical.

3. The DFWA further holds that "[n]o Federal agency shall enter into a contract with an individual unless such individual agrees that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract."

4. The DFWA does not mandate any particular type of drug testing, but requires the employer to maintain a drug-free workplace in compliance with the DFWA, under penalty of denial or debarment from federal

contracts. 41 U.S.C. §§ 701(a)(1) and (b)(1). *See also Parker v. Atlanta Gas Light Co.*, 818 F.Supp. 345, 347 (S.D.Ga.1993) ("the statute establishes no requirement for drug testing" and employee identified no regulations implementing act that did so).

5. A employee who is discharged after refusing to submit to drug test, which was part of employer's fitness for work policy, which had been developed in response to Drug-Free Workplace Act, was not entitled to unemployment compensation, since employee had signed form agreeing to abide by policy. *Riceland Foods, Inc. v. Director of Labor*, 38 Ark. App. 269, 832 SW2d 295 (1992).

B. <u>Drug-Free Workplace Requirements</u>

1. A covered federal contractor or grant recipient meets the requirements of the DFWA by the following:

   a. publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition, 41 U.S.C. § 701(a)(1)(A);

   b. establishing a drug-free awareness program to inform employees about: (i) the dangers of drug abuse in the workplace; (ii) the person's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation, and employee assistance programs; and (iv) the penalties that may be imposed upon employees for drug abuse violations, 41 U.S.C. § 701(a)(1)(B);;

   c. making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A), 41 U.S.C. § 701(a)(1)(C);

   d. notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will (i) abide by the terms of the statement; and (ii) notify the employer of any criminal drug statute conviction for a violation occurring *in the workplace* no later than 5 days after such conviction, 41 U.S.C. § 701(a)(1)(D);

   e. notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction, 41 U.S.C. § 701(a)(1)(E);

f. imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title, 41 U.S.C. § 701(a)(1)(F); and

g. making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F). 41 U.S.C. § 701(a)(1)(G).

2. A grantee or contractor who receives notice from an employee of a conviction for a drug offense occurring *within the workplace* shall, within 30 days:

a. take appropriate personnel action against such employee up to and including termination; or

b. require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

41 U.S.C. § 703.

C. <u>Consequences of Non-Compliance</u>

1. Suspension, termination, or debarment of the contractor. Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor or the individual who entered the contract with the Federal agency shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that:

a. the contractor violates the requirements for a drug-free workplace under the DFWA; or

b. such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by the DFWA.

41 USC 701(b)(1)(A) & (B)

2. Conduct of suspension, termination, and debarment proceedings. If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal

Acquisition Regulation and applicable agency procedures. Suspension and debarment proceedings must include notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding. 41 USC 701(b)(2)(A) & (B)

3. Effect of debarment. Upon issuance of a decision requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years. 41 USC 701(b)(3)

V. Practice issues

1. Assisting employers with formulating and implementing various drug-free workplace programs, policies and procures.

   a. educational component;

   b. documentation requirements;

   c. periodic training, review and revision of policies.

2. Litigation issues.

   a. employee claims;

   b. employer defenses;

   c. administrative debarment proceedings for federal contractors/grant recipients.

PUBLIC OFFICIAL ETHICS

By

C. Christopher Anderson III, Tallahassee

CONFLICTS OF INTEREST, FINANCIAL DISCLOSURE, GIFT LAWS, POSTEMPLOYMENT RESTRICTIONS, AND MORE UNDER PART III, CHAPTER 112, FLORIDA STATUTES (CODE OF ETHICS FOR PUBLIC OFFICERS AND EMPLOYEES)

C. Christopher Anderson III, Chief Assistant General Counsel
Florida Commission on Ethics
www.ethics.state.fl.us

I. PERSONS GOVERNED BY THE ETHICS LAWS

A. Public Officers

1. A "public officer" is defined in F.S. 112.313(1) and 112.3143(1)(a) to include persons "elected or appointed to hold office in any agency, including any person serving on an advisory body." One can be "appointed" by various means (CEO 02-15).

2. Officers and directors of nonprofit corporations organized under Ch. 617, F.S. have been found not to be public officers subject to the Code of Ethics. CEO 84-17, CEO 91-41. HOWEVER, CHAPTER 2009-126, L.O.F., CREATED F.S. 112.3136, SUBJECTING THE OFFICERS, DIRECTORS, AND CHIEF EXECUTIVE OFFICER OF A CORPORATION, PARTNERSHIP, OR OTHER BUSINESS ENTITY THAT IS SERVING AS THE CHIEF ADMINISTRATIVE OR EXECUTIVE OFFICER OR EMPLOYEE OF A POLITICAL SUBDIVISION, AND ANY BUSINESS ENTITY EMPLOYEE WHO IS ACTING AS THE CHIEF ADMINISTRATIVE OR EXECUTIVE OFFICER OR EMPLOYEE OF THE POLITICAL SUBDIVISION, TO A NUMBER OF PROVISIONS OF THE CODE OF ETHICS. In a particular situation, neither a hospital authority's financial services firm nor the firm's personnel were found to be subject to F.S. 112.3136. CEO 09-17.

3. Members of advisory board of city-operated charter school are public officers. CEO 99-2. However, in a particular context, officers and directors of nonprofit governing organization of a charter school were not found to be public officers. CEO 99-10. BUT NOTE THAT CHAPTER 2009-214, LAWS OF FLORIDA, AMENDED F.S. 1002.33 TO MAKE MEMBERS OF CHARTER SCHOOL GOVERNING BOARDS, INCLUDING GOVERNING BOARDS OF SCHOOLS OPERATED BY A PRIVATE ENTITY, SUBJECT TO F.S. 112.313(2), (3), (7), AND (12) AND F.S. 112.3143(3), OF THE CODE OF ETHICS. ALSO, CHARTER SCHOOL PERSONNEL IN SCHOOLS OPERATED BY A MUNICIPALITY OR OTHER PUBLIC ENTITY HAVE BEEN MADE SUBJECT TO F.S. 112.3135 (THE ANTI-NEPOTISM LAW). FURTHER, CERTAIN CHARTER SCHOOL PERSONNEL IN A CHARTER SCHOOL OPERATED BY A PRIVATE ENTITY HAVE BEEN MADE SUBJECT TO RESTRICTIONS LIKE THE RESTRICTIONS OF F.S. 112.3135, BUT APPARENTLY WITHOUT THE ADMINISTRATION OF THE RESTRICTIONS BEING PLACED IN THE COMMISSION ON ETHICS. F.S. 1002.33(24) and (25).

4. See Section 22, Chapter 2011-142. L.O.F., regarding Enterprise Florida, Inc.

B. Public Employees

1. The term "employee" is not defined in the Code of Ethics, but the First District Court of Appeal has applied in an ethics context the same definition of "employee" as is used in tort actions. Wright v. Commission on Ethics, 389 So.2d 662 (Fla. 1st DCA 1980).

2. "Independent contractors" are not employees and therefore are not governed by provisions in the Code that are applicable to public employees. CEO 81-48, CEO 81-61. Also, see CEO 83-2 regarding a "contract city manager." However, see this outline below regarding "local government attorneys," and above regarding new F.S. 112.3136.

3. See CEO 99-10 and F.S. 1002.33(24) and (25) regarding certain charter school employees.

C. Candidates for public office [defined in F.S. 112.312(6) to mean any person who has filed financial disclosure and qualification papers, has taken the candidate's oath, and seeks to become a public officer by election] are subject to a limited number of Code provisions; and successful former candidates who have not yet taken office are subject to the gifts law contained in F.S. 112.3148.

D. "Local government attorneys" (see below) also are subject to a limited number of Code provisions.

II. ANTI-NEPOTISM PROHIBITION

A. The anti-nepotism law (F.S. 112.3135) prohibits a public official from appointing, employing, promoting, or advancing, or advocating the appointment, employment, promotion, or advancement of a relative. It does not prohibit two relatives from being employed within the same agency. CEO 90-62, CEO 93-1, CEO 94-26. The law addresses placement in "a position in [an] agency," and thus has been found not to address situations in which a relative is hired as an independent contractor. CEO 96-13. Of course, a private law firm is not a public "agency" within the meaning of the law. CEO 11-04.

B. At the State level, the law applies to all agencies (executive, legislative, and judicial), except for "an institution under the jurisdiction of the Board of Governors of the State University System." At the local level, the law applies to counties, cities, and "any other political subdivision," except for school and community college districts. F.S. 112.3135(1)(a), (AGO 72-72, AGO 82-48). However, the Florida K-20 Education Code prohibits a district school board member from employing or appointing a "relative" (as defined in F.S. 112.3135) to work under the direct supervision of the member. F.S. 1012.23(2). A city charter school authority (as opposed to its sponsoring school district) is subject to F.S. 112.3135. CEO 06-13. AND SEE F.S. 1002.33(24), AS AMENDED BY CHAPTER 2009-214, LAWS OF FLORIDA, MAKING CERTAIN CHARTER SCHOOL OFFICERS OR PERSONNEL SUBJECT TO F.S. 112.3135 OR TO SIMILAR RESTRICTIONS. The law applies to appointments made by a community redevelopment agency (CRA) and by a city commission to the city's enterprise zone development agency. CEO 96-5, aff'd by PCA sub nom. City of Gainesville v. State Commission on Ethics, 683 So. 2d 487 (Fla. 1st DCA 1996).

C. The definition of "relative" for purposes of the anti-nepotism law is broader than the term as used in the voting conflicts law, but narrower than the term as it applies in the context of the gift law. Compare F.S. 112.312(21), 112.3135(1)(d), and 112.3143(1)(b). One's mother's sister's husband is not one's "uncle" under the anti-nepotism law. CEO 99-5. A person is not

one's "sister-in-law"" by virtue of marriage to one's wife's brother. CEO 96-6. One's paramour is not one's "relative." CEO 02-3.

D. The anti-nepotism law does not apply to actions other than appointment, employment, promotion, advancement, or advocacy of the same. Supervising or assigning work to a relative is not addressed or prohibited in the law. CEO 90-62, CEO 00-17. An advancement or promotion is "only an increase in grade which elevates an employee to a higher rank or position of greater personal dignity or importance . . . ." [Slaughter v. City of Jacksonville, 338 So. 2d 902 (Fla. 1st DCA 1976)]; however, see CEO 94-30 (in which the Commission found that designation of the position of chief deputy property appraiser for inclusion into the Florida Retirement System's Senior Management Service Class was an advancement or promotion) and compare CEO 94-26 (in which the Commission found that a special pay increase for a brother of the Secretary of the Department of Community Affairs was not a promotion or advancement); see also CEO 94-39 (action labeled "lateral transfer" substantively a promotion or advancement) and CEO 98-23 (sheriff's brother-in-law's promotion to deputy first class not a "promotion" or "advancement" under the law). Also, when a seemingly prohibited relationship develops after lawful employment (such as via marriage of a public official and an existing employee of the same agency), discharge of the employee is not required, as there is a "grandfathering"; but the employee cannot be advanced or promoted. CEO 94-6, CEO 91-27. However, "rehires" are not grandfathered. CEO 92-10 (county commission hiring relative of commissioner as correctional officer when commission takes over jail operations from sheriff who formerly employed the relative); CEO 09-15 (reappointments).

E. Under the former law, when an appointment was made by a board or commission, a relative of one of the board members could be appointed so long as the board member did not participate in the decision or advocate the appointment. City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

F. However, an amendment to the statute after Galbut specifies that a relative of a board member cannot be appointed by the board, regardless of whether the related board member does not participate. CEO 09-15. An exception is made in municipalities of less than 35,000 population for appointments to boards not having land-planning or zoning responsibilities. This exception applies regardless of whether the related public official voted on the appointment and regardless of whether the appointment was made before the exception was adopted. Kinzer v. Commission on Ethics, 654 So. 2d 1007 (3d DCA 1995). See CEO 98-22 regarding the meaning of "land-planning or zoning responsibilities."

G. The receipt of delegated authority to hire, promote, or advance will bring one under the statute in regard to his or her relatives; but one vested with hiring/promotion/advancement authority cannot avoid the statute by attempted delegation of the authority. Morris v. Seeley, 541 So. 2d 659 (Fla. 1st DCA 1989). Merit promotions/advancements going to the highest-scoring applicant and involving no discretion have been found, in at least one instance, not to be violative of the statute. CEO 98-2 (promotions of wildlife officer sons of GFC (FWC) Commission member). A county commission is not necessarily the "public official" vested with hiring/promotion/advancement authority in relation to all county positions; see CEO 93-1, in which the Commission found that the law was not violated where a county commissioner's wife was promoted in the county's solid waste department because under the county's charter the county manager held the promotion authority. Also, there is support for the position that the law does not apply in situations where a public official merely has the ability to approve or disapprove (rather than make) the hire or

appointment (AGO 83-13, AGO 73-75, AGO 71-158); however, be very careful in such situations not to confuse approval/disapproval with attempted delegation of the authority to hire or appoint.

H. The law applies to paid and unpaid positions (CEO 95-12) and to reappointments (CEO 95-12, CEO 09-15).

I. Certain volunteer emergency medical, volunteer firefighting, and volunteer police services positions are exempted from the law.

J. Agencies may authorize by regulation temporary employment in the event of an emergency as defined in F.S. 252.34.

III. DOING BUSINESS WITH ONE'S AGENCY PROHIBITION

A. F.S. 112.313(3) contains two prohibitions, the first of which prohibits a public officer acting in an official capacity, or public employee acting in an official capacity as a purchasing agent (CEO 09-3), from directly or indirectly purchasing, renting, or leasing realty, goods, or services (but, maybe, not intangible personal property, CEO 86-26) for the person's own agency from a business entity of which the person or the person's spouse or child (or any combination of them) is an officer, partner, director, proprietor, or the owner of a "material interest." NOTE THAT CERTAIN "PRIVATE" CHARTER SCHOOL GOVERNING BOARD MEMBERS AND CERTAIN "PRIVATIZED" CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS ARE NOW SUBJECT TO THE STATUTE. F.S. 1002.33(25)(a) and F.S. 112.3136. However, neither the first nor the second prohibition of F.S. 112.313(3) prohibits a public officer's or public employee's purchase of realty, goods, or services <u>from</u> his or her political subdivision or an agency thereof [CEO 01-16, CEO 04-5, CEO 07-11 (note 8), CEO 10-24 (note 6)]; nevertheless, such a purchase may be violative of F.S. 112.313(7). Also, note that a director or officer can come within the prohibition whether or not he or she is paid or compensated (CEO 06-26, CEO 10-2); that nonprofit corporations are "business entities" (CEO 94-17); but that public "agencies" (e.g., state universities) are not "business entities (CEO 06-2).

1. "Purchasing agent" is defined in F.S. 112.312(20).

2. "Business entity," under appropriate circumstances, may or may not include an individual natural person in their personal capacity. CEO 10-4.

3. "Material interest" is defined in F.S. 112.312(15) to mean the direct or indirect ownership of more than 5% of the total assets or capital stock of a business entity.

4. "Indirectly" doing business does not include situations where the officer's or employee's corporation does business with a business entity that is selling to his or her agency. CEO 78-83, CEO 88-43, CEO 07-2, CEO 08-8 (Question 2). See also CEO 00-21 regarding a county manager's sale of land to an entity that in turn donates the land to the county; however, this opinion is of little precedent value in that it is expressly limited to its peculiar facts.

5. A public officer "acts in his or her official capacity" for purposes of the first prohibition when a board of which he or she is a member (e.g., a county commission) acts collegially to purchase, rent, or lease, regardless of whether the public officer abstains from voting on the matter. CEO 90-24, CEO 10-4. It has been found that a city commissioner does not act to purchase when the city physician, rather than the city commission, acts to purchase.

CEO 82-24. The first prohibition is not violated where the purchase, rental, or leasing by the public agency occurs before the public officer of the public agency became connected privately to the business entity. CEO 07-1.

B. The second prohibition in 112.313(3) is against a public officer or employee acting in a private capacity to rent, lease, or sell any realty, goods, or services to the person's agency, or to the political subdivision served by the person, or any agency of the political subdivision.

1. "Acting in a private capacity" includes situations where one personally is involved with the sale to the agency or political subdivision (CEO 81-50 and CEO 94-3), as well as where one is an officer, director, or owner of more than a 5% interest in a business that is selling to the agency or political subdivision. CEO 81-2; CEO 09-1. The statute does not apply to a situation where one merely is an employee of a business entity and personally is uninvolved with the sale (CEO 94-3); however, see F.S. 112.313(7) below. One does not act in a private capacity where he or she was a member of the public agency, but held no connection to the business entity, at the time of the rental, lease, or sale to the public agency. CEO 07-1. One does not act in a private capacity to rent, lease, or sell to his political subdivision or an agency thereof where his or her company subcontracts with another company that in turn is renting, leasing, or selling to his political subdivision or agency thereof. CEO 07-2, CEO 08-8 (Question 2). "Selling" requires a sale. CEO 08-14.

2. The statute applies to prevent an agency employee from being a partner in a law firm which is providing services to the agency. Howard v. Commission on Ethics, 421 So. 2d 37 (Fla. 3d DCA 1982); CEO 08-15. However, one's public employee duties can be increased for extra pay without violating the statute. CEO 08-15, Question 2. [And see "local government attorneys" below.]

3. A public officer's or public employee's selling to his agency includes situations where his or her business entity provides services to a clientele that the agency itself would be legally obligated (not just voluntarily choosing) to serve but for the proxy actions of the entity paid for or supported by the agency. CEO 07-11 (note 9), CEO 82-22, CEO 82-9. But was found not to apply in a situation where a school board member's company sold uniforms to parents of school children, not to the school district or the district's schools. CEO 10-12.

C. Donations to one's agency do not fall within the scope of this prohibition. CEO 82-15. Neither does a real estate sale involving a public official as a real estate professional without a commission (CEO 82-50), the bringing of a lawsuit (CEO 77-14), nor the condemnation of an official's land by the official's agency (CEO 78-8). Note that the statute does not address purchases from one's agency or political subdivision; but also note the possible applicability of F.S. 112.313(7). CEO 82-50, CEO 01-16, CEO 07-11 (note 8).

D. Exceptions to the prohibition:

1. F.S. 112.313(3) expressly "grandfathers" in certain existing contracts, including those entered into prior to qualification for elective office, appointment to public office, or beginning public employment. CEO 96-30; CEO 09-1. However, changes in contracts after a person assumes a public position are deemed to be new contracts not subject to this exemption (CEO 85-40 and CEO 84-43), unless the renewals are completely nondiscretionary (CEO 82-10) or unless the original agreement expressly provides for renewal for a specified period and the provisions of the contract under the renewal are the same as the provisions of the original agreement (CEO 85-40). Also, see CEO 02-14, CEO 07-1, CEO 08-8 (Question 1), and CEO 09-1. Further, the Commission has used FS 112.316 to grandfather contracts entered into

between qualification for elective office and assumption of office (CEO 95-13); and has used FS 112.316 to negate the prohibition in situations involving a "unity of interest" (CEO 06-26, county tax collectors acquiring integrated tax management system).

2. Other express exemptions are contained in F.S. 112.313(12), as follows:

a. Advisory board members may receive a waiver in a particular instance by the appointing authority, made in a public meeting after a written disclosure is made on Commission Form 4A. Note that advisory status requires a detailed examination of the attributes of the governmental body, and is not controlled by any perceived insignificance of the body (CEO 96-19, county fine arts council not advisory); note that it has been found that the whole of the body's attributes and operations must be advisory, note merely some of its nature (CEO 10-24); and note that for purposes of the exemption in F.S. 112.313(12), but not for purposes of financial disclosure under F.S. 112.3145, that an advisory board need only be "solely advisory," irrespective of the amount of its budget or authorized expenditures (CEO 77-178). See also CEO 06-24, in which a county transportation service board was found not to be an advisory board.

b. At the local government level, when the business is to be transacted by rotation among all qualified suppliers, the official's business may be placed on the rotation list. "Qualified" means that reasonable, but not unduly restrictive, conditions may be placed on the suppliers by the purchasing agency, such as the ability to supply merchandise of acceptable quality or specifications. F.S. 112.313(12)(a). CEO 89-64 and CEO 92-27. The use of selection criteria that include the volume of current and prior work done with a firm does not constitute a "rotation system." CEO 96-23. See CEO 01-15 and CEO 11-9, regarding providers from outside of the political subdivision being included in the rotation.

c. When the business is to be transacted through a sealed, competitive bidding process, the official's business may submit a bid and be awarded the contract. F.S. 112.313(12)(b). However, the official must file a written disclosure prior to or at the time the bid is submitted (Commission Form 3A), and must not participate in the process. In CEO 10-5, the Commission found that a water management district governing board member's earlier general involvement regarding a district real property did not equate to "participation in the determination of the bid specifications" regarding a subsequent lease of the property. And see CEO 07-23, applying F.S. 112.316 to negate a conflict in a "piggy-back" contract situation not technically in compliance with the exemption. Contracts awarded under the Consultants' Competitive Negotiation Act (F.S. 287.055) do not constitute a sealed bidding process. CEO 81-28 and CEO 01-15. Nor do RFPs (CEO 89-48). However, while the exemption will insulate one from conflicts based upon the business between the official's public agency and the provider of goods, services, or realty to the public agency, it will not exempt conflicts arising independent of the competitively bid business. CEO 96-7. HOWEVER, NOTE THAT F.S. 1001.42(12)(i), A PROVISION OF LAW OUTSIDE OF THE CODE OF ETHICS AND NOT ADMINISTERED BY THE COMMISSION ON ETHICS (A PROVISION OF THE FLORIDA K-20 EDUCATION CODE), PROHIBITS SCHOOL BOARD MEMBERS AND SCHOOL SUPERINTENDENTS FROM HAVING CERTAIN INTERESTS REGARDING CONTRACTS FOR MATERIALS, SUPPLIES, OR SERVICES. AGO 06-50.

d. Legal advertising in a newspaper, utilities service, and passage on a common carrier are exempted. F.S. 112.313(12)(c). Legal advertising means only that advertising required by law. CEO 90-57. Utilities service includes telephone service (CEO 83-7), but does not include bulk fuel oil (CEO 95-8). The exemption for passage on a common

carrier applies to purchase of tickets by the agency directly from the carrier, but does not apply to purchases from a travel agency (CEO 80-1).

e. Emergency purchases are exempted, but only when made "in order to protect the health, safety, or welfare" of the citizens. F.S. 112.313(12)(d).

f. When the official's business is the only source of supply within the political subdivision, an exemption is provided, as long as disclosure is made prior to the transaction, on Commission Form 4A. F.S. 112.313(12)(e). A television station has been found, in a certain context, to be a sole source of supply. CEO 00-10. Real property owned by a corporation in which an assistant principal has a one-third interest has been found, in a certain context, to be a sole source of supply of real property for construction of new schools. CEO 06-28. The purchase of parcels for road right-of-way can be a series of sole source purchases. CEO 91-31. In CEO 09-18, the exemption was found to be inapplicable to a relationship between a city and a developer, where the relationship involved interests of the developer beyond its provision of sole source items to the city. In CEO 10-4, realty adjacent to a county park was found to be a sole source item. CEO 11-02 found a landowner employing a water management district governing board member to be a sole source of a water project agreement. CEO 10-17 found a corporation employing a reserve deputy sheriff to be the only source of supply for computer applications that enable information sharing between police agencies. As with the rotation exemption, the sole source exemption is not available to State-level agencies.

g. Transactions not exceeding $500 in the aggregate in a calendar year may be made between the agency and the official's business. F.S. 112.313(12)(f).

h. A municipal, county, or district public official may be a stockholder, officer, or director of a bank acting as a depository of the agency's funds, provided that the governing body of the agency (e.g., city commission, county commission, school board, water management district board) has determined that the official has not favored that bank over other qualified banks. F.S. 112.313(12)(g), CEO 83-48, and CEO 83-81. Note that this applies only when the bank will be acting as a depository; other banking functions, such as loans, are not encompassed by the exemption.

i. The transaction is made pursuant to F.S.1004.22 or F.S. 1004.23 and is specifically approved by the president and the chair of the university board of trustees. F.S. 112.313(12)(h).

3. When the public officer or employee has and had no influence or public responsibility in relation to the business between the agency and the private business entity with which the officer or employee is connected, the Commission has viewed F.S. 112.316 as negating the literal language of the prohibition in F.S. 112.313(3). CEO 76-38. As a result, members of subordinate boards of a city or county would not, in certain circumstances, be prohibited from doing business with the city or county, so long as their board had nothing to do with the transaction [see, for example, CEO 81-66, CEO 88-17, and In re Stephen Huie, 13 FALR 1852 (Comm. on Ethics 10/26/89)] and so long as no other conflicting factors existed (see CEO 05-14, member of personnel board leasing space to county where member might be tempted to favor county in issues before the board). Also, via F.S. 112.316, a county commissioner is not prohibited from serving as a county-funded indigent defense counsel specially appointed by the court (under a scheme set prior to his becoming a commissioner), although the statute would not legitimize the commissioner's contracting with the county as a special contract public defender (CEO 02-6). Further, see CEO 94-19 (city police officers receiving rent reduction in exchange for providing security services), CEO 09-3 (city fire

department personnel taking courses from fire lieutenant's company), and CEO 10-23 (city tennis professional employee also operating pro shop).

IV. CONFLICTING EMPLOYMENT AND CONTRACTUAL RELATIONSHIPS

A. F.S. 112.313(7) prohibits a public officer or employee (but not a mere candidate for office, CEO 09-20, and not a relative of the public officer or employee, CEO 11-04) from having a contractual relationship or employment with an agency or a business entity that is either subject to the regulation of, or doing business with, the officer's or employee's agency. NOTE, AS REGARDING F.S. 112.313(3), NEW APPLICABILITY OF THE STATUTE TO "PRIVATE" CHARTER SCHOOL BOARD MEMBERS AND TO "PRIVATIZED" CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS. F.S. 1002.33(25)(a), F.S. 112.3136.

1. "Employment" requires that one be compensated, or receive some consideration. CEO 76-21; CEO 80-29. "Employment" is not limited to a master/servant relationship, but also includes being an owner, partner, or sole proprietor of a business (CEO 84-95), and includes compensated directors of nonprofit entities (CEO 85-89). Refusal, in advance and in writing, of compensation has been held to negate the required element of compensation (CEO 00-23; CEO 08-22).

2. Whether a "contractual relationship" exists has been governed by the substantive law of contract.

a. It has not been limited to contracting parties, but has been found to include third party beneficiaries. CEO 76-85.

b. Sales of goods or realty, the provision of services for compensation, the ownership of shares of stock (CEO 99-13, CEO 11-05), and the holding of stock options (CEO 05-18, note 8) have been found to constitute contractual relationships.

c. Members (partners, shareholders, associates), but not "of counsel attorneys," of law firms have contractual relationships with each client of the firm regardless of whether a particular attorney performs or supervises work for a particular client (CEO 80-79, CEO 94-5, CEO 96-1, CEO 03-7, CEO 04-9, CEO 10-20, CEO 10-24); and accountants may have "firm-based" contractual relationships similar to those of attorneys (CEO 89-24). Proprietors of unincorporated insurance agencies have been found to hold contractual relationships with each client of the insurance agency (CEO 94-10). But, in CEO 09-19, under particular facts, it was found that an insurance agent's contractual relationship with a developer ended with the renewal of a policy she brokered for the developer.

d. Uncompensated service has been found not to constitute a contractual relationship (CEO 06-26), even if travel and lodging expenses are received (CEO 93-23); however, lack of compensation is not controlling if consideration or substitutes for consideration are present, or if services under professional licensure (e.g., insurance agent licensure, real estate broker licensure, engineer licensure) are involved (CEO 95-28, CEO 08-7, CEO 08-8). And note that a president of a voluntary association can have a conflicting contractual relationship (CEO 06-12), as can an officer or director of a voluntary association (CEO 08-7, Question 2); however, mere membership in the association or service on one of its committees likely would not support the existence of a conflicting contractual relationship. CEO

08-7; CEO 08-22. An uncompensated director of a nonprofit corporation, who is not a member (analogous to a shareholder) of the corporation, was not found to hold a contractual relationship with the corporation (CEO 10-2). And see CEO 09-7 (county commissioner serving on economic development council). A member of a limited liability company (LLC) has a contractual relationship with the company. CEO 08-7. Marriage does not constitute a contractual relationship between the husband and wife. CEO 90-77.

e. The holding of an office (e.g., a county/city commission seat) is not employment or a contractual relationship, even if it is a compensated position. CEO 92-39.

f. One does not hold a contractual relationship with a company merely because one's corporation holds a contractual relationship with the company. CEO 08-23.

3. Past or possible future contractual relationships do not violate the statute; the contractual relationship or employment must exist simultaneously with the other elements of the statute. CEO 88-11; CEO 08-14.

4. A "business entity" is defined in F.S. 112.312(5). A private university is a business entity (CEO 99-11), as is a nonprofit youth center (CEO 78-18) and a foundation/nonprofit corporation/tax-exempt organization (CEO 07-11). Even parent and subsidiary corporations have been found to be separate business entities (CEO 86-12, CEO 05-8), except for situations involving holding companies or subsidiaries where the parent owns only the asset of the subsidiary (CEO 94-5, CEO 99-13, CEO 03-1, CEO 09-2, CEO 11-05). Even an individual, such as a self-employed person privately providing tutoring services, can be a “business entity” (CEO 04-17); however, natural persons who merely own personal or real property are not necessarily “business entities” (CEO 92-2; CEO 82-88; CEO 07-18, note 4; CEO 08-12).

5. "Agency" is defined at F.S. 112.312(2). The definition does not necessarily include the entire department or political subdivision of the officer or employee, but rather refers to the lowest departmental unit within which a public officer's or employee's influence might reasonably be considered to extend. CEO 93-31 and CEO 99-7. Determining the agency of the officer or employee can be critical to an analysis of how the statute applies. For example, the agency of some appointed board members has been found to be that board (CEO 90-7), while the agency of other board members, particularly boards with only ad hoc advisory authority, may be the unit of government they are advising (CEO 94-36, CEO 99-2, CEO 99-11). A city planning board is a separate agency from the city commission (CEO 01-16). A city's downtown development review board was not found to be a separate agency from its economic development commission (CEO 10-24). However, a city manager's agency was found to be much more of city government than the city manager's office (CEO 96-15). The agency of a county personnel board member is the board (CEO 05-14). The agency of a county transportation service board member has been found to be the board (CEO 06-24). The agency of a county board of adjustment member was found to be the board (CEO 88-17). A school board member's agency does not include the county value adjustment board where he or she is not one of the two school board appointees to the board and where the remaining members of the school board could be asked to substitute for the named appointees but seldom have (CEO 02-5). A public school teacher’s or principal’s agency is his or her school, not the whole of the school district (CEO 04-17, CEO 10-15). In CEO 08-1, the agency of a city councilman for purposes of F.S. 112.313(7) was determined to be the city council; but note that F.S. 112.313(3), see above, can apply regarding the whole of an officer's or employee's political subdivision. The whole of a

water management district has been found to be the agency of a water management district engineer (CEO 96-3). At the State level, one's agency may only be one's bureau (CEO 92-48) or one's district (CEO 87-20, CEO 01-7) and not the whole of an executive department. But note that the agency of an employee of the State Agency for Persons with Disabilities (APD) is the entire APD. CEO 05-6, CEO 05-7. The agency of a member of the Florida Statewide Passenger Rail Commission has been found to be the Commission rather than FDOT. CEO 10-20. The agency of an employee of a county health department has been found to be the employee's health department and not health departments within other counties. CEO 98-20, CEO 90-65.

6. A business entity is "subject to the regulation of" an agency when the business' operations or modes of doing business are subject to the control or authority of the agency. CEO 74-8. In CEO 09-18, a corporation which had entered into a development agreement with a city was found to be "subject to the regulation of" the city council, due to the many terms and conditions contained in the agreement. Occupational licensing for revenue purposes is not "regulation." CEO 79-82. Incidental or passive governmental influence, such as the enactment of ordinances that affect a broad number of people, does not constitute "regulation." CEO 78-59. County phosphate mining ordinances have been held not to constitute "regulation" by county commissions of mining companies. CEO 00-14. In some situations, a city council or a county commission may not regulate a developer, even though the city's board of adjustment and building department may. CEO 08-1, CEO 08-7. However, in CEO 11-6, the Commission found that activities of a city planning and zoning board did not constitute "regulation." The enforcement of laws of general applicability does not constitute "regulation." CEO 91-22, CEO 04-14. However, an agency may be subject to the regulation of another agency, as in CEO 97-03, where the State Board of Community Colleges was found to regulate community colleges. A city building and planning department regulates licensed contractors doing business in the city (CEO 96-15), but a city commission usually does not (CEO 99-7). A city manager's ministerial (nondiscretionary) function to sign a subdivision plat has been found not to constitute regulation of a developer (CEO 76-205, Question 2). Annexation constitutes neither "regulation" nor "doing business." CEO 03-7. A waiver of taxes or granting of a similar economic incentive by a city's economic development commission was found not to constitute regulation or the doing of business, but café permitting or similar functions by its downtown development review board were found to constitute regulation (CEO 10-24). A port authority regulates a shipping company operating at the port (CEO 03-17); and the interests of a shipping agent (CEO 08-5). A county manatee rule review committee (an ad hoc advisory body) does not exercise regulatory authority (CEO 04-14). A city housing authority does not regulate a state university where the two cooperate to carry out tutoring of at-risk children under a federal program (CEO 06-2). CEO 97-7 found that a charter school is subject to the regulation of its sponsoring school district; but, in a particular context, CEO 09-23 used F.S. 112.316 and "the spirit of" F.S. 112.313(15) to negate a conflict of a school board member employed as an adjunct faculty member at a State college operating a charter school approved by the school board. NOTE THAT POSSIBLE FUTURE REGULATION IS NOT "REGULATION" UNDER THE STATUTE; ONE'S CONTRACTUAL RELATIONSHIP MUST OCCUR AT THE SAME TIME AS THE REGULATORY RELATIONSHIP (CEO 90-65).

7. A business entity is "doing business with" an agency where the parties have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a breach or default. CEO 86-24, CEO 07-11. Note that the public officer or public employee personally does not have to be involved on the

private side of the business between his private employer and his public agency in order for the "doing business" element to be present. CEO 10-7. A public officer or employee does not hold employment or a contractual relationship with a company that is doing business with his or her public agency merely because a company of which he or she is an owner or officer subcontracts with the other company (CEO 88-43, CEO 07-2). The company of a school board member was not found to be doing business with the school district when it sold uniforms to parents of school students but not to the district or the district's schools, provided no solicitation or pressuring of school personnel occurred. CEO 10-12. A lawsuit between a business entity and an agency does not constitute "doing business" (CEO 77-14); nor does the mere donation of property to an agency (CEO 82-13) or from an agency (CEO 04-5, Question 3, and CEO 04-6). Agreements between governmental entities for the provision of services generally do not constitute "doing business" (CEO 76-2; CEO 81-5; CEO 04-9, Question 3; and CEO 06-2), but the extension of a grant from one agency to another may (CEO 77-65). In CEO 08-6, it was determined that a sheriff's office's contracting with a city to provide municipal law enforcement services did not constitute "doing business," where a city commissioner's employment with the sheriff's office was not connected to the sheriff's provision of services to the city. The existence of a warranty on a sheriff's mobile command post constitutes "doing business" (CEO 06-25), as does the relationship between a charter school and its sponsoring school district (CEO 97-7). A city was found to be "doing business" with a corporation by their entry into a development agreement with one another (CEO 09-18).

8. Examples of conflicts under this prohibition include the following: city commissioner prohibited from being employed by brokerage firm if firm is selected as underwriter for one or more city bond issues (CEO 85-29); county commissioner prohibited from employment with national brokerage firm contracting with county for underwriting services for proposed bond issue (CEO 88-80); city commissioner employed by two city franchisees [Gordon v. Commission on Ethics, 609 So. 2d 125 (Fla. 4th DCA 1992)]; and health facilities authority's employee's law firm providing services to authority (CEO 08-15, Question 1).

B. F.S. 112.313(7) also prohibits a public officer or employee from having a contractual relationship or employment that will create a "continuing or frequently recurring" conflict of interest, or that would "impede the full and faithful discharge" of public duties.

1. The statute is grounded in the principle that one cannot serve two masters. It does not require proof that the public officer or employee has failed to perform his responsibilities or has acted corruptly; the statute is entirely preventative in nature, intended to prevent situations in which private economic considerations may override the faithful discharge of public responsibilities. It is concerned with what might happen, with the temptation to dishonor. See Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), finding the statute not unconstitutionally vague.

2. An impediment to public duty can be based on a single incident or transaction. For example, the Commission has concluded that representing a client before the board of which one is a member interferes with the full and faithful discharge of one's public duties and, where such representations are frequent, presents a continuing or frequently recurring conflict. CEO 77-126, CEO 78-86. The same conflict would exist when another member or employee of the public officer's professional firm undertakes to represent a client before the officer's board (CEO 88-40, CEO 11-6), or where a member or employee of a law firm of which the public officer is "of counsel" seeks to represent a client before the officer's board [CEO 96-1, aff□d by PCA sub nom. Korman v. State Commission on Ethics, 710 So. 2d 553 (Fla. 1st DCA

1996]. And note that such a conflict has been recognized to exist if the public officer's firm represents the client in the matter, regardless of whether the firm's work includes an appearance before the public officer's assembled board or the work stops short of such an appearance. CEO 10-24. And see CEO 09-10. But see CEO 07-13 regarding other members of a city commissioner's law firm representing clients before city boards other than the city commission. However, commentary in a private capacity to one's own public board regarding delivery of a product has been distinguished from prohibited representation of a client before one's public board. CEO 07-2, CEO 08-8 (note 6). Also, even though a conflict of interest would be created were a State Senator to personally represent a client before the Legislature, a conflict would not be created were another attorney of a law firm with which the Senator has an "of counsel" relationship to represent a client before the Legislature, provided certain conditions are adhered to. CEO 03-3. See CEO 05-10 regarding the law firm of a member of the Florida Building Commission Technical Advisory Committee representing clients regarding the Commission, the Committee, or the Accessibility Advisory Council [however, the result of this opinion may be affected by F.S. 553.74(5)].

3. This prohibition can interface with other aspects of the Code, such as F.S. 112.313(8), regarding the temptation to disclose or use information not available to the general public and gained by reason of one's official position (CEO 92-18, deputy clerks of court developing software for sale to other clerks' offices having access to proprietary information via their public positions.)

4. The statute would prohibit a county commission candidate from entering into a binding contract containing campaign promises and a penalty clause with a political action committee. CEO 96-24 and CEO 96-25. However, statute does not prohibit a State Senator’s filing and supporting general and special legislation of interest to his private law client, where Senator is not compensated in any way by the client for his efforts as a member of the Legislature. CEO 03-11. But the statute would prohibit a State Representative from serving as president of the Florida Association of Realtors (CEO 06-12) and it would prohibit a State Representative from consulting with a waste management company as its manager of community and municipal relations (CEO 06-19). And see CEO 09-8 regarding a State Representative's working privately to cultivate, for his private employer, clients employing Legislative lobbyists. It would prohibit a county probation officer from being employed by an entity that is providing services to probationers. CEO 96-28. Absent aggravating facts, it would not prohibit Fish and Wildlife Conservation Commission law enforcement officers from providing security services to private landowners. CEO 07-25. It would prohibit a city mayor from contracting to promote charter schools with a subsidiary of a company doing business with the city. CEO 01-9. It would prohibit a district school board member from being employed as an assistant principal at a charter school sponsored by the school board (CEO 06-23); or from being president and owner of a corporation providing career preparation coaching to students of a charter school (CEO 10-10). It would prohibit a public school teacher from privately tutoring for pay his or her own public school students; but it would not, under certain circumstances, prohibit the teacher’s private tutoring of other public school students. CEO 04-17. While the statute would not prohibit a teacher from operating, for a fee, a summer art camp, it would prohibit the teacher's contracting with parents of students who are in the teacher's classes to have their children participate in the camp. CEO 10-15. And see CEO 09-3 (city fire department personnel taking courses from fire lieutenant's company). Also, it would prohibit a sheriff’s administrative/disciplinary review board member from serving as president of a police union

local. CEO 04-13. The statute would not prohibit a trustee of a city's pension boards (who personally is not a member of any pension plan/system of the city) from being employed as the city's finance director. CEO 06-16. It would prohibit a member of the Florida Real Estate Commission from being employed as an instructor at a real estate school (CEO 06-9); however, no prohibited conflict was found where a member of a hospital district board, acting in his private capacity as a real estate professional, received a commission regarding the purchase of a home by district personnel, where the member did not solicit the business (CEO 07-18). It would prohibit a DCF contract manager from being employed by a subcontractor of a nonprofit corporation contracting with DCF. CEO 07-9. Under certain conditions, the statute was not found to prohibit a city police officer's privately locating and recovering chattel property for lenders (CEO 08-16); and was not found, under certain conditions, to prohibit a school board member's company from selling school uniforms to parents of students (CEO 10-12). The statute can apply when a public employee inspects his own private work or when another employee of his public agency inspects his private work (CEO 87-12, Question 2); but determining the scope of one's "agency" and possible application of Section 112.316, Florida Statutes, should be a part of the analysis in a given matter, especially if the other employee is not subordinate in his public capacity to the employee with the private endeavor. See CEO 11-03, regarding a State Representative being engaged as an expert witness by a law firm representing the Department of Financial Services in litigation. In CEO 11-05, under the circumstances presented, the Commission found that a Governor's passive investments in large national corporations and investment funds did not create a prohibited conflict under the statute; and the Commission found that the Governor could place nonconflicting investments in a blind trust without there being a prohibited conflict, even if the trust later invested in a Florida company in which the Governor would be prohibited from directly owning an interest.

5. The Commission on Ethics has wide discretion to interpret the statute, and courts must defer to its interpretation unless clearly erroneous. Velez v. Commission on Ethics, 739 So. 2d 686 (Fla. 5th DCA 1999).

6. Issues of use of leave time from one's public position to attend to one's private business endeavor and whether a public employee has adequate time to perform both his public and private jobs is not governed by the statute. CEO 86-81, CEO 90-65.

C. Exemptions to the Application of 112.313(7):

1. When the agency is a special tax district created for the purpose of financing, constructing, and maintaining improvements in the district, or is a Ch. 298 F.S. water control district, employment or contracts with the business entity developing the property will not be prohibited, per se. However, the district must be created by general or special law, as opposed to local ordinance. CEO 84-4. F.S. 112.313(7)(a)1.

2. When the agency is a legislative body and the regulatory power exercised over the business entity resides in another agency or is exercised strictly through the enactment of laws or ordinances, employment and contracts with the business entity are not prohibited. F.S. 112.313(7)(a)2. CEO 91-1. CEO 08-20 (state senator in private equity firm). CEO 09-8 (Florida House member). CEO 09-13 (House member employed by Office of Criminal Conflict and Civil Regional Counsel).

3. When legislative act or local ordinance requires or allows certain public officers or employees to engage in certain occupations or professions in order to be qualified to hold their public positions, then 112.313(7) does not prohibit the officer or employee from practicing in that occupation or profession. F.S. 112.313(7)(b). For example, in CEO 84-63, a

port authority member was required to be a representative of business entities doing business with or at the port; the member's employment as vice president of a shipping company at the port was considered exempted; but see CEO 08-5. In Brevard County v. Commission on Ethics, 678 So. 2d 906 (Fla. 1st DCA 1996), the court affirmed CEO 95-27, an opinion concluding that the county's firefighters would be prohibited from being employed by local ambulance companies and that F.S. 112.313(7)(b) would not allow the County to exempt its firefighters' employment from the prohibition of F.S. 112.313(7)(a). See also CEO 01-10 [Section 112.313(7)(b) not applicable to Florida Building Commission member]. Regarding architectural review board members, see CEO 04-1.

4. An elected public officer may be employed by a "501(c)" tax-exempt organization that contracts with the officer's agency, as long as the officer's employment is not compensated as a result of the contract, the officer does not participate in the agency's decision to contract, and the officer abstains from voting on matters involving the officer's employer and otherwise follows the voting conflicts law. F.S. 112.313(15), CEO 97-05, CEO 01-4, CEO 07-11, CEO 10-16. Note that this exemption only applies to "employment"; it does not apply to "contractual relationships" (CEO 98-11, note 2). Under particular facts, CEO 09-23 applied the exemption, via F.S. 112.316, to a school board member's employment with a State college [not a 501(c) organization] which operated a charter high school approved by the school board.

5. The exemptions contained in F.S. 112.313(12) (noted above) are applicable to exempt conflicts under 112.313(7): for advisory board members [but see above under FS 112.313(3) regarding how to determine whether a given board is or is not "advisory"]; depositories of public funds; passage on a common carrier; contracts awarded by sealed, competitive bid; emergency purchases; legal advertising in a newspaper; aggregated transactions not exceeding $500; and utilities service. And, at the local government level, business/work handled through a rotation system or sole sources of supply.

6. When a public officer or employee privately purchases goods or services from a business entity which is doing business with his or her agency, the transaction is exempted from 112.313(7) if the purchase is "at a price and upon terms available to similarly situated members of the general public." F.S. 112.313(12)(i).

7. Similarly, an officer or employee may purchase goods or services from a regulated business when the price and terms are available to similarly situated members of the public and full disclosure of the relationship is made prior to the transaction to the State agency head or local governing body (e.g., county commission). F.S. 112.313(12)(j). Found not to apply when officer's corporation, rather than officer as a natural person, purchased limousine service. CEO 08-23.

8. The Commission has applied F.S. 112.316 to "grandfather" in employment or contractual relationships with business entities doing business with the officer's or employee's agency, usually when both the employment or contractual relationship and the business relationship with the agency predate the officer's holding office or the employee's public employment. CEO 82-10, CEO 96-31, CEO 96-32, CEO 02-14, CEO 02-19 (employee county attorney), CEO 08-4 (note 6), CEO 09-1. And see CEO 09-20, in which it was found that grandfathering was available to negate a conflict where the business was entered into during a prior officeholding, during which an official held no employment with the company, and where the official then left office, followed by his employment with the company and his subsequent election and taking of office again. But renewals/extensions/amendments, after one takes office, of a grandfathered contract can violate the statute (CEO 02-14, CEO 08-8, CEO 09-1), as can

entry into new contracts after one takes office (CEO 09-20, CEO 10-16). And the Commission also has applied F.S. 112.316 to negate a conflict in a "piggy-back" contract situation. CEO 07-23. Also, as with situations under F.S. 112.313(3), F.S. 112.316 may apply to negate conflict under F.S. 112.313(7) occasioned by matters in which a public officer or employee played and plays no material public role regarding his or her business or secondary employer (but note that application of F.S. 112.316 can be limited, especially regarding governing board members and other high-ranking personnel or "central office" personnel). See, for example, CEO 01-12 and CEO 02-6 [county commissioner serving as county-funded, court-appointed indigent defense counsel (but not as special public defender contracting with county), under scheme set prior to his becoming a commissioner]; see CEO 03-9 (county parks and recreation department employees providing on-site security for county parks); see CEO 06-10 (Department of Agriculture and Consumer Services employees participating in cost-share programs administered by the Division of Forestry); see CEO 08-28 (county recreation employee also Special Olympics employee); see CEO 09-3 (city fire lieutenant); see CEO 10-23 (city tennis professional employee also operating pro shop); and see CEO 10-24 (city economic development commission/downtown development review board). Also, see CEO 05-6 (not applicable to negate conflict of employee of Agency for Persons with Disabilities occasioned by employee's operation of group home); but see F.S. 393.0654. Additionally, see CEO 06-25 (deputy sheriff employed by company contracting with sheriff's office). Further, Section 112.316 has been applied in a situation in which a county commissioner owned a small number of shares in a large, publicly-traded corporation (CEO 05-8), in a situation in which a State-level employee owned a small number of stock options in a large, publicly-traded telecommunications company (CEO 05-18), and in a situation in which a hospital district board member was employed by a large corporation making limited sales of equipment to the district (CEO 10-7). In addition, FS 112.316 has been applied to negate a conflict under FS 112.313(7)(a) where a member of a housing authority joined a law firm contracting with the authority, where the contract/business between the authority and the law firm was entered into before the member became connected to the firm. CEO 07-1. But be careful to analyze a given situation in light of the second part of F.S. 112.313(7)(a), as a F.S. 112.316 grandfathering alone may not be adequate to exempt a situation from creating a continuing or frequently recurring conflict or an impediment to public duty. CEO 09-1.

9. Officers of collective bargaining organizations (e.g., police unions) can be excluded from the prohibitions of the first part of the statute, but not necessarily from the prohibitions of the second part. CEO 04-13.

V. PROHIBITION AGAINST EMPLOYEES HOLDING OFFICE

A. No person may both be an employee of a county, municipality, special taxing district, or other political subdivision, or of a State agency, and hold office as a member of the governing board, council, commission, or authority which is his or her employer. F.S. 112.313(10).

B. However, a school teacher may take a leave of absence without pay to serve on the school board without violating this prohibition. Wright v. Commission on Ethics, 389 So. 2d 662 (Fla. 1st DCA 1980).

C. Does not prohibit simultaneous employment/office-holding for different political subdivisions. For example, a public school teacher or other school district employee is not prohibited by this provision from serving as a member of the city council of a city located within the school district. CEO 02-4.

D. A fire district commissioner's service as a district firefighter, provided he refuses in advance and in writing his compensation (per-run payments), is not violative of the statute. CEO 00-23.

E. The prohibition can be negated, in particular circumstances, by the application of FS 112.316. CEO 06-2 (city housing authority commissioner manager of tutoring site on authority property).

VI. RESTRICTION ON PROFESSIONAL AND OCCUPATIONAL LICENSING BOARD MEMBERS; AND RESTRICTION ON BOARD OF GOVERNORS OF STATE UNIVERSITY SYSTEM AND TRUSTEES OF UNIVERSITIES SERVING AS A LEGISLATIVE LOBBYIST

A. No officer, director, or administrator of a Florida state, county, or regional professional or occupational organization or association, while holding such position, shall be eligible to serve as a member of a State examining or licensing board for the profession or occupation. FS 112.313(11). However, the restriction does not encompass enumerated service with a national or regional (e.g., southern states) organization or association (CEO 85-74 and CEO 83-68); and the restriction applies only to enumerated positions within a covered organization or association (CEO 90-61).

B. FS 112.313(17) prohibits citizen members of the Board of Governors of the State University System and citizen members of boards of trustees of local constituent universities from holding employment or a contractual relationship as a legislative lobbyist requiring annual registration and reporting pursuant to FS 11.045.

VII. MISUSE OF PUBLIC POSITION PROHIBITION

A. Public officers, public employees, local government attorneys, and "privatized" chief administrative officers of political subdivisions (new F.S. 112.3136) may not corruptly use or attempt to use their official position or any property or resource within their trust, or perform their official duties, to secure a special privilege, benefit, or exemption for themselves or another. F.S. 112.313(6).

B. "Corruptly" is defined in F.S. 112.312(9) to mean

> done with a wrongful intent and for the purpose of obtaining, or compensating, or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

C. The statute has been upheld as not being void for vagueness. Tenney v. Commission on Ethics, 395 So. 2d 1244 (Fla. 2d DCA 1981); Garner v. Commission on Ethics, 415 So. 2d 67 (Fla. 1st DCA 1982).

D. In order to have acted "corruptly," one must have acted "with reasonable notice that conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics." Blackburn v. Commission on Ethics, 589 So.2d 431 (Fla. 1st DCA 1991). A determination that one acted corruptly must be supported by substantial competent evidence. Kinzer v. Commission on Ethics, 654 So. 2d 1007 (Fla. 3d DCA 1995). The standard of proof is clear and convincing evidence. Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

E. Mismanagement, "waste in government," and negligent acts are not sufficient; there must be intentional conduct to benefit oneself or another.

F. Sexual harassment (use of position to benefit oneself) can be a violation. See Bruner v. Commission on Ethics, 384 So.2d 1339 (Fla. 1st DCA 1980), and Garner v. Commission on Ethics, 415 So.2d 67 (Fla. 1st DCA 1982); also Garner v. Commission on Ethics, 439 So.2d 894 (Fla. 2d DCA 1983).

G. See CEO 02-13 regarding proper/improper use of public agency "business cards"; see CEO 07-24 regarding a sheriff's office employee (candidate for sheriff) wearing uniform and equipment while campaigning; see CEO 08-20 regarding identification of a senator's public position in private firm descriptive information; and see CEO 09-7, note 9, as to a county commissioner's promoting job creation.

VIII. PROHIBITION AGAINST DISCLOSURE OR USE OF CERTAIN INFORMATION

Current and former public officers, public employees, and local government attorneys are prohibited from disclosing or using information not available to members of the general public and gained by reason of their official position (except for information relating exclusively to governmental practices) for their personal gain or benefit or for the personal gain or benefit of any other person or business entity. F.S. 112.313(8); CEO 11-01. Does not prohibit use of one's general expertise or skill, but can be violated where one would work privately regarding a particular project or matter about which he or she gained knowledge or expertise via his or her public position. CEO 04-15. NOTE THAT THE STATUTE NOW HAS APPLICABILITY TO "PRIVATIZED" CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS (new F.S. 112.3136).

IX. PROHIBITION AGAINST SOLICITATION AND ACCEPTANCE OF CERTAIN GIFTS

A. Public officers, public employees, local government attorneys, "private" charter school board members [new F.S. 1002.33(25)(a)], "privatized" chief administrative officers of political subdivisions [new F.S. 112.3136], and candidates for nomination or election are prohibited from soliciting or accepting anything of value to the recipient based on any understanding that the vote, official action, or judgment of the official, employee, attorney, or candidate would be influenced thereby. F.S. 112.313(2). CEO 09-21.

B. Things of value under this provision include, but are not limited to, gifts, loans, rewards, promises of future employment, favors, and services.

C. Essentially amounts to bribery and requires a quid pro quo.

X. PROHIBITION AGAINST UNAUTHORIZED COMPENSATION/GIFTS

A. Public officers, employees, local government attorneys, and their spouses and minor children (but not other relatives, e.g., a son-in-law, CEO 11-04) are prohibited from accepting any compensation, payment, or thing of value when the official knows or, with the exercise of reasonable care, should know that it is given to influence a vote or other action in which the official was expected to participate in his/her official capacity. F.S. 112.313(4).

B. The Commission has found this standard violated when a legislator received a lobbyist-paid hunting trip, when a legislator received a lobbyist-paid trip to Key West, when a mayor received free cable television service from the city's cable franchisee, and when city officials received free memberships from a country club leasing its facilities from the city. Also, this provision would be violated were an employee of the Department of Children and Family Services to receive $100 for participation in a brief survey regarding a company doing business with the Department (CEO 01-2); but see CEO 04-11 (violation unlikely under circumstances where school superintendent received "to-be-forgiven" home loan). In CEO 08-12, a fair market value, arms-length residential rental to a school board member was not found to violate the statute. In CEO 09-21, a public officer's not knowing the identity of contributors to a fund to help her ill son-in-law was a factor in there being no violation of the statute. CEO 10-9 found that the statute was not violated where the wife of a Public Service Commission member obtained contract work with a private school, where the husband of a member of the school's advisory board frequently represented intervenors before the PSC.

C. The Third District Court of Appeal held the statute unconstitutionally vague in Barker v. Commission on Ethics, 654 So. 2d 646 (Fla. 3d DCA 1995), but the Supreme Court reversed in Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. S. Ct. 1996). The First District Court of Appeal held the statute not to be unconstitutionally vague. Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

NOTE: THE STATUTE NOW HAS APPLICABILITY TO "PRIVATIZED" CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS. F.S. 112.3136.

XI. GIFT PROHIBITIONS AND DISCLOSURES FOR "REPORTING INDIVIDUALS" AND "PROCUREMENT EMPLOYEES"

A. "Reporting Individuals" and "Procurement Employees" (RIPEs) also are subject to the detailed gift law provided in F.S. 112.3148. The persons subject to this law include, but are not limited to, district school board members. However, note that district school board members also are subject to newly-created F.S. 1001.421 (CS/CS/HB 1255), which prohibits district school board members and their relatives, as defined in F.S. 112.312(21), from directly or indirectly soliciting or accepting any gift, as defined in F.S. 112.312(12), in excess of $50, from any person, vendor, "potential vendor," or other entity doing business with the school district;

and note that F.S. 1001.421 is not a part of the Code of Ethics contained in F.S. Part III, Chapter 112.

1. "Reporting individuals" are defined to include persons who are required by law to file the full financial disclosure statement specified in Art. II, Sec. 8, Fla. Const. (CE Form 6), and persons required to file the limited financial disclosure statement specified in FS 112.3145 (CE Form 1). F.S. 112.3148(2)(d); and see F.S. 112.3136 regarding chief administrative officers of political subdivisions. Reporting Individuals who are suspended from office have been found to remain subject to the gift law while suspended. CEO 10-19. "Procurement employees" are defined to include any employee of an officer, department, board, commission, or council of the executive branch or judicial branch of state government who participates through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, or auditing or in any other advisory capacity in the procurement of contractual services or commodities as defined in F.S. 287.012, if the cost of such services or commodities exceeds $1,000 in any year. FS 112.3148(2)(e).

2. Local government attorneys who are RIPEs (by virtue of filing limited disclosure) generally are only the city attorney or the county attorney. Assistant city or county attorneys, attorneys for local government boards, and attorneys for special districts are not RIPEs. See CEO's 83-56, 84-5, 85-49. District School Board attorneys are not RIPEs, unless they come within a generic definition [e.g., "purchasing agent" as defined in Section 112.3145(1)(a)3. Florida Statutes (a F.S. 287.017 CATEGORY ONE purchasing agent).]

3. Based on information submitted by State and local agencies, the Commission prepares lists of persons required to file full and limited disclosure. F.S. 112.3145(6). These lists are helpful as a starting point for information about who is a reporting individual.

B. Prohibition against RIPEs Soliciting Gifts: A RIPE is prohibited from soliciting any gift from a lobbyist who lobbies the RIPE's agency, from the partner, firm, employer, or principal of such a lobbyist, or from a political committee or committee of continuous existence as defined in the election laws (FS 106.011), <u>if</u> it is for the personal benefit of the RIPE, another RIPE, or a parent, spouse, child, or sibling of a RIPE. FS 112.3148(3).

1. The prohibition against solicitation is comprehensive, there is no valuation threshold, and it applies even to food and beverages.

2. The gift must be for the personal benefit of the RIPE, a family member, or one or more other RIPEs. Therefore, a RIPE cannot solicit lobbyists for contributions toward a banquet for other RIPEs. But, solicitation of a gift intended for one's agency or for a charity, for example, is not prohibited. CEO 91-52. Under the facts of CEO 09-21 (fund established to benefit ill son-in-law of county commissioner), solicitation was not found.

C. General Rule on Accepting Gifts: Subject to specific, limited exceptions, a RIPE (and any other person on behalf of the RIPE) is prohibited from knowingly accepting a gift which he or she knows or reasonably believes has a value exceeding $100: (1) directly or indirectly from a lobbyist who lobbies the RIPE's agency or from a political committee or committee of continuous existence; or (2) directly or indirectly made on behalf of the partner, firm, employer, or principal of such a lobbyist. FS 112.3148(4).

1. On the issue of knowledge, note that Commission Rule 34-13.310(4), F.A.C., provides that "reasonable inquiry" should be made of the source of the proposed gift to

determine whether it is prohibited. [All further citations to Commission rules are to F.A.C. Chapter 34-13.]

2. Where the gift is given to someone other than a RIPE by one of the prohibited group of donors and is given with the intent to benefit the RIPE, the gift is considered an indirect gift to the RIPE. Rule 310(6). This rule also provides examples of what would be considered prohibited and permitted indirect gifts, as well as the factors the Commission considers in determining whether an indirect gift has been made. See CEO 99-6 (Republican Party fundraiser at Disney World attended by public officers) and CEO 05-5 (city officials accepting admissions to speedway suite). See also CEO 06-27 (city paying travel expenses for companions of city officials) and CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation). In CEO 08-2, it was determined that appearances by the Attorney General in public service announcements promoting a Florida conference for women (although constituting a gift) would not constitute an indirect gift from a prohibited donor. CEO 09-21 (fund established to benefit ill son-in-law of county commissioner) did not find an impermissible indirect gift.

3. Exceptions. Aside from the exemption for gifts from relatives, there are only three express exceptions to the general rule against accepting gifts worth more than $100 from one of the prohibited group of donors:

a. When the gift is accepted on behalf of a governmental entity or a charitable organization. In this instance, the recipient may maintain custody of the gift for only the time reasonably necessary to arrange for the transfer of custody and ownership of the gift. FS 112.3148(4). These gifts need not be reported. Rule 400(2)(d). Note that Rule 320(1)(b) defines "charitable organization" to mean an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a).

b. When the gift is from one of certain kinds of governmental entities (an entity of the legislative or judicial branch, a department or commission of the executive branch, a county, a municipality, an airport authority, a water management district created pursuant to FS 373.069, the South Florida Regional Transportation Authority, the Technological Research and Development Authority, a county, a municipality, or a school board), provided that a public purpose can be shown for the gift. FS 112.3148(6)(a)&(b). These gifts must be reported; however, in CEO 01-14, the Commission on Ethics found that office space made available by a municipality to a Legislator for use as his district office was not a "gift." Note that Rule 320(2) defines "public purpose," specifies that there must be a public purpose for the entity's having given the gift and for the RIPE's accepting the gift, and concludes that there is no public purpose for a gift involving attendance at a spectator event unless the donee has direct supervisory or regulatory authority over the event, persons participating in the event, or the entity which gave the tickets. See also CEO 91-53 (county provides telephone service to legislative delegation).

c. When the gift is from a direct-support organization (DSO) specifically authorized by law to support a governmental entity, so long as the RIPE is an officer or employee of that governmental entity. FS 112.3148(6)(a)&(b). These gifts must be reported. See CEO 92-14 (DSO for state university).

D. Gift Disclosures for RIPEs.

1. Quarterly Gift Disclosure (CE Form 9): Each RIPE must file this form to list each gift worth over $100 accepted by the RIPE, except for gifts from relatives, gifts required to be disclosed on other forms, and gifts the RIPE is prohibited from accepting. The deadline is

the last day of the calendar quarter following the calendar quarter in which the gift was received. The form need not be filed if no reportable gift was received during the calendar quarter. However, note that the Commission rule requires a RIPE to disclose a gift reportable on this form received during the time the RIPE held his or her public position, regardless of whether the position was vacated before the form is due. The form is filed with the Commission. FS 112.3148(8); Rule 400.

2. Annual Gift Disclosure (CE Form 10). Each RIPE must file this form to list each gift worth over $100 received by the RIPE: from a governmental entity, for which a public purpose can be shown; or from a direct-support organization. For example, see CEO 10-11 (direct-support organization of hospital district providing gifts to district board members). The deadline is July 1 of the year following the year in which the gift was received. The form is filed along with the annual financial disclosure form. A procurement employee files with the Commission on Ethics. The form need not be filed if no reportable gift was received. FS 112.3148(6)(d); Rule 410. The report filed by a reporting individual or procurement employee who left office or employment during the calendar year covered by the report shall be filed by July 1 of the year after leaving office or employment at the same location as his or her final financial disclosure statement or, in the case of a former procurement employee, with the Commission on Ethics.

E. Gift Prohibitions for Donors

1. A lobbyist who lobbies a RIPE's agency; the partner, firm, employer, or principal of a lobbyist; another on behalf of the lobbyist or partner, firm, principal, or employer of the lobbyist; and a political committee or committee of continuous existence are prohibited from giving, either directly or indirectly, a gift that has a value in excess of $100 to the RIPE or any other person on the RIPE's behalf. FS 112.3148(5)(a).

2. Exceptions to this prohibition mirror those for RIPEs: a gift worth over $100 may be given if it is intended to be transferred to a governmental entity or charitable organization; a gift worth over $100 may be given by certain governmental entities if a public purpose can be shown for the gift; a gift worth over $100 may be given by a direct-support organization to an officer or employee of the agency supported by the DSO.

F. Gift Disclosures Applicable to Donors.

1. Quarterly Gift Disclosure (CE Form 30): A lobbyist who lobbies a RIPE's agency, or the partner, firm, employer, or principal of such a lobbyist, who makes or directs another to make a gift having a value over $25 but not over $100 to a RIPE of that agency, must file this form to report the gift. Each political committee or committee of continuous existence which makes or directs another to make a gift having a value over $25 but not over $100 to a reporting individual or procurement employee must file this form to report the gift. In addition, the donor must notify the intended recipient at the time the gift is made that the donor, or another on the donor's behalf, will report the gift. The report is filed with the Commission, except with respect to gifts to RIPES of the legislative branch (of State government), in which case the report shall be filed with the Division of Legislative Information Services in the Office of Legislative Services. FS 112.3148(5)(b); Rule 420.

a. The disclosure requirement does not apply to the following gifts: those which the donor knows will be accepted on behalf of a governmental entity or charitable organization; those from a direct support organization (DSO) to a RIPE of the agency supported by the DSO; or those from an entity of the legislative or judicial branch, a department or commission of the executive branch, a water management district created pursuant to FS

373.069, the South Florida Regional Transportation Authority, the Technological Research and Development Authority, a county, a municipality, an airport authority, or a school board.

b. The deadline is the last day of the calendar quarter following the calendar quarter in which the gift was made. The same gift need not be reported by more than one person or entity, and the form need not be filed if no reportable gift was made during the calendar quarter.

c. Note that the Commission rule requires the donor to disclose a gift reportable on this form, regardless of whether the donor is within the prohibited group at the time the form is due.

2. Annual Gift Statements by Governmental Entities and DSOs. No later than March 1 of each year, each governmental entity or DSO which has given a gift worth over $100 to a RIPE during the previous calendar year (where the gift is exempted) must give the RIPE a statement describing the gift, the date of the gift, and the value of the total gifts given by the entity or DSO to that RIPE during the calendar year. CEO 10-11. A governmental entity may provide a single statement covering gifts provided by the entity and any associated DSO. No form has been promulgated by the Commission for this statement. FS 112.3148(6)(c); Rule 430.

G. Gifts from Relatives:

1. Gifts solicited or accepted by a RIPE from a relative are not prohibited or reportable by either the RIPE or the relative, regardless of whether the relative is a lobbyist or the partner, employer, or principal of a lobbyist. FS 112.3148(1); Rules 300(3), 320(4), 400(2), 420(7).

2. The definition of "relative" is expansive, including not only family members such as in-laws and step-relatives, but also persons engaged to RIPEs, persons who hold themselves out as or are generally known as intending to marry or form a household with the RIPE, and any person having the same legal residence as the RIPE. FS 112.312(21).

H. The Definition of "Gift." Although comprehensive in many respects, including what may be provided to the donee directly, indirectly, or through another, the definition of "gift" [FS 112.312(12)] contains several important exceptions. Since the definition is uniformly applicable to the prohibitions and disclosures, this has the effect of exempting transactions within an exception to the definition of gift (e.g., gifts from relatives, items received in exchange for equal or greater consideration) from being prohibited or subject to disclosure. (As the definition contains a long list of examples of what is a gift and what is not, it is not quoted here; only major concepts and exceptions are reviewed.)

1. Included in the definition are several items that might not normally be considered a gift. These include the use of real or personal (tangible and intangible) property; a preferential rate or terms on a debt, loan, goods, or services, which rate is not a government rate or available to similarly situated members of the general public by virtue of certain private attributes; transportation (other than transportation provided by an agency in relation to officially approved governmental business), lodging, and parking; personal and professional services; and any other service or thing having an attributable value. Free publicity or exposure for members of the Legislature can constitute a "gift" (CEO 05-11), as it can for a city commissioner (CEO 08-29).

2. If equal or greater consideration is given (within 90 days of receipt of the gift), it is not a gift; "consideration" does not include a promise to pay or otherwise provide something of value unless the promise is in writing and enforceable through the courts. F.S.

112.312(12)(a) and 112.312(12)(d). Based upon this concept, the Commission's rule specifies that salary, benefits, services, fees, or other expenses (including travel expenses when a public purpose for the travel exists) received by a RIPE from his or her public agency do not constitute gifts. However, services rendered by the RIPE on behalf of the RIPE's agency by use of official position do not count as consideration for a gift from a person or entity other than the agency. CEO 01-19, CEO 05-5 (regarding speedway admissions). The rule provides that substantiating equal or greater consideration is the responsibility of the donee. CEO 01-13. This can be done by providing information demonstrating the fair market value of items of merchandise, supplies, raw materials, or finished goods provided by the donee to the donor. In the case of personal labor or effort for the benefit of the donor, the length of time, value of the service provided, and whether others providing similar services for the donor received a comparable gift will be reviewed by the Commission. Rule 210. CEO 01-13.

3. There is a significant exclusion for salary, benefits, services, fees, commissions, expenses, and even gifts associated primarily with the donee's employment or business, or with the donee's service as an officer or director of a corporation or organization. CEO 09-1; CEO 10-11. Rule 214 states that this means those things associated with the donee's principal employer or business occupation and unrelated to the donee's public position. EXAMPLE: Fees or even gifts received by a RIPE from a client of his or her private law practice, with no other relationship between the RIPE and the client, would not be a prohibited or reportable gift. However, in CEO 92-33 tickets from one's agency to theater performances were not considered "benefits" under the rule, unlike benefits typically associated with employment.

4. Contributions or expenditures reported under the campaign financing law, campaign-related personal services provided by volunteers, and any other contribution or expenditure by a political party are exempted.

5. An honorarium or expense related to an honorarium event paid to a RIPE or spouse is exempted. These are treated exclusively under the honorarium law.

6. Effective January 1, 1997, food and beverages consumed at a single sitting or event came within the definition of gift. Chapter 96-328, Laws of Florida. Therefore, a cup of coffee or a meal may be prohibited or reportable, depending on value.

I. The Definition of "Lobbyist." A "lobbyist" is defined to mean any natural person who is compensated for seeking to influence the governmental decisionmaking of a RIPE or the agency of a RIPE or for seeking to encourage the passage, defeat, or modification of any recommendation or proposal by a RIPE or the RIPE's agency; it also includes any person who did so during the preceding 12 months. FS 112.3148(2)(b); Rule 240.

1. A lobbyist is being compensated when receiving a salary, fee, or other compensation for the action taken. Rule 240. Thus, any employee of an organization, including the chief executive officer or a salesperson, who is contacting the agency as part of his or her job may be lobbying. On the other hand, an unpaid volunteer member of a nonprofit organization who seeks to influence governmental decision making will not be a lobbyist (but see 4, below, for a possible exception).

2. All types of governmental decisionmaking or recommendations are included, whether they fall in the area of procurement, policy making, investigation, adjudication, or any other area. Rule 240(3).

3. A purely informational request made to an agency and not intended in any way to directly or indirectly affect a decision, proposal, or recommendation of a RIPE or an agency does not constitute lobbying. One must have the intent to affect a decision, proposal, or

recommendation and take some action that directly or indirectly furthers or communicates one's intention. Rule 240(4).

4. For agencies that have established by rule, ordinance, or law a registration or other designation process for persons seeking to influence decision making or to encourage the passage, defeat, or modification of any proposal or recommendation by such agency or an employee or official of the agency, a "lobbyist" includes only a person who is required to be registered or otherwise designated as a lobbyist in accordance with that process or who was so required during the preceding 12 months. FS 112.3148(2)(b). However, the local registration system must be at least as broad in defining who is a "lobbyist" as the Legislature's registration system in order to define who is a lobbyist for purposes of the gift and honoraria laws.

J. Valuation of Gifts.

1. The general method for valuation uses the actual cost to the donor (less taxes and gratuities) rather than fair market value of the gift, but several exceptions are provided. The Commission's Rule specifies that "actual cost" means the price paid by the donor which enabled the donor to provide the gift to the donee; if the donor is in the business of selling the item or service (other than personal services), the donor's actual cost includes the total costs associated with providing the items or services divided by the number of units of goods or services produced. FS 112.3148(7); Rule 500(1).

2. Personal services provided by the donor, meaning individual labor or effort performed by one person for the benefit of another, are valued at the reasonable and customary charge regularly charged for such service in the community in which the service is provided. FS 112.3148(7)(a); Rule 500(2).

3. Compensation provided by the donee to the donor is deducted from the value of the gift in determining the value of the gift. Under the Commission's rule, compensation includes only payment by the donee to the donor and excludes personal services rendered by the donee for the benefit of the donor. However, recall that services by the donee may constitute equal or greater consideration, with the result that no gift has been made. The compensation principle gives rise to the so called "$100 deductible," under which the official pays all but $100 of the value of the gift in order to be allowed to accept the gift; but see H.2 above regarding the requirement of payment within 90 days.

4. If the actual value attributable to a participant at an event cannot be determined, the total costs are prorated among all invited persons, including nonRIPEs. FS 112.3148(7)(c).

5. Transportation is valued on a round-trip basis and is a single gift, unless only one-way transportation is provided. Transportation in a private conveyance is given the same value as transportation provided in a comparable commercial conveyance. The rule specifies that this means a similar mode and class of transportation which is available commercially in the community; transportation in a private plane is valued as an unrestricted coach fare. If the donor transports more than one person in a single conveyance at the same time, the value to each person is the same as if it had been in a comparable commercial conveyance. FS 112.3148(7)(d); Rule 500(4).

6. Lodging on consecutive days is a single gift. Lodging in a private residence is valued at $44 per night (the per diem rate less the meal rate provided in FS 112.061). FS 112.3148(7)(e).

7. Where the gift received by a donee is a trip and includes payment or provision of the donee's transportation, lodging, recreational, or entertainment expenses by the

donor, the value of the trip is equal to the total value of the various aspects of the trip. Rule 500(3).

8. Food and beverages consumed at a single sitting or event are considered a single gift, valued according to what was provided at that sitting or meal; other food or beverages provided on the same calendar day are considered a single gift, valued at the total provided on that day. FS 112.3148(f). If the gift is food, beverage, entertainment, etc. provided at a function for more than ten people, the value of the gift is the total value of the items provided divided by the number of persons invited, unless the items are purchased by the donor on a per person basis.

9. Tickets and admissions to events, functions, and activities are a frequent source of inquiries. Generally, the rule is that the value is the face value of the ticket or admission fee, but if the gift is an admission ticket to a charitable event AND is given by the charitable organization, that portion of the cost which represents a charitable contribution is not included in valuing the gift. F.S. 112.3148(7)(k) and CEO 04-12 (opining as to a charitable golf tournament). Rule 500(5) provides a number of specific examples and principles for valuing this type of gift, especially relating to football tickets, booster fees, and seating in a skybox. Skybox tickets given by a county for professional basketball playoff games would be valued at the cost of admission to persons with similar tickets. CEO 95-36 and CEO 96-02. Multiple tickets received at one time by a RIPE to be used by the RIPE or given to others are valued by multiplying the number of tickets given times the face value of each (CEO 92-33).

10. Where the donor is required to pay additional expenses as a condition precedent to being eligible to purchase or provide the gift, and where the expenses are for the primary benefit of the donor or are of a charitable nature, those expenses are not included in determining the value of the gift. EXAMPLES: A lobbyist's golf club membership fees, for the personal benefit of the lobbyist, are not included when valuing the gift of a round of golf; and the portion of a skybox leasing fee allocated to the FSU Foundation, Inc. (expenses of a charitable nature) is not included in the value of a skybox seat. Rule 500(7) and CEO 94-43.

11. Membership dues paid to one organization during any 12 month period are considered a single gift. FS 112.3148(7)(g).

12. Unless otherwise noted, a gift is valued on a per occurrence basis, meaning each separate occasion on which a donor gives a gift to a donee. F.S. 112.3148(7)(i); Rule 500(6).

K. Multiple donors.

1. In determining whether a gift is prohibited, the value of the gift provided to a RIPE by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. The value of the portion provided by any lobbyist or other prohibited donor cannot exceed $100; if it does, the RIPE cannot accept the gift. Rules 310(5), 510(2). CEO 08-19.

2. Regardless of whether the gift is provided by multiple donors, the RIPE must disclose it if the value of the gift as a whole exceeds $100. Rule 510(1). CEO 08-19.

3. In determining whether a donor must disclose a gift ($25-$100) or provide a statement to the RIPE about the gift (over $100), the value of the gift provided by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. If that value exceeds the threshold, the donor must disclose the gift or provide the statement. Rules 420(9), 430(4), 510(3). CEO 08-19.

****[NOTE: IN ADDITION TO THE GIFT AND HONORARIA LAWS CODIFIED AT F.S. 112.3148 AND 112.3149, THE LEGISLATURE ENACTED, IN A DECEMBER 2005 SPECIAL SESSION, CHAPTER 2005-359, LAWS OF FLORIDA, WHICH ADDRESSES LEGISLATIVE AND EXECUTIVE-BRANCH LOBBYING AT THE STATE LEVEL. THE LAW ADDS NEW AND SUBSTANTIAL OBLIGATIONS, PROHIBITIONS, AND REQUIREMENTS. HOWEVER, WHILE THE NEW LAW MAY APPLY TO CERTAIN LOBBYING-RELATED GIFTS, EXPENDITURES, OR ACTIVITIES MADE BY OR ON BEHALF OF LOCAL GOVERNMENTS TO STATE LEVEL OFFICIALS, IT DOES NOT APPLY TO SUCH ITEMS OR ACTIVITIES DIRECTED AT LOCAL GOVERNMENT OFFICIALS. NEVERTHELESS, THE NEW LAW DID NOT REPEAL ANY PROHIBITION OF SECTIONS 112.3148 AND 112.3149, WHICH CONTINUE TO APPLY AT BOTH THE STATE AND LOCAL LEVELS. THE COMMISSION ON ETHICS HAS DEVELOPED RULES AND CONTINUES TO RENDER ADVISORY OPINIONS REGARDING THE PORTION OF THE NEW LAW WHICH IT WILL ADMINISTER (EXECUTIVE-BRANCH PORTION, F.S. 112.3215, FLORIDA STATUTES); AND THE LEGISLATURE HAS ESTABLISHED INTERIM LOBBYING GUIDELINES FOR THE HOUSE AND SENATE.] See CEO 06-4 (executive branch lobbying, agency officials and employees buying tickets to association's annual legislative reception), CEO 06-6 (engagement party or wedding gifts paid for by lobbyists), CEO 06-7 (donations to the Department of Agriculture and Consumer Services and its direct-support organization given by principals of lobbyists), CEO 06-11 (Governor and staff traveling on trade mission paid for by Enterprise Florida, Inc.), CEO 06-14 (corporate donations used to underwrite costs of annual Prudential Financial-Davis Productivity Awards), CEO 06-15 (corporate gifts and donations to the United Way for the annual Florida State Employees' Charitable Campaign), CEO 06-17 (promotional items given away by insurance provider to state employees attending benefit fairs), CEO 06-18 (discounted cellular telephone service offered to Department of Revenue employees by company whose lobbyists are registered to lobby the executive branch), CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation), CEO 07-8 (lobbying firms and prohibited indirect expenditures), CEO 08-2 (Attorney General appearing in public service announcements), and CEO 09-1 (Citizens Insurance board member). Also, see FS 112.3215(1)(d) regarding what is an "expenditure." Many government entities have been found not to be an "agency" for purposes of FS 112.3215 (CEO 08-19). Expenditures from one who lobbies any executive branch agency have been found to be prohibited as to certain officials or employees of all executive branch agencies (CEO 08-19). Reimbursement to a public agency, as opposed to an agency employee, has been found not to be a prohibited expenditure (CEO 08-26).

XII. HONORARIA AND HONORARIUM EVENT-RELATED EXPENSES

A. An "honorarium" is defined to mean a payment of money or anything of value, directly or indirectly, to a RIPE or to any other person on the RIPE's behalf, as consideration for a speech, address, oration, or other oral presentation; or for a writing (other than a book) which is or is intended to be published. F.S. 112.3149(1)(a).

1. The Commission's rule specifies that the speech or other oral presentation means a formal address, lecture, panel discussion, or other presentation which a RIPE has been invited to make to a gathering of persons, and further provides examples of documentation

evidencing a genuine presentation by the RIPE, rather than a subterfuge to allow an otherwise prohibited gift. Rule 220.

2. The term "honorarium" specifically excludes: payment for services related to outside employment; ordinary payments or salary received for services related to the RIPE's public duties; a campaign contribution reported as required by law; and the payment or provision of actual and reasonable transportation, lodging, event or meeting registration fees, and food and beverage expenses related to the honorarium event for the RIPE and spouse. FS 112.3149(1)(a). Rule 220(3) concludes that to the extent that the expenses paid or provided for exceed those that are actual and reasonable, that amount constitutes an honorarium. The rule also specifies a number of circumstances the Commission will consider in determining the reasonableness of expenses paid or provided, again in an effort to see that this exception does not allow an otherwise prohibited gift or honorarium.

B. A RIPE is prohibited from soliciting an honorarium from anyone, regardless of amount, when the subject of the speech or writing relates to the RIPE's public office or duties. FS 112.3149(2).

C. Prohibition Against Accepting or Providing Honoraria. A RIPE is prohibited from knowingly accepting an honorarium from: a lobbyist; the employer, principal, partner, or firm of a lobbyist; and a political committee or committee of continuous existence. Similarly, these persons and entities are prohibited from providing an honorarium to a RIPE. There is no $100 threshold for honoraria, as there is for gifts. As with gifts, the Commission's rule states that "reasonable inquiry" should be made by the RIPE to determine whether the honorarium is prohibited. FS 112.3149(3) & (4); Rules 620 & 630.

D. A RIPE must disclose the receipt of payment for, or the provision of, expenses related to an honorarium event from a person or entity that is prohibited from paying an honorarium to the RIPE. There is no $100 threshold for this disclosure requirement. Honoraria or honorarium event-related expenses paid or provided by any other person or entity are not required to be disclosed. CEO 91-57. The statement (CE Form 10) is due by July 1 for expenses paid for or provided during the prior calendar year, but the form need not be filed if there is nothing to report. The form is filed along with the annual financial disclosure. FS 112.3149(6); Rule 710. A procurement employee files with the Commission on Ethics. The statement filed by a reporting individual or procurement employee who left office or employment during the calendar year covered by the statement shall be filed by July 1 of the year after leaving office or employment at the same location as his or her final financial disclosure statement or, in the case of a former procurement employee, with the Commission on Ethics.

E. No later than 60 days after the honorarium event, the person or entity paying or providing a RIPE's honorarium event-related expenses must provide to the RIPE a statement listing the name and address of the person or entity, a description of the expenses provided each day, and the total value of the expenses provided for the event. This applies only to persons and entities that are prohibited from paying an honorarium to the RIPE. No form has been promulgated by the Commission for this statement. FS 112.3149(5).

XIII. LOCAL GOVERNMENT ATTORNEYS

A. All "local government attorneys" are subject to the provisions of the Code of Ethics contained in F.S. 112.313(2), (4), (5), (6), & (8). Government employee (not independent

contractor) local government attorneys also are subject to FS 112.313(3) & (7). F.S. 112.313(16); CEO 02-19, note 3.

B. A "local government attorney" is defined to mean "any individual who routinely serves as the attorney for a unit of local government." "Unit of local government" includes, but is not limited to, municipalities, counties, and special districts. Expressly excluded from the definition are attorneys who render services limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding.

C. Unless the local government attorney is a full-time employee or governing board member of the unit of local government, it is not conflicting under F.S. 112.313(3) or 112.313(7) for the attorney's law firm to provide services to the governmental unit; however, the local government attorney may not refer legal work to his or her firm unless authorized by contract. Also, the firm may not represent private clients before the governmental unit. F.S. 112.313(16).

D. The Commission on Ethics did not find F.S. 112.313(16) to apply to a situation involving a public employee general counsel/executive director whose employment was not limited to the provision of legal services. CEO 08-15.

XIV. CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS

A. The officers, directors, and chief executive officer of a corporation, partnership, or other business entity that is serving as the chief administrative or executive officer or employee of a political subdivision, and any business entity employee who is acting as the chief administrative or executive officer or employee of the political subdivision, for the purposes of the following sections, are public officers and employees who are subject to F.S. 112.313 [various standards of conduct, with qualifications], 112.3145 [financial disclosure and other disclosures], 112.3148 [gift laws], and 112.3149 [honoraria laws]. F.S. 112.3136. CEO 09-17, CEO 10-01.

B. For F.S. 112.313 purposes, their "agency" is the political subdivision that they serve.

C. The contract under which the business entity serves as chief executive or administrative officer is not deemed to violate F.S. 112.313(3) or (7).

D.

XV. CHARTER SCHOOL BOARD MEMBERS/PERSONNEL [F.S. 1002.33(24) & (25)]

A. Charter school governing board members, including members of governing boards of charter schools operated by a private entity, are subject to F.S. 112.313(2), (3), (7), and (12), and to F.S. 112.3143(3).

B. Charter school personnel in schools operated by a municipality or other public entity have been made subject to F.S. 112.3135 (the anti-nepotism law). And to F.S. 112.3145 (financial disclosure), via Chapter 2011-232, L.O.F.

C. Certain charter school personnel in charter schools operated by a private entity are subject to restrictions like the restrictions of F.S. 112.3135, but apparently without the administration of the restrictions being placed in the Commission on Ethics. AGO 10-14.

XVI. POST OFFICE-HOLDING AND POST EMPLOYMENT (REVOLVING DOOR) RESTRICTIONS

A. FS 112.313(9) contains a two-year prohibition on former legislators, statewide elected officers, selected exempt service employees, senior management service employees, and certain others representing persons or entities before their former agencies. CEO 10-14 found that a former Assistant State Attorney was not subject to the prohibition because his public position had not been that of an "employee" under the applicable definition. Applies only to certain former State-level employees or officers; does not apply to former local (e.g., city housing authority) employees or officers (CEO 07-19, note 3).

1. Usually does not apply to former career service employees. CEO 00-09. Under certain circumstances, was found not to apply to former career service employees subjected to an en masse transfer to selected exempt service (CEO 02-1); but see Section 2, Chapter 2006-275, L.O.F., bringing those transferred en masse under the prohibition.

2. Was found, in a particular situation, not to apply to a former Other Personal Services (OPS) employee (CEO 05-1); but see Section 2, Chapter 2006-275, L.O.F., bringing OPS employees under the prohibition.

3. If applicable, effects are broad due to definition of "represent" codified in FS 112.312(22). CEO 09-5. But see CEO 11-03, finding, under a similar prohibition, that certain expert witness services involving a public agency did not amount to "representation" before the agency; and see CEO 11-7, finding that a former Secretary of the Department of Community Affairs could serve as an expert witness.

4. To be applicable, the representation must be regarding a matter before one's former agency; however, note that a matter can be "before" one's former agency regardless of whether or not the former agency is the locus of the authority to take final action regarding the matter. See CEO 06-1, in which the Commission found that a FDOT former SES employee would be prohibited by F.S. 112.313(9)(a)4 from personally representing another person or entity for compensation against FDOT in eminent domain proceedings, in eminent domain presuit negotiations, in an inverse condemnation lawsuit, and in negotiations prior to an inverse condemnation lawsuit. As to the extent of one's former "agency," see CEO 02-12, CEO 03-10, CEO 04-16, CEO 06-1, CEO 07-4 (former employee of Department of Financial Services and Office of Insurance Regulation), CEO 09-6 (former employee of Commission for the Transportation Disadvantaged), CEO 09-11 (former DCF employee), and CEO 10-13 (former senior attorney of Agency for Workforce Innovation). For purposes of the prohibition, CEO 08-18 found that the agency of a former employee of the Florida Turnpike Enterprise (FTE) was the FTE, not the whole of the FDOT. NOTE THAT CEO 11-10 CLARIFIED THAT THE "AGENCY" OF A FORMER FDOT DISTRICT EMPLOYEE IS THE DISTRICT, AND NOT THE WHOLE OF FDOT.

5. Is ameliorated by certain "grandfatherings." CEO 94-20; CEO 00-01; CEO 08-21 (as to former PSC employee).

6. Applies only to representations before one's former "agency," and not to representations before all of State government. CEO 00-20, CEO 00-11, CEO 02-12. Actions necessary to carry out, as opposed to actions to obtain, a contract with one's former agency apparently do not constitute "representation" within the meaning of the prohibition (CEO 00-6; CEO 01-5; CEO 05-16; CEO 05-19, note 5; CEO 06-3; and CEO 09-5); but see F.S. 112.3185 below.

7. Does not apply vicariously to other members of one's post-public-service firm. CEO 00-20; CEO 09-5.

8. Has been found not to apply where the former employee is listed in bid response documents written or filed by another person. CEO 09-6.

9. Former employees are exempt if their new employment is with another agency of State (not local or regional) government.

10. Former legislators are not expressly exempted via taking State-level public employment; but in certain contexts the Commission on Ethics has constructed such an exemption. CEO 00-7, CEO 00-18. However, the Commission receded from CEO 00-7 and CEO 00-18 in CEO 09-4.

11. As to a former Attorney General, see CEO 10-22.

B. Persons who have been elected (not appointed, CEO 07-19, note 3) to any county, municipal, school district, or special district office are prohibited by FS 112.313(14) from representing another person or entity for compensation before the government body or agency of which they were an officer for a two-year period after leaving office. For the statute to apply, one must have been elected to office, not merely appointed to an elective office. CEO 09-16. Was found to be applicable to representations before the former governing body, before individual members of the former governing body, and before aides to members; but not to representations before other boards of the political subdivision that are not the "governing body" or "part of the governing body." CEO 05-4. However, FS 112.313(14), as amended by Section 2, Chapter 2006-275, L.O.F., now defines "government body or agency," differently for various local governments. As a result, a former county commissioner is prohibited for two years after he leaves office from representing a client for compensation before the county commission collegially, or its individual members, as well as the commissioners' aides and others. "Representation" includes mere physical attendance at a county commission meeting or workshop, even if the former county commissioner does not directly address the commission. CEO 06-22. A former county commissioner is not prohibited from merely attending, in behalf of a client for compensation, gatherings which are not regular meetings of the county commission and which are not advertised or noticed under the Sunshine Law; however, the former county commissioner is prohibited from making comments in behalf of a client at such a gathering if a county commissioner or one or more enumerated county employees is present. CEO 07-6. Also, see CEO 09-20.

C. At the option of the local governing body through ordinance or resolution, appointed county, municipal, school district, and special district officers and employees of these entities may be subjected to a similar two-year prohibition, except for collective bargaining matters, under FS 112.313(13). However, if enacted, such an ordinance or resolution is not within the jurisdiction of the Commission on Ethics and a violation of it would not constitute a violation of the State Code of Ethics (CEO 07-19).

XVII. ADDITIONAL RESTRICTIONS REGARDING STATE-LEVEL EMPLOYEES; LEGISLATORS

A. FS 112.3185(2) prohibits certain public employees who have a role in the procurement of "contractual services" (as set forth in Chapter 287) from simultaneously being an employee of a public agency and an employee of a person contracting with the agency.

B. FS 112.3185(3) contains a restriction, unlimited in duration, on former public employees holding employment or a contractual relationship with a business entity in connection with any contract in which the employee participated personally and substantially [see CEO 02-17, CEO 03-8 (former State Technology Office employees), CEO 05-9 (former Department of Juvenile Justice employee), and CEO 08-17 (former FDOT employee) regarding "substantial"] through decision, approval, disapproval, recommendation, rendering of advice, or investigation (activities concerning development or procurement of a contract, CEO 83-8 and CEO 06-3). Does not apply to work for a governmental entity (CEO 88-32); applies only to employment/contractual relationship "in connection with" the contract (CEO 01-6, CEO 09-11); and can apply to contracts coming into existence before or after one leaves public employment (CEO 00-6). Along with FS 112.3185(4), has been found not to be violated in a specific situation due to the application of FS 112.316 (CEO 05-16); see also CEO 05-19. The public employee's public agency duties must have concerned a particular contract between the agency and the business entity in order for a violation to exist; mere participation in an entire program or subject matter (without participation as to the particular contract) will not violate the statute (CEO 06-3, note 6). The restriction cannot be avoided by employment with a different company than the company contracting with one's former public agency (e.g., cannot be avoided via subcontracting), if one's actual post-public-employment (private) work is in connection with the contract (CEO 07-16, note 3). However, when the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

C. FS 112.3185(4) is a two-year restriction on former public employees holding employment or a contractual relationship with any business entity in connection with any contract for "contractual services" which was within the employee's responsibility. But see CEO 01-5 (former DBPR employee "outsourcing" with DBPR) and B above. "Within responsibility" is not mere incidental contact with the contract (CEO 93-2, CEO 06-3); however, "within responsibility" includes situations in which one is the supervisor of another who actually participates (for example, who actually monitors/manages) regarding a contract (CEO 07-16, CEO 01-6); also, see CEO 08-17. Depending on particular facts, restriction can be negated by Section 112.316, Florida Statutes (CEO 07-16). Unlike FS 112.3185(3), cannot apply to contract not in existence until after employee leaves public employment (CEO 84-30, CEO 00-6, CEO 02-17, and CEO 03-8). "Contractual services" are defined as set forth in F.S. Chapter 287. CEO 06-3; FS 112.3185(1)(a). The restriction cannot be avoided by employment with a different company than the company contracting with one's former public agency (e.g., cannot be avoided via subcontracting), if one's actual post-public-employment (private) work is in connection with the contract (CEO 07-16, note 3). However, if the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

D. FS 112.3185(5) caps the amount of money (at the amount of annual salary at severance from public employment) a former public employee can be paid by his or her former agency for "contractual services" provided to the agency during the first year after the employee vacates his or her public employment; and the gross amount paid, rather than the net received, is

the measure (CEO 08-14). This prohibition may be waived by the agency head for a particular contract, upon a time/cost savings to the State determination by the head. CEO 01-5. Applies to situations where a former employee (personally or through a closely-held entity) contracts with his or her former agency; does not apply to situations where one works arms length for a business entity contracting with his or her former agency [this is the type of situation addressed by FS 112.3185 (3) & (4)]; see CEO 93-2 and CEO 00-6. If former public employee is employed at arms length by a bona fide company (rather than being employed by his or her former public agency or by a sham/straw man company), the prohibition does not apply, regardless of the amount of money paid to the former public employee by the bona fide company. CEO 05-13; CEO 08-17.

E. FS 112.3185(6) contains a prohibition similar to that contained in FS 112.313(3). However, the prohibition is broader in that it applies in part to an employee's "relative," as defined in FS 112.312(21), and not just to an employee's spouse or child. The prohibition does not apply to local government officials. CEO 11-04, note 1.

F. Regarding FS 112.3185, see, for example, CEO 86-21 (former FDOT attorney, note that definition of "contractual services" has changed since opinion issued); CEO 87-8 (former FDOT engineer); CEO 93-2 (former FDOT public transit specialist); CEO 00-1; CEO 00-6 (FDOT selected exempt service employee); and CEO 01-5 (former DBPR employee "outsourcing" with DBPR).

G. "Agency" is specially defined within the statute. As to an application of FS 112.3185 to former State University employees, see CEO 88-12 and CEO 08-14.

H. Also, Article II, Section 8(e), Florida Constitution, and F.S. 112.313(9)(a)3 contain term-of-office representation prohibitions for legislators. They apply to representation before State-level (not local) agencies. CEO 03-11; CEO 09-8; CEO 09-13. Exempt from the prohibitions are representations before judicial tribunals involving State agencies; but note that formal administrative proceedings pursuant to FS Chapter 120 (DOAH hearing officer/ALJ proceedings) have not been found to be within the "judicial tribunal" exemption. CEO 91-54, CEO 84-6, CEO 78-2. In CEO 11-03, the Commission found that a State Representative would not be personally "representing" another person or entity for compensation before a State agency when negotiating with a law firm to extend a contract for his expert witness services, when acting as an expert witness in fulfillment of the contract and testifying in court, or when consulting with counsel or communicating with agents and employees of the Department of Financial Services, where the law firm represented the Department in litigation.

XVIII. VOTING CONFLICTS OF INTEREST

A. A voting conflict arises when the official is called upon to vote on:

> any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer . . . .

F.S. 112.3143.

[NOTE: GAIN OR LOSS TO AN ENTITY (FOR EXAMPLE, A CORPORATION) IN WHICH A NATURAL PERSON OWNS A SUBSTANTIAL INTEREST NECESSARILY CONSTITUTES GAIN OR LOSS TO THE NATURAL PERSON. CEO 90-54, Question 2; CEO 06-20, note 6; CEO 08-7, Question 1. SIMILARLY, SEE CEO 10-6 REGARDING FAMILY/CLOSELY-HELD ENTITIES.].

1. A "principal by whom the officer is retained" includes: the officer's employer (CEO 78-27); a client of the officer's legal or other professional practice (CEO 84-11, CEO 84-1, CEO 76-107, CEO 78-59, CEO 79-2, CEO 85-14, CEO 08-7, Question 1, CEO 11-6; but see CEO 03-7 regarding an "of counsel" relationship); a corporation for which the officer serves as a compensated director (CEO 84-107); and clients of an official who is an insurance agent (CEO 94-10)—but, compare CEO 09-19. However, a non-lawyer employee of a law/lobbying firm was not found to be retained by clients of the firm other than her clients, although she would be retained by the firm (CEO 08-13). A corporation which wholly owns a corporation which wholly owns another corporation which employs a city council member is a parent organization of a corporate principal by whom the council member is retained (CEO 03-13). Depending on the facts of a given situation, persons or entities other than the person or entity who signs one's paycheck can also be one's employer or principal. CEO 06-21; In re Irving Ellsworth, Comm. on Ethics Compl. No. 02-108 (final order 06-024), affirmed, per curiam, as Ellsworth v. Commission on Ethics, 944 So. 2d 359; and CEO 09-2. Note that the principal-agent relationship must exist at the time of the vote; the voting conflicts law addresses present (not past or possible future) employment. CEO 06-5, CEO 09-9.

2. Situations where the person or entity in question has not been found to be a "principal by whom the officer is retained" include: the officer's church (CEO 90-24); the officer's landlord (CEO 87-86, CEO 08-12); a homeowner's association of which the officer is a member (CEO 84-80); a non-profit corporation of which the officer is an uncompensated director (CEO 84-50; CEO 08-4, Question 4; CEO 09-7; CEO 10-2); the hospital where the officer is on the medical staff (CEO 84-3, CEO 02-16); customers of the officer's retail store (CEO 76-209); a person with whom the officer merely holds a contractual relationship (CEO 08-1); a volunteer fire department from which a city commissioner does not receive funds and for which he is not an officer or director (CEO 08-22); and a developer for whom an insurance broker previously obtained a policy (CEO 09-19).

3. One's "relative" is defined to include only one's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. F.S. 112.3143(1)(b). However, in CEO 10-6, notwithstanding that "brother-in-law" is not included in the definition, a voting conflict was found because the vote/measure affecting the brother-in-law of a mosquito district commissioner also affected the commissioner's "sister" (a relationship within the definition), due to the sister and her husband (the brother-in-law) sharing a household and living expenses. Note that a measure affecting a public officer's relative's private firm (e.g., an officer's husband's employer) or its clients can, but does not necessarily, inure to the special private gain or loss of the relative. CEO 07-5, CEO 08-30, CEO 11-04 (county commissioner's son-in-law non-equity shareholder in law firm when county commission voting on land use matter in which firm is representing the property owner).

4. "Business associate" is defined to mean "any person or entity engaged in or carrying on a business enterprise with a public officer, public employee, or candidate as a partner, joint venturer, corporate shareholder where the shares of such corporation are not listed on any national or regional stock exchange, or coowner of property." F.S. 112.312(4). In order for persons to be "business associates" they must be engaged in a common business undertaking (a "business enterprise"); it is not sufficient that they merely hold a nominal status in relation to one another; see CEO 98-9 in which the Commission found that common ownership of a houseboat used for recreational (not commercial) purposes (even via ownership of shares of stock of a for-profit corporation holding title to the houseboat) did not make the owners business associates of one another. Also, see CEO 01-17 (county commissioner member of educational/networking forum not a business associate of other forum members by virtue of forum membership). In CEO 08-4, it was determined that other directors of a bank's board of directors are not, by virtue of being directors, business associates of a county commissioner/bank director. In CEO 08-12, a residential landlord and tenant were not found to be business associates via the rental. CEO 09-2 did not determine that persons who merely held responsibilities for a corporation were business associates; and see CEO 09-12. Note that the definition has been found to require a present, not a past or possible future, relationship (CEO 09-12).

5. A "public officer" is any person elected or appointed to hold office in an agency, including persons serving on an "advisory body." F.S. 112.3143(1)(a). NOTE NEW F.S. 1002.33(25)(a), SUBJECTING BOARD MEMBERS OF "PRIVATE" CHARTER SCHOOLS TO F.S. 112.3143.

6. Note that members of school boards are subject to the voting conflicts law (F.S. 112.3143) regarding measures which would inure to the special private gain or loss of their relatives (e.g., measures to hire their relatives to school positions), even though the anti-nepotism law (F.S. 112.3135), as opposed to F.S. 1012.23(2), is not applicable to school boards and school districts. CEO 87-50, AGO 72-72, AGO 82-48.

B. Voting Conflict Duties of State Public Officers

1. Unlike local public officers (dealt with below), State-level public officers are not prohibited from voting on any measure. However, if the measure is one which will inure to a State public officer's special private gain or loss, or to that of the various persons or entities enumerated in the statute, he or she must make a disclosure of interest via CE Form 8A. CEO 08-20, CEO 09-1, CEO 09-8. Similar to appointed local officers, appointed State officers have requirements regarding "participation" in certain matters that are not applicable to elected officers. FS 112.3143(2) & (4) and CE Form 8A. Also, see F.S. 310.151(1)(c) regarding participation by members of the Pilotage Rate Review Committee.

C. Voting Conflict Duties of Local Public Officers

1. If there is a voting conflict under the terms of the statute, a local official holding an <u>elective</u> position must:

a. Abstain from voting on the measure;

b. Before the vote, publicly state to the assembly the nature of his or her interest in the matter; and

c. Within 15 days of the vote, file a memorandum of voting conflict (Commission Form 8B) with the person responsible for recording the minutes of the meeting, who incorporates the form in the minutes.

[Note that elected officials are not subject to the same limitation on their ability to "participate" in the matter as appointed officials; and note that one appointed to fill a position normally filled by election is not an appointed official (CEO 87-14, CEO 09-9). "Participate" is defined in F.S. 112.3143(4)(c) to mean "any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction."]

2. Local officials holding appointive positions must follow more complex guidelines. If they do not intend to "participate" in the measure, they follow the same procedures as elected officials: make the oral declaration, abstain, and follow up with the written form within 15 days. If they do intend to "participate," they must abstain but must make their disclosure before they participate. This is accomplished by either:

a. Filing the memorandum of voting conflict (Form 8B) prior to the meeting, in which case the memorandum is to be provided immediately to the other members of the agency and is to be read publicly at the next meeting after its filing; or

b. If the disclosure has not been made prior to the meeting at which the measure will be considered or the conflict was unknown prior to the meeting, making the disclosure orally at the meeting before "participating," followed by the written memorandum (Form 8B) within 15 days after the oral disclosure, which would be provided immediately to the other members of the agency and be read at the next meeting after its filing.

c. Also, see F.S. 445.007(11) regarding regional workforce boards.

D. Special Private Gain or Loss--Size of the Class of Persons Affected

1. Obviously, a measure to reduce taxes would inure to the private gain of each taxpayer, including the public officials who are to vote on the proposal. The Commission has recognized that the concept of "special" gain can relate to the number of persons affected, stating:

> [w]hether a measure inures to the *special* private gain of an officer or his principal will turn in part on the size of the class of persons who stand to benefit from the measure. Where the class of persons is large, a special gain will result only if there are circumstances unique to the officer or principal under which he stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, the possibility of special gain is much more likely. [CEO 77-129.]

2. On the one hand, where the official would be the only beneficiary of the measure, there clearly would be "special" gain. See CEO 89-16 (citizen advisory task force member prohibited from voting to recommend the approval of his own application to receive community development block grant funds).

3. On the other hand, the Commission advised that a city council member would not be prohibited from voting on a proposed sign ordinance where the council member owned a commercial art shop that produced signs, among other products, and other members who owned an advertising business that recommended and purchased billboard space for its clients and who owned an electrical contracting company that had contracted to do work for a sign company also could vote on the ordinance. As the ordinance would have only an indirect

effect on the council members' businesses and there was no indication that the members would be affected by the ordinance to a significantly greater or lesser degree than other affected businesses, the Commission concluded that the ordinance would not inure to the "special" gain of the members. (CEO 86-59)

4. Subsequent decisions by the Commission indicate that the threshold for "special gain" occurs when the official constitutes around 1-2% of the size of the class of persons affected. The Commission has concluded that a vote on an ordinance limiting the number of wrecker businesses on a city wrecker rotation list from 18 to 11 violated the statute when the city councilman worked for one of the 11 wrecker companies. In re Thomas R. Tona, 13 FALR 1845 (Fla. Comm. on Ethics 1989). Similarly, the Commission concluded that a county commissioner had been prohibited from voting to pave the road to his residence, where his was one of 13 residences on the paved portion and he owned the majority of the land abutting one side of the paved portion of the road. In re T. Butler Walker, Comm. on Ethics Compl. No. 92-30 (1994).

5. In groups of a larger size, the Commission advised in CEO 93-10 that a town council member was prohibited from voting on a measure to resolve a real property ownership dispute between the town and 43 private property owners, including the council member; see also CEO 04-10 (measure affecting 55 employees one of whom is relative of public officer requires abstention). In CEO 90-64, the Commission concluded that a city commissioner was prohibited from voting on a renovation project that would benefit property in which he owned an interest, where part of the cost of the project would be assessed against the property owners. There, the commissioner owned 50% of one of 55 parcels that would be affected, the parcels were owned by over 40 persons or entities, and the property's frontage was 2.7% of the total frontage upon which the assessment would be based. In CEO 92-37, the Commission advised that a city commissioner would be prohibited from voting on a measure to add to a local historic preservation district an area that included five hotel or apartment buildings owned by closely-held corporations that were owned by him and his relatives. There, the buildings constituted either 5 of 60 sites to be included or 5 of 168 sites to be included, depending on how the measure was framed. In CEO 95-4, the Commission advised that a county planning commissioner would be prohibited from voting on a comprehensive plan amendment affecting the designation of 1,200 acres of property owned by the planning commissioner, his relatives, and his business associates, where the measure would have affected a total of approximately 32,000 acres.

6. A series of other opinions involve situations where the class of persons affected was sufficiently large that no "special" gain was deemed to occur. In CEO 90-55, the Commission advised that a city mayor was not required to abstain from voting on measures involving the proposed expansion and renovation of a private club of 2,000 members. In CEO 87-18, the Commission concluded that a planning commissioner was not required to abstain from voting on a comprehensive plan amendment that would have affected 29,000 acres because his principal was leasing 300 acres of the affected area. In CEO 90-71, the Commission advised that a town commissioner was not prohibited from voting on issues relating to a project that would benefit his neighborhood and that would be assessed against the property owners in the neighborhood, when the commissioner owned 1.2% of the 83 lots that would be included in the assessment. Also, see CEO 99-12 (regarding an airport authority commissioner), CEO 00-13 (regarding a city commissioner receiving and voting on pension benefits), CEO 11-01 (city councilmember voting on collective bargaining measures affecting her police officer-husband), CEO 06-20 (regarding a county commissioner voting on measures concerning a proposed

judicial complex near her properties), and CEO 07-22 (county commissioner voting on matter affecting developers including homebuilder spouse). But see CEO 06-21 (no special private gain where each of a town's residents was similarly impacted by a rezoning vote, notwithstanding the small number of town residents) and CEO 07-17 (no special private gain where votes will impact virtually all of a town's residents similarly). CEO 10-2 found no special private gain or loss to a county commissioner's husband who was one of many healthcare providers who would be similarly affected by a measure regarding a healthcare information network.

7. Other decisions involve officials whose interests are proportionately large, when compared to the other members of the class of persons affected. For example, in one case the Commission concluded that a county commissioner should not have voted on the extension of a road along a boundary of her property, where the commissioner owned 260 acres, was one of 32 property owners along the proposed road extension, and was the fifth largest land owner along the road extension, with the next largest land owner having 20 acres. In re Jeanne McElmurray, Comm. on Ethics Compl. Nos. 87-24 & 26 (Stipulated Final Order 1988).

8. Budgets and appropriations acts are another type of measure that have a broad impact, but that may, in one aspect, inure to the gain of the voting official. In CEO 88-20, the Commission advised that a city commissioner was not prohibited from voting on the approval of a city budget that included funding for in-kind services to be provided in connection with the activities of his employer. See also CEO 89-19, CEO 92-43, and CEO 04-6 for situations that involve voting on a city's budget that contains items that the official would be prohibited from voting on if the items were considered individually.

9. A vote/measure of a SAC (school advisory council) to award "A plus" school recognition moneys to teachers/staff of the school, including teacher/staff members of the SAC, was not found to involve "special" gain or loss, notwithstanding the number of persons affected by the vote/measure, provided the vote/measure did not address a particular person/customized amount. CEO 10-21.

E. Special Private Gain or Loss--Remote or Speculative

1. In some situations the Commission has concluded that any gain or loss resulting from the measure would be so remote or speculative that it could not be said to inure to the official's special gain or loss. In CEO 85-46, the Commission advised that a city commissioner could vote on a petition for annexation of property, where the commissioner's employer had sold the property, retained a mortgage, and also owned adjoining property; see also CEO 09-14 (county purchase of airport buffer where mortgage retained). In CEO 93-4, a city commissioner was advised that he could vote on rent increases for a mobile home park owned by the city and located near a proposed recreational vehicle park he owned, because the possibility that he could in the future justify charging higher rent for his park if the city's park had higher rent was too speculative to conclude that the rent increases would inure to his special gain. See also CEO 05-2 (village affordable housing committee member owner of mobile home park and voting on mobile home park measures), CEO 05-3 (county commissioner and relatives owning interest in parcels of land near proposed road), CEO 05-17 (airport authority member voting on matters concerning road project near her business), and CEO 09-7, note 7, (county commissioner voting to fund EDC where his corporate cash pay-out tied to land sale). In CEO 88-27, the Commission concluded that a city commissioner was not prohibited from voting on the rezoning of property that was being sold contingent upon rezoning, where the commissioner supported another group that was interested in purchasing the same property and the commissioner probably would have been the building contractor for that group in the event the group were to

purchase the property. There, the Commission reasoned that the failure of the rezoning measure would not be the only contingency that would have to occur for the commissioner to benefit from the development of the property, as the existing owner would have to agree to sell to the group. However, the Commission noted, if the property were sold to the group, the commissioner could not vote on matters affecting the development of the property so long as he were the contractor for the development. See also CEO 00-8 and CEO 01-18. In CEO 07-14 and CEO 07-15 (identical opinions issued to two city commissioners), the Commission found that any gain or loss would be remote or speculative regarding measures to hire or dismiss city attorneys who might counsel city conduct regarding lawsuits to which the city was a party and to which the commissioners were nominal, private-capacity parties; and also found that city measures to continue or settle the lawsuits, or measures to repeal the ordinance underlying the litigation, would not cause gain or loss to the commissioners, inasmuch as they were nominal parties not personally responsible for paying for the litigation. In CEO 10-8, a mayor was not found to have a voting conflict regarding measures concerning a commuter rail station in his city, where he was employed by a hospital corporation whose interests in a neighboring city were tied to commuter rail.

2. Several Commission opinions have involved the impact of nearby development on a business owned by the voting official or employing the official--all of these have concluded that any gain resulting from the development was too remote and speculative to inure to the special gain of the official or employer. See CEO 85-77, CEO 85-87, CEO 86-44, CEO 89-32, CEO 91-70, CEO 06-8, and CEO 06-20; however, compare CEO 01-8. Later, under the particular facts of CEO 08-1, a city's relinquishment of an outfall (drainage) easement burdening property of a developer upstream from a city councilman's property was found not to create a voting conflict.

3. Not every instance of indirect gain has been classified as too remote and speculative to constitute "special gain," however. In CEO 88-27, the Commission advised that a city commissioner should abstain from voting on the rezoning of property where his employer had contracted to purchase the property contingent upon its receiving a particular zoning designation from the city. In CEO 93-29, the Commission concluded that a city commissioner would be prohibited from voting on matters involving the city's proposed purchase of property where the commissioner and his son owned interests in the mortgage encumbering the property. The Commission also has found a violation where a city/county planning commissioner voted to rezone a parcel of property to permit a higher density, when the commissioner had assigned his contract to purchase the property to the rezoning applicant and he was owed $10,000 by the applicant as part of the assignment. In re John S. Mooshie, 15 FALR 382 (1992), affirmed, per curiam, as Mooshie v. State Commission on Ethics, 629 So. 2d 138 (Fla. 1st DCA 1993).

4. In some situations, a series of decisions are made, some of which would inure to the special gain of the official and others of which would not, depending on the circumstances and the extent of the official's private participation in the process. Construction projects provide a good example of this. In CEO 89-45, the Commission considered a situation where a city commissioner owned a steel company that designed and bid steel packages to general contractors and developers, who generally would appear before the city commission prior to the commissioner's having submitted a bid on the proposed project. The Commission advised that if the commissioner had not submitted a proposal at the time of the vote, then any perceived gain to him would be too speculative to require him to abstain. However, if the commissioner had contacted or was in the process of negotiating with the contractor or

developer, but had not yet submitted a proposal, then he would be required to abstain. But see CEO 07-7, in which a city councilman whose company was a supplier of a local manufacturer of fire trucks was not presented with a voting conflict regarding a measure to provide financial incentives to the manufacturer in an effort to keep the manufacturer from relocating. See also CEO 00-5 (effect of transient rental ordinance on a grocery store not remote and speculative). Citing the remote and speculative nature of any gain or loss, the Commission determined that no voting conflict would be created were a city commissioner to vote on a measure to amend the city's affordable (work force) housing ordinance, where one of the commissioner's private legal clients was a potential developer of affordable housing within the city. CEO 05-15. And see CEO 06-21 (regarding Town of Marineland).

F. Special Private Gain or Loss-- Procedural or Preliminary Issues

1. Some measures are simply procedural or preliminary to the later actions that would result in actual gain or loss, and therefore do not present voting conflicts for officials who would have voting conflicts if called to vote on more substantive measures concerning the same subject. See CEO 78-74 (removing item from consent agenda, to enable it to be discussed). However, in CEO 93-10 the Commission concluded that a town council member who was prohibited from voting on a measure to resolve a real property ownership dispute between the town and private property owners, including the council member, also would be prohibited from voting on a measure to order a survey regarding the disputed property. The Commission reasoned that, since the dispute could not be resolved without a survey being done and the resolution of the dispute would inure to the special gain of the council member, the decision not to order a survey would effectively preclude the resolution of the dispute. Therefore, ordering a survey of the disputed property would not simply be preliminary to an issue where gain or loss could occur.

G. Exceptions to the Voting Conflict Rules

1. When the principal retaining the official is a public agency, the Commission has concluded that the official is not prohibited from voting on a measure inuring to the special gain of the agency and is not required to make any specific disclosures. CEO 86-86, CEO 88-20, CEO 91-20. See F.S. 112.312(2) for the definition of "agency."

2. Commissioners of community redevelopment agencies created or designated pursuant to F.S. 163.356 or 163.357, as well as officers of independent special tax districts elected on a one-acre, one-vote basis, are not prohibited from voting. F.S. 112.3143(3)(b). In CEO 86-13 and CEO 10-24, the Commission advised that a CRA official may vote on matters affecting his or her interests but still would be required to publicly announce the conflict and file a voting conflict memorandum; similarly, see CEO 87-66, regarding a community development district supervisor elected on a one-acre, one-vote basis. And see F.S. 163.367(2), a provision outside the Code of Ethics, which independently requires certain disclosures by CRA officials, commissioners, and employees.

3. Public officers are not prohibited from voting on matters affecting their salary, expenses, or other compensation as a public officer, as provided by law. F.S. 112.313(5). See CEO 08-24 and CEO 08-25, regarding voting to appoint oneself to paid mayor or council office. Note also that this provision specifies that local government attorneys may consider matters affecting their salary, expenses, or other compensation as the local government attorney, as provided by law.

NOTE ALSO THE "VOTING REQUIREMENTS LAW," F.S. 286.012. See CEO 08-11 and CEO 11-8.

XIX. FINANCIAL DISCLOSURE (FORM 6- "FULL" DISCLOSURE)

A. Who Must File? NOTE: SEE FORM 6, AVAILABLE ON THE COMMISSION'S WEBSITE (www.ethics.state.fl.us), FOR A DEFINITIVE LISTING OF WHO MUST FILE.

1. "Full" disclosure (Commission Form 6--Full and Public Disclosure of Financial Interests) is required of persons holding and seeking elective constitutional office, and is required of other public officers, candidates, and public employees as determined by law. Art. II, Sec. 8(a) and (h), Fla. Const.

2. Elective constitutional offices include, at the State and local level, the following: Governor, Lieutenant Governor, Cabinet member, Legislator, Circuit Judge, County Judge, State Attorney, Public Defender, Clerk of Circuit Court, Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections (CEO 82-87), County Commissioner, elected Superintendent of Schools (CEO 77-100), District School Board member, Mayor of Jacksonville, Jacksonville City Council member.

3. Appointive position holders required to file Form 6 include: Supreme Court Justices; DCA Judges; Judges of Compensation Claims; the Duval County Superintendent of Schools; and members of the Florida Housing Finance Corporation Board, and the Florida Prepaid College Board.

4. Regarding the Miami-Dade County Expressway Authority (MDX), see CEO 07-21. Regarding various expressway, transportation, bridge, or toll authority members, see F.S. 348.0003(4)(c), as amended by Chapter 2009-85, L.O.F., and CEO 10-18.

B. When Is the Form Due, and Where Is It Filed?

1. Incumbents file with the Commission on Ethics in Tallahassee no later than July 1 of each year. If the form is not filed timely, the Commission sends a reminder notice, advising of a grace period until September 1st; those who ignore the grace period will face an "automatic" $25-per-day-late fine, up to a maximum of $1,500, and may face additional penalties if an ethics complaint is filed. F.S. 112.3144(5). Article V, Florida Constitution, judges and justices do not receive reminder notices and do not get the grace period; however, they are not subject to the statutory automatic fines (their conduct is cognizable by the Judicial Qualifications Commission).

2. Candidates must file prior to or at the time they file their qualifying papers, with the officer before whom they qualify. Plante v. Smathers, 372 So. 2d 933 (Fla. 1979); F.S. 99.061; F.S. 99.063; F.S. 105.031.

3. Persons leaving public positions must file (Commission Form 6F) within 60 days of leaving, unless within the 60-day period the person takes another position requiring full disclosure. F.S. 112.3144(6). NOTE THAT PERSONS REQUIRED TO FILE A FORM 6F MUST ALSO FILE A FORM 6 ON OR BEFORE JULY 1.

C. What Must Be Disclosed?

1. Each asset worth more than $1,000 must be described and valued [household goods and personal effects may be reported in a lump sum--see F.S. 112.3144(3)]. Art. II, Sec. 8(a) and (h), Fla. Const. The Commission has advised that an "asset" includes all

forms of property interests that can be sold to be applied to the payment of one's debts. CEO 87-84 and CEO 78-1. The asset should be valued at fair market value, as of the date used for reporting one's net worth. Property owned solely by one's spouse need not be reported. CEO 77-158. However, the full value of property held in tenancy by the entirety (held as husband and wife) or otherwise held jointly with right of survivorship must be reported. CEO 74-27. Assets held jointly, other than in tenancy by the entirety or in joint tenancy with right of survivorship, can be reported based on the percentage of value owned by the reporting person. FS 112.3144(4)(a).

2. Each liability worth in excess of $1,000 must be described and valued (Art. II, Sec. 8(a) and (h), Fla. Const.), except for credit card and retail installment accounts, taxes owed unless reduced to a judgment, indebtedness on a life insurance policy owed to the company of issuance, contingent liabilities, and accrued income taxes on net unrealized appreciation. F.S. 112.312(14). Valuation depends on the face amount of the debt and the basis for liability (e.g., joint or several). Liability for a debt that is secured by property owned by the reporting individual but that is held jointly, with right of survivorship, must be reported at 100 percent of the total amount owed. FS 112.3144(4)(b). Liability on a promissory note only as a guarantor (CEO 86-40) or as a partner (CEO 95-1) is contingent and not reportable. Liability as a comaker of the note must be reported. CEO 89-5.

3. The net worth of the reporting person as of the close of the prior calendar year, or a more current date. Art. II, Sec. 8(a) and (h), Fla. Const.

4. Income reporting requirements can be satisfied in one of two ways:

a. Attaching a complete copy of the reporting individual's most recent income tax return (including all attachments); or

b. Reporting the name and address, and amount, of each source of income exceeding $1,000 received during the prior year, including a statement of all "secondary sources" of income. "Secondary sources" mean each source of income exceeding 10% of the gross income of a business entity of which the reporting individual owned more than a 5% interest and from which the reporting individual received more than $1,000 of gross income. Amounts of secondary income are not disclosed. Art. II, Sec. 8(h), Fla. Const.; Commission Rule Ch. 34-8, F.A.C. As to correct reporting of “declined payment of salary,” see CEO 04-8.

5. Amendments (Commission Form 6X) to full disclosure filings are allowed; however, amendments are only potentially mitigative regarding an ethics complaint proceeding. F.S. 112.3144(7).

XX. FINANCIAL DISCLOSURE (FORM 1- "LIMITED" DISCLOSURE)

A. Who Must File? NOTE: CONSULT THE FORM ITSELF, ON THE COMMISSION'S WEBSITE (www.ethics.state.fl.us), FOR A DEFINITIVE LISTING OF WHO MUST FILE. "State officers"(CEO 02-15, Question 2), "local officers," and "specified state employees" (for example, full-time state employees serving as counsel or assistant counsel to a state agency), as defined in F.S. 112.3145(1), are required to file the "limited" financial disclosure statements (Commission Form 1--Statement of Financial Interests). State university "grants compliance analysts" who have no authority to apply for or award grants and no authority to decide how grant funds are spent were determined not to be "grants coordinators," and thus do not have to file (CEO 10-25). Each member of the board of directors of Space

Florida who is not who is not otherwise required to file full financial disclosure pursuant to the State Constitution or pursuant to F.S. 112.3144 shall file Form 1 disclosure. F.S. 331.3081(14). Trial court staff attorneys are not required to file (CEO 03-12); but see CEO 05-12, requiring filing by various employees of the State Courts System in a Judicial Circuit. Support Enforcement Hearing Officers appointed pursuant to Rule 12.491(c), Florida Family Law Rules of Procedure are not required to file (CEO 02-18). A Regional Counsel for the Office of Criminal Conflict and Civil Regional Counsel is required to file as a "specified state employee" due to his status as a "purchasing agent" with the requisite purchasing authority. CEO 08-9. "Local officers" include the following:

1. Persons elected to office in any political subdivision, or appointed to fill a vacancy in such an office, except for the elected constitutional officers who file Form 6. F.S. 112.3144(2).

2. Candidates for such local offices. F.S. 112.3145(2)(a).

3. Members of various, but not all, appointed bodies. See CE Form 1, F.S. 112.3145(1)(a)2., CEO 01-11, and CEO 01-20.

4. Certain personnel of private businesses serving as the chief administrative/executive officer of a city or other political subdivision. F.S. 112.3136. CEO 10-01.

5. Any appointed member of a local government board who is required to file a statement of financial interests by the appointing authority or the enabling legislation, ordinance, or resolution creating the board. F.S. 112.3145(1)(a)2.

6. Persons holding any of the following positions:

> mayor; county or city manager; chief administrative employee of a county, municipality, or other political subdivision; county or municipal attorney; chief county or municipal building code inspector; county or municipal water resources coordinator; county or municipal pollution control director; county or municipal environmental control director; county or municipal administrator, with power to grant or deny a land development permit; chief of police; fire chief; municipal clerk; district school superintendent (other than those superintendents who file Form 6); community college president; district medical examiner; or purchasing agent having the authority to make any purchase exceeding $20,000 (F.S. 287.017 CATEGORY ONE purchasing agent) for any political subdivision of the state or any entity thereof. F.S. 112.3145(1)(a)3.

a. "County or municipal attorney" includes only the city or county attorney, and not assistant city or county attorneys. CEO 85-49. Includes a city attorney whose firm is retained as an independent contractor. CEO 08-27.

b. Rather than simply reviewing an employee's title, a functional analysis of the employee's duties is required to determine if the employee is a "local officer." Thus, a city building and zoning director not having the power to grant or deny a building permit and lacking purchasing authority would not be required to file. CEO 84-61. A city public

utilities department director whose responsibilities include the operation of the city's water and sewer facilities would be considered a water resources coordinator, required to file. CEO 84-70.

c. A "purchasing agent" is defined in F.S. 112.312(20) to mean "a public officer or employee having the authority to commit the expenditure of public funds through a contract for, or the purchase of, any goods, services, or interest in real property for an agency, as opposed to the authority to request or requisition a contract or purchase by another person." Thus, this category may include a number of administrative personnel whose positions are not specified otherwise. See CEO 88-62.

d. Members of health facilities authorities created pursuant to Chapter 154, Part III, Florida Statutes, were found not to be "local officers." CEO 03-5. Appointed and ex officio members of the Citrus Levy Marion Regional Workforce Development Board, Inc. are not subject to filing financial disclosure. CEO 08-3.

7. A non-voting member of a board has been found to be a "member" required to file financial disclosure (CEO 07-20), and a suspended city commissioner has been found to be required to file (CEO 10-19).

B. When Is the Form Due, and Where Is It Filed?

1. Candidates for local office must at the time they file their qualifying papers, with the officer before whom they qualify. F.S. 99.061, 112.3145(2)(a), and 112.3145(2)(c).

2. Others must file within 30 days of their appointment or employment and annually thereafter, by July 1st, with the supervisor of elections of the county where they reside (if they are not permanent residents of any county, they file where their agency is headquartered). F.S. 112.3145(2)(c). State officers and specified State employees file with the Commission on Ethics. If the form is not filed timely, a reminder notice advising of a grace period until September 1st is sent. Those who ignore the notice and grace period will face an "automatic" $25-per-day-late fine, up to a maximum of $1,500, and may face additional penalties if an ethics complaint is filed. F.S. 112.3145(6).

3. The obligation to file accrues at the close of a calendar year in which the officer or employee holds his or her office or employment. However, persons who leave their office or employment must file Commission Form 1F within 60 days after leaving, unless another reporting position is taken within the 60-day period. F.S. 112.3145(2)(b). The form must be filed even if there is nothing to report. F.S. 112.3145(3).

C. What Must Be Disclosed (note that a disclosure option is now available; see D below)?

1. The Form 1 disclosure is considered "limited" disclosure, because it requires no disclosure of dollar amounts for income, assets, or liabilities. Disclosure thresholds are relative, based on percentages or comparisons, rather than based on absolute dollar amounts.

2. The "disclosure period" covered by the form is the taxable year, whether calendar or fiscal, immediately preceding the last day of the period during which the statement is required to be filed. F.S. 112.312(10).

3. All sources of income in excess of 5% of the reporting person's gross income received by the person in his or her name "or by any other person for his or her use or benefit." Public salary need not be reported, although it should be included when calculating the total amount of one's gross income; nor are sources belonging only to one's spouse or business partner to be reported. F.S. 112.3145(3)(a); CEO 75-19.

4. Secondary sources of income (major clients or customers of businesses owned by the reporting individual) must be disclosed. "Secondary sources" mean each source of income exceeding 10% of the gross income of a business entity of which the reporting individual owned more than a 5% interest and from which the reporting individual received more than 10% of his or her gross income, and at least $1,500. F.S. 112.3145(3)(a)2.

5. The location or description of Florida real property, except for residences and vacation homes, in which the reporting person owns directly or indirectly more than 5% of the value of the property must be disclosed. "Indirect" ownership includes ownership of a beneficial interest in a trust owning the property or in a corporation owning the property, but does not include ownership by a spouse or minor child. F.S. 112.312(13) and 112.3145(3)(a)3; CEO 83-3; CEO 76-162.

6. Intangible personal property worth more than 10% of the reporting individual's total assets must be reported. F.S. 112.3145(3)(a)3.

7. Any liability which equals more than the reporting individual's net worth must be disclosed, except for credit card and retail installment accounts, taxes owed unless reduced to a judgment, indebtedness on a life insurance policy owed to the company of issuance, contingent liabilities, and accrued income taxes on net unrealized appreciation. F.S. 112.312(14) and 112.3145(3)(a)4. Valuation depends on the face amount of the debt and the basis for liability (e.g., joint or several). Liability on a promissory note only as a guarantor (CEO 86-40) or as a partner (CEO 95-1) is contingent and not reportable. Liability as a comaker of the note would be reportable. CEO 89-5.

8. For valuation purposes, property held by husband and wife as tenancy by the entirety should be valued at full value; other joint property should be based on the percentage of ownership. CEO 82-30. Bank accounts where each joint tenant is authorized to withdraw the full amount are valued at full value. CEO 82-30.

D. However, the following disclosure option is available under F.S. 112.3145(3)(b):

1. All sources of gross income in excess of $2,500.

2. All sources of income to a business entity in excess of 10 percent of the gross income of a business entity in which the reporting person held a material interest and from which he or she received gross income exceeding $5,000 during the disclosure period.

3. The location or description of real property in Florida, except for residences and vacation homes, owned directly or indirectly by the reporting person, when such person owns in excess of 5 percent of the value of such real property.

4. A general description of any intangible property worth in excess of $10,000.

5. Every liability in excess of $10,000.

E. Amendments (Commission Form 1X) are allowed; however, the effect of an amendment is potentially mitigative (not curative) in an ethics complaint context. F.S. 112.3145(9).

XXI. DISCLOSURE OF SPECIFIED BUSINESS INTERESTS

A. Persons required to file Form 6 or Form 1 who are or were during the disclosure period an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process), or who own or owned more than a 5% interest in one of certain types of

business entities, are required to disclose the fact as part of their Form 6 or Form 1 disclosures. F.S. 112.3145(5).

B. The only types of businesses for which this disclosure must be made are the following: state and federally chartered banks, state and federal savings and loan associations, cemetery companies, insurance companies (including insurance agencies), mortgage companies, credit unions, small loan companies, alcoholic beverage licensees, pari-mutuel wagering companies, utility companies, entities controlled by the PSC, and entities granted a franchise to operate by either a city or a county government. F.S. 112.312(19).

XXII. CLIENT DISCLOSURE (QUARTERLY)

A. Who Must File?

State officers, local officers (note addition of "privatized" chief administrative officers, F.S. 112.3136), specified state employees, and elected constitutional officers are required to report, on a quarterly basis, the names of clients represented for a fee or commission before agencies at their level of government, using Commission Form 2. F.S. 112.3145(4).

B. When Is the Form Due and Where Is It Filed?

The form should be filed only when a reportable representation is made during a calendar quarter, no later than the last day of the quarter following the quarter in which the representation is made. "Local officers" file with the supervisor of elections of the county in which the officer is principally employed or is a resident. Elected constitutional officers, state officers, and specified state employees file with the Commission on Ethics. F.S. 112.3145(4).

C. What Should Be Disclosed?

1. The names of clients and the names of the agencies before which the clients were represented by the reporting individual or by any partner or associate of a professional firm of which the reporting individual is a member, when the reporting individual has actual knowledge of the representation. Depending on the substance of one's relationship to a law firm, one who is "of counsel" to a law firm may not be a "member" of the firm. CEO 74-55, CEO 92-11.

2. Although the statute requires that reportable representations be at the reporting individual's "level of government," Commission opinions have required only disclosure of representations within the political subdivision served by a given local officer. CEO 80-63, CEO 85-33.

3. Appearances in ministerial matters are not reportable. A "ministerial matter" is one involving "action that a person takes in a prescribed manner in obedience to the mandate of legal authority, without the exercise of the person's own judgment or discretion as to the propriety of the action taken." F.S. 112.312(17).

4. "Representation" includes actual physical attendance on behalf of a client in an agency proceeding, letters written or documents filed on behalf of the client, and personal communications made with the officers or employees of the agency on behalf of the client. F.S. 112.312(22).

5. Under F.S. 112.3145(4), the following also do not have to be reported:

a. Appearances before any court;

b. Appearances before compensation claims judges;

c. Representations on behalf of one's agency in one's official capacity;

d. Preparing and filing forms and applications merely to obtain or transfer a license based on a quota, a franchise of the agency, or a license or operation permit to engage in a profession, business, or occupation, when the action does not require substantial discretion, a variance, a special consideration, or a certificate of public convenience and necessity.

XXIII. AUTHORITY TO ADOPT MORE STRINGENT STANDARDS

Agencies, by rule, and political subdivisions, by ordinance, are expressly authorized to adopt "additional or more stringent standards of conduct and disclosure requirements," provided that they do not otherwise conflict with the provisions of the Code of Ethics. F.S. 112.326. Counties may specify fines and jail time by ordinance. F.S. 125.69(1).

XXIV. ETHICS COMMISSION PROCESSES AND PROCEDURES

A. Commission on Ethics created in F.S. 112.320 to serve:

1. As the guardian of the standards of conduct provided in the Code of Ethics for Public Officers and Employees (Part III, Ch. 112, F.S.); and

2. As the independent commission provided for in Art. II, Sec. 8(f), Fla. Const., to "conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission."

B. The Commission does so, primarily, in two ways:

1. By rendering binding, judicially-reviewable advisory opinions [F.S. 112.322(3); relevant rules are in Ch. 34-6, Florida Administrative Code]; and

2. By investigating complaints [F.S. 112.324; relevant rules are in Ch. 34-5, Florida Administrative Code]

C. Advisory Opinions:

1. Standing is limited to:

a. the person who is in doubt about the applicability of the law to himself or herself, "in a particular context" (not hypothetical); or

b. a public officer or employee having the power to hire or terminate an employee has standing to request an opinion about how the law applies to that applicant or employee

2. Opinion Procedure:

a. Written request initiates the proceeding

b. Commission staff prepares a draft opinion which is sent to the Commission and to the requestor prior to the meeting at which it will be considered

c. Requestor can respond in writing, appear at the meeting and be heard; rendered opinions are numbered, dated and published at Commission's website (www.ethics.state.fl.us)

d. Are analogous to declaratory statements under APA (F.S. 120.565), as they are based on the facts provided by the requestor, rather than on adjudicated facts, and are reviewable by appeal to a District Court of Appeal (F.S. 112.3241)

D. Complaints:

1. Must be made under oath on the form prescribed by the Commission (CE Form 50); a copy must be sent by the Commission to the respondent (accused violator) within 5 days [F.S. 112.324(1)]

2. Are confidential, unless confidentiality is waived in writing, up to the point where either the complaint is dismissed by the Commission or the Commission finds "probable cause" [F.S. 112.324(2)]

3. First stage: facial review for legal sufficiency of complaint. If Commission finds complaint to be insufficient to indicate a possible violation of the ethics laws, complaint is dismissed without investigation, but with order explaining reasoning. [Rule 34-5.002, F.A.C.]

4. Second stage: preliminary investigation to determine "probable cause." Commission or Executive Director orders investigation of complaint; investigator prepares written report, which is provided to the respondent, who is given time to reply. Commission "Advocate" (prosecutor) prepares written probable cause recommendation, which also is provided to the respondent, who can provide a written reply. "Probable cause" hearing before the Commission allows oral argument by the respondent and Advocate (no evidence taken) and allows the complainant to observe. If probable cause is found, Commission can order hearing or allow respondent 14 days to request a public hearing. [F.S. 112.324(3); Rule 34-5.006]

5. Third stage: determination of whether there was a violation. Either stipulated settlement agreement negotiated between respondent and Advocate or hearing before Division of Administrative Hearings' Administrative Law Judge. ALJ's recommended order reviewed by Commission pursuant to F.S. 120.569 and 120.57. Clear and convincing evidence standard applies to complaint proceedings. Latham v. Fla. Comm. on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Penalties provided for in F.S. 112.317 are imposed by disciplinary officials (typically the Governor), not by the Commission, which can only recommend penalties. Commission's final order is subject to appeal to District Court of Appeal under F.S. 112.3241 and 120.68. Orders are published on Commission's website per F.S. 120.53.

6. If a complaint is dismissed, the complainant does not have standing to appeal the Commission's decision, not being considered to be a party to the complaint proceeding. Mulgado v. Rodriguez, 933 So.2d 657 (Fla. 1st DCA 2006), and Mulgado v. Diaz, 933 So. 2d 658 (Fla. 1st DCA 2006).

E. Composition of the Commission:

1. Nine members appointed for two-year terms

2. Five members appointed by the Governor, no more than three of whom are from the same political party, one of whom must be a former city or county official

3. Two members are appointed by the President of the Senate, and two members by the Speaker of the House of Representatives; neither the Speaker nor the President may appoint more than one member from the same political party

4. No member may hold any public employment or be a "lobbyist" under state law or local charter or ordinance; no member may serve more than two full terms in succession. (F.S. 112.321(1))

F. Other Responsibilities of the Commission:

1. Financial disclosure -- compile a list of persons required to file financial disclosure, receive and maintain disclosure forms, and enforce the timely filing of forms by collecting automatic fines imposed by statute for late filings ($25 per day; $1,500 maximum) and by hearing appeals from the fines [F.S. 112.3144(5) and 112.3145(6)]

2. Administer and enforce the executive branch lobbyist registration and reporting law, which requires that persons register to lobby executive branch agencies and officials, and Con. Rev. Comm'ns, under certain circumstances (Legislative lobbyists are regulated by the Legislature) [F.S. 112.3215]

3. Investigate complaints alleging a violation of F.S. 11.062(2), which requires executive branch agencies, state universities, community colleges, and water management districts to lobby the legislative and executive branch only by using full-time employees.

4. Investigate suspected violations of limitations on proper use of State motor vehicles and State aircraft when reported by the CFO (F.S. 287.175)

5. Investigate complaints and render opinions concerning the ethics standards applicable to members and staff of the Public Service Commission, and to members of the Public Service Commission Nominating Council. F.S. 350.031 - .043; 350.0605 (former members).

G. Representing Agency Personnel in Complaints Before the Ethics Commission

1. Consider Whether a Conflict of Interest May Prohibit the Representation

a. When an ethics complaint has been filed against an agency officer or employee, the Commission has advised that the Code of Ethics does not prohibit an agency attorney from representing the officer or employee. See CEO 76-144 and CEO 86-57.

b. However, in at least some instances the Bar has concluded that professional ethics considerations would prohibit the agency attorney from representing the officer or employee before the Commission. See Professional Ethics of the Florida Bar Opinion 77-30, May 9, 1978 (county attorney may not represent individual county commissioner before Ethics Commission in matter involving misuse of public office).

c. This opinion was reconsidered by the Board of Governors on Sept. 29, 2006 to clarify its views on conflicts involving a county attorney's representation of a county commissioner who is the subject of an ethics complaint. The reconsidered opinion concludes that there may be a conflict of interest under Rule 4-1.7, and that whether the conflict may be waived depends on the individual circumstances of the matter. In order to waive the conflict, both the commissioner and the county must give informed consent in writing, with the county's consent being given by someone other than the commissioner.

2. Consider the Extent to Which the Attorney Client Privilege May Apply

a. In Re Bruce R. Lindsey, 158 F.3d 1263 (D.C. Cir. 1998):

Government attorney-client privilege did not protect from disclosure advice which Deputy White House counsel rendered on political, strategic, or policy issues in connection with lawsuit involving the President in his personal capacity prior to expansion of

Independent Counsel's jurisdiction to investigate whether wrongdoing occurred in connection with that action.

Deputy White House Counsel could not assert government attorney-client privilege to avoid responding to grand jury if he possessed information relating to possible criminal violations.

Deputy White House Counsel could not withhold from grand jury information about possible criminal misconduct that he obtained in conferring with the President and the President's private counsel on matters of overlapping concern to the President personally and in his official capacity.

b. In Re A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002):

Attorney-client privilege did not apply to bar grand jury testimony of state government counsel as to communications with officeholder; any privilege ran to the office and not to the employees in that office, and lack of criminal liability for government agencies and duty of public lawyers to uphold the law outweighed any need for a privilege, in context of a federal criminal investigation.

c. Attorney General Opinion 97-61:

Discussions regarding school business between individual school board members and the school board attorney are not attorney-client conversations and, therefore, are not privileged communications.

A school board attorney may memorialize, in writing, any conversations with an individual school board member or the superintendent. These documents are public records subject to inspection and copying.

d. Attorney General Opinion 98-59:

Those records in the files of the city attorney which were made or received in carrying out her duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor.

H. Attorney's Fees for Defense Against Ethics Complaint

1. Paid by the Official's Public Agency

a. An official's successful defense of misconduct charges brought in proceedings before the Ethics Commission qualifies under the common law for reimbursement by the official's agency of attorney's fees expended in that defense. (There is no statutory obligation.) Thornber v. City of Fort Walton Beach, 568 So. 2d 914, fn. 7 at p. 918 (Fla. 1990).

b. However, fees may not be awarded when the complaint arises out of a vote by the public official that directly advances the official's private pecuniary interests. Chavez v. City of Tampa, 560 So.2d 1214 (Fla. 2d DCA 1990).

c. Maloy v. Bd. of County Commissioners of Leon County, 946 So.2d 1260 (Fla. 1st DCA 2007), rev. den. 962 So. 2d 337 (Fla. 2007): Court affirmed Leon County's refusal to pay Commissioner's attorney fees for successfully defending against ethics complaint which arose out of his consensual affairs with two women, concluding that the ethics proceeding "did not arise out of and in the course of Maloy's employment with the Board while he served a public purpose."

2. Paid by the Complainant

a. A complainant who has filed an ethics complaint with malicious intent to injure the reputation of the official by filing with the knowledge that the complaint

contains one or more false allegations, or with reckless disregard for whether the complaint contains false allegations, of fact material to a violation of the Code of Ethics is liable for costs and reasonable attorney's fees incurred in defending the official. (F.S. 112.317(7); Commission Rule 34-5.0291, F.A.C.)

b. Regardless of whether the official was represented by agency counsel and the official did not incur any out-of-pocket expenses, a complainant who has filed a frivolous ethics complaint with malicious intent to injure the reputation of the official is liable for reasonable costs and attorneys fees incurred in defending the official. Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993).

c. The amount to be awarded includes fees and expenses incurred in proving entitlement to attorney's fees. Kaminsky v. Lieberman, 675 So.2d 261 (Fla. 4th DCA 1996).

d. For purposes of considering a fees award, the "complaint" filed by the complainant may include statements made by the complainant's attorney to the Commission investigator during the investigation. Osborne v. Commission on Ethics, 951 So.2d 25 (Fla. 5th DCA 2007), rev. dismissed sub nom Milanick v. Osborne, 962 So.2d 337 (Fla. 2007).

e. "[T]he elements of a claim by a public official for costs and attorney fees are that (1) the complaint was made with a malicious intent to injure the official's reputation; (2) the person filing the complaint knew that the statements made about the official were false or made the statements about the official with reckless disregard for the truth; and (3) the statements were material." This is not the "actual malice" standard of NY Times v. Sullivan. Brown v. State Commission on Ethics, et al., 969 So.2d 553 (Fla. 1st DCA 2007), pet. for rev. den. sub nom Burgess v. Brown, 980 So.2d 1070 (Fla. 2008).

f. The procedure for requesting an award of attorney's fees is set out in Commission Rule 34-5.0291, F.A.C., and contemplates the filing of a petition within 30 days of dismissal of the underlying complaint, review of the petition by Commission staff, possible dismissal after an informal hearing, and award of fees only after a formal hearing by the Division of Administrative Hearings.

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