FLORIDA MUNICIPAL ATTORNEYS ASSOCIATION

FLORIDA MUNICIPAL LAW REPORTER

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Editor's Note: The following case law summaries were reported for the period of January 1, 2013, through March 31, 2013.

Section 1. Recent Decisions of the Florida Supreme Court.

Public employees – Retirement – Statutory amendments that converted Florida Retirement System (FRS) from noncontributory by employees to contributory, required all current FRS members to contribute 3 percent of their salaries to the retirement system, and eliminated the retirement's cost-of-living adjustment for creditable service after the effective date of the amendment are constitutional – Amendments do not unconstitutionally impair the contract rights of existing members of FRS, do not effect an unconstitutional taking, and do not impair constitutionally guaranteed rights to collectively bargain concerning pension issues.

During the 2011 legislative session, the Florida Legislature passed a bill that converted the Florida Retirement System (FRS) from noncontributory to contributory, required FRS members to contribute 3 percent of their salaries to the retirement system, and eliminated the retirement cost-of-living adjustment for creditable service after the effective date of the act. The FRS members (plaintiffs) argued the changes to the retirement plan violated the contracts clause, the takings clause and the collective bargaining clause of the Florida Constitution. The trial court held the "preservation of rights" statute in Section 121.011(3)(d), Florida Statutes, granted the plaintiffs a contractual right to the noncontributory retirement plan. Thus, any alteration to the existing retirement plan would constitute a violation of the contracts clause and give rise to an unlawful "taking." The trial court further held the legislation impaired the right to collective bargaining because it removed the subject of retirement from the collective bargaining process and rendered any negotiations on the subject futile. On appeal, the Florida Supreme Court reversed the decision of the trial court. The supreme court held the "preservation of rights" statute does not preclude the Legislature from making prospective changes to the retirement plan, provided the changes do not impair any benefits tied to service performed prior to the date of the amendment to the plan. The preservation of rights statute does not create binding contract rights for existing employees to future retirements benefits based on the FRS plan that was in place prior to the 2011 legislation. The supreme court held that since no contract between the state and the FRS members had been breached, no unconstitutional taking had occurred. The supreme court concluded nothing in the legislation abridged the constitutional right to collective bargaining as there was nothing in the legislation that, on its face, would remove bargaining over retirement benefits from the collective bargaining process. *Rick Scott, et al. v. George Williams, et al.*, 38 Fla. L. Weekly S27 (Fla. 2013).

Section 2. Recent Decisions of the Florida District Courts of Appeal.

Torts – Contracts – Municipal corporations – Public employees – Jurisdiction – Exhaustion of administrative remedies – Futility – Where some plaintiffs exhausted their administrative remedies before the Public Employee Relations Commission (PERC), court must conclude that outcome of any administrative proceeding as to those plaintiffs who did not participate in PERC proceedings would have been no different; the law requires no futile act.

Plaintiffs are a group of Tampa police and firefighter employees who agreed to retire under a Deferred Retirement Option Program (DROP). The multiplier used to calculate their monthly retirement benefit was 2.5 percent. Subsequent to the retirement of the plaintiffs, the multiplier was increased to 3.5 percent. The plaintiffs were unable to take advantage of the increased multiplier because they had already left employment. Some of the plaintiffs filed unfair labor practice complaints with the Public Employee Relations Commission (PERC). PERC dismissed the complaints, finding the retirees lacked standing since, as required by statute, they were not public employees at the time the alleged unfair labor practice

occurred. The plaintiffs, some who had filed complaints with PERC and some who had not, filed a complaint asserting claims for declaratory, contract, and tort relief with the circuit court. Because some of the plaintiffs failed to file complaints with PERC, the trial court held the plaintiffs as a whole failed to exhaust all administrative remedies prior to filing the complaint. Thus, the trial court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Second DCA reversed the trial court. Since numerous identical PERC actions had already been dismissed, the Second DCA concluded any future cases filed on the same set of facts would likewise be dismissed. Thus, the filing of any additional PERC actions would be futile. Since the law requires no futile act, the Second DCA held the plaintiffs, including those who had yet to file a PERC action, had exhausted their administrative remedies. Based on the above reasoning, the DCA found the circuit court had subject matter jurisdiction and remanded the case for future proceedings. *Sylvia Artz for Carl Artz, et al. v. City of Tampa, et al.*, 38 Fla. L. Weekly D27 (Fla. 2d DCA December 19, 2012).

Municipal corporations – Contracts – Trial court properly found that there was a contractual relationship between plaintiff and pension fund, and that pension fund breached contract by unreasonably delaying approval of pension and failing to provide plaintiff with information as to amount of contribution necessary to make up deficit in his contribution to receive full pension benefits.

A Jacksonville firefighter applied for disability pension benefits after suffering a heart attack in the course of his employment. The pension fund's advisory board recommended approval of the application. The Board of Trustees of the pension fund deferred action on the application and attempted to find the firefighter a light-duty position within the fire department. While the pension fund deferred the application, the firefighter continued to be paid by the fire department, but at a lower rate than his pre-injury rate of pay. After a four-month delay, the pension fund approved the firefighter's pension benefits. However, the pension benefits were calculated using the lower rate of pay. The trial court found in favor of the firefighter, holding the four-month delay in approval of the application and the failure to provide the firefighter with information on how to make up the deficit in the pension contribution to restore full benefits was a breach of contract and breach of fiduciary duty.

The First DCA affirmed the trial court, holding Jacksonville's pension ordinance as well as a provision in its charter created a contractual relationship between the pension fund and the firefighter. The Jacksonville charter provides the pension fund's board is the sole administrator of the fund and has the responsibility of determining a participant's amount of benefit. Because the pension fund failed to provide the firefighter with the information needed to determine the amount necessary to make up any deficit in his contributions, the fund breached the contract as provided by ordinance and the charter. *Bd. of Trustees of the Jacksonville Police & Fire Pension Fund v. Joseph Kicklighter*, 38 Fla. L. Weekly D102 (Fla. 1st DCA January 4, 2013).

Municipal corporations – Police officers – Municipal ordinance creating a Civilian Investigative Panel to investigate civilian complaints against police officers and to make recommendations to city manager and police chief regarding allegations of misconduct does not directly conflict with state statute – City acted within its home rule authority in creating Civilian Investigative Panel.

The City of Miami approved an ordinance creating a Civilian Investigative Panel (CIP) to provide civilian oversight over the police department. The CIP was given subpoena power and had the authority to conduct investigations, inquiries and hold public hearings on allegations of misconduct by police officers. The CIP was designed to facilitate resolution to any complaints and to make recommendations to the city manager and police chief regarding allegations of misconduct by police officers. The Fraternal Order of Police sought a declaratory action holding the investigative powers of the CIP were unconstitutional because they directly conflict with the provisions of the Police Officers' Bill of Rights (PBR) set forth in Sections 112.532-112.533, Florida Statutes. The PBR provides a framework for internal investigations by police departments to determine if disciplinary action should be taken. The Fraternal Order of Police argued the PBR vests law enforcement agencies with the exclusive authority to investigate complaints against officers. Municipalities have the home rule authority to exercise any power for municipal purposes except where expressly prohibited by state statute or the constitution. Municipal action is expressly prohibited: (1) where state law expressly preempts the actions; or (2) where there exists a literal incompatibility or direct conflict between the local ordinance and state statute. It was uncontested the PBR does not expressly preempt investigative bodies or other forms of oversight. The question turns on whether there is a direct conflict between the PBR and the powers of the CIP. The Third DCA held a direct conflict does not exist with the PBR because the CIP does not have the authority to make management decisions such as the disciplinary procedures set forth in the PBR. Also, the CIP does not affect any obligation imposed on the police department by the PBR. Given the absence of any conflict between the ordinance and the PBR, the Third DCA held the city acted within its home rule authority in creating the CIP. *Freddy D'Agastino et al., v. The City of Miami et al.*, 38 Fla. L. Weekly D167 (Fla. 3d DCA January 23, 2013).

Government in the Sunshine – Injunction – Members of school board violated Sunshine Law by visiting an adult education school without providing reasonable notice – …because Sunshine Law violation was cured… injunction was properly denied.

Three Martin County School Board members visited an adult education school that was under the board's jurisdiction. The board members did not provide any notice of their visit. The plaintiff filed a complaint alleging a Sunshine Law violation because the board members conducted the visit without notice. The plaintiff sought an injunction prohibiting the school board to take any action related to the visit. The trial court denied the plaintiff's request for an injunction, holding the plaintiff did not demonstrate a substantial likelihood of proving a Sunshine Law violation because the plaintiff failed to show the board members conducted any discussions or official acts related to a matter on which it was foreseeable that action would be taken by the board. The plaintiff appealed.

The Fourth DCA affirmed the trial court's decision, albeit with different reasoning. The DCA held the trial court erred in finding the plaintiff failed to prove a substantial likelihood of success in proving a Sunshine Law violation. The DCA noted the undisputed evidence demonstrated the board members had discussions with the school coordinator regarding employment matters and school teaching materials. Furthermore, a board member testified she would have notified the superintendent if she had concerns about an issue discovered during the visit. Notification of the superintendent by a board member constitutes an official action. Based on these factors, the DCA found a Sunshine Law violation occurred. However, the DCA held the violation was cured because future school board action on topics related to the adult education school took place during noticed school board meetings and did not appear to be ceremonial or perfunctory in nature. *Citizens for Sunshine, Inc. v. The School Bd. of Martin Cnty, Fla., et al.*, Fla. L. Weekly D180 (Fla. 4th DCA January 23, 2013).

Eminent domain – Inverse condemnation – Ripeness – Where city denied petition for plat approval because the petition included a proposed sewer line running through a conservation area in violation of settlement agreement and zoning regulations, but property owner filed inverse condemnation action without offering any revisions or other options and without requesting any changes to accommodate development plans, trial court properly found that inverse condemnation claim is not ripe for litigation.

A developer submitted a subdivision plat application for approval by the Gainesville City Commission. Approval of the plat application would have given the developer the authority to complete the final phase of an existing subdivision. The existing subdivision and the proposed development were bisected by a conservation area that included a creek. A prohibition on construction or disturbance of the conservation area was agreed to in a 1988 agreement to settle an administrative claim brought by an environmental group. This agreement was part of the existing zoning regulations governing the developer's property. Despite this agreement, the developer's application indicated a sewer line would run through the conservation area for approximately 300 feet and cross the creek. Per Gainesville's ordinances, compliance with existing zoning regulations is required for a plat approval. The City Commission denied the application since it was not consistent with the zoning regulations. The developer filed suit alleging a regulatory taking. The trial court entered judgment in favor of the City of Gainesville and held the developer's claim was not ripe.

A regulatory taking claim is not ripe until the claimant has filed at least one meaningful application with a regulatory agency and then allowed the regulatory agency to exercise its full discretion; for example, granting a waiver or variance. However, a claimant does not have to file an application if it would be meaningless or futile. To satisfy the ripeness test, the First DCA held the developer would have to demonstrate the application it submitted was meaningful, the denial of the application by the City Commission was a final decision, and a submission of an amended application would prove futile. In the instant case, the DCA held the application was not meaningful since it denied the City Commission the authority to exercise its full discretion in determining how the developer may use the property. The application was in direct conflict with the terms of the developer's self-imposed settlement agreement and contained no alternatives to the construction of the sewer line through the conservation area. Also, the application did not seek any amendment to the master plan, which contained the settlement agreement. The City Commission had no choice but to enforce the terms of the agreement. The DCA noted the transcript of the petition hearing and the previous discussions between the city and the developer indicated the city was willing to work with the developer in reaching a mutually agreeable solution. Had the developer's application not been an all-or-nothing proposal or had the developer submitted an amended application, the outcome may have been different. Based on the above reasoning, the First DCA upheld the trial court's judgment that the developer failed to satisfy the ripeness requirement. *Alachua Land Investors, LLC v. City of Gainesville*, 38 Fla. L. Weekly D248 (Fla. 1st DCA January 31, 2013).

Torts – Municipal corporations – Sovereign immunity – Appeals – Certiorari – Review by certiorari of non-final order denying sovereign immunity is appropriate where immunity is based on separation of powers doctrine.

The City of Freeport issued a development order for a proposed residential community. Freeport's land development code required developers to post a bond to ensure completion of certain required services and infrastructure. The developer posted a standby letter of credit loan, which Freeport determined was acceptable. Beach Community Bank made a loan to the developer. The loan was secured by mortgages on platted lots within the development. The developer failed to complete the required infrastructure. When the City of Freeport attempted to collect the security bond, it discovered the letter of credit was fraudulent and uncollectable. The bank filed suit against Freeport alleging the city breached its duty to ensure the developer posted adequate bond, failed to conduct a reasonable investigation into the authenticity of the letter of credit, and failed to determine whether the provider of the letter of credit was a legitimate business that was financially viable. Freeport filed a motion to dismiss, alleging it was immune from suit because any alleged breaches of duty were policy-making, planning-level functions. The circuit court denied the motion to dismiss. Freeport appealed. The First DCA was presented with two issues: (1) did the DCA have jurisdiction over a non-final order; and (2) was Freeport immune from suit. Erroneous denial of sovereign immunity is a material, irreparable injury. If a defendant is immune from suit, the trial itself is the material harm. In the instant case, the First DCA held jurisdiction was proper because the trial court's denial of immunity would subject Freeport to more litigation, which would cause material, irreparable harm. Sovereign immunity bars suits against a government entity that arise from the exercise of a discretionary, planning-level function. In the instant case, the First DCA held Freeport was immune from suit because decisions relating to the enforcement of its land development code, including regulations requiring a developer to post a bond, are all planning-level policy decisions. The DCA quashed the trial court's order and halted any further trial proceedings against Freeport. *City of Freeport, Fla. v. Beach Community Bank,* 38 Fla. L. Weekly D380 (Fla. 1st DCA February 18, 2013).

Torts – Sheriffs – Limitation of actions – In action against sheriff, alleging that while plaintiff was incarcerated in county jail she was injured as a result of jail employees' negligence, the applicable statute of limitations is the four-year statute of limitations for claims based on waiver of sovereign immunity, rather than the one-year statute of limitations for prisoner claims.

The plaintiff, who was incarcerated in a county jail, filed a suit against the sheriff claiming injuries due to the negligence of jail employees. The plaintiff's suit was filed more than one year after the alleged incident occurred. The sheriff moved for summary judgment, arguing Section 95.11(5)(g), Florida Statutes, which places a one-year statute of limitations on prisoner claims, barred the suit. The plaintiff responded that the applicable statute of limitations was the four-year limit for claims based on waiver of sovereign immunity in Section 768.28(14), Florida Statutes. The trial court granted the sheriff's motion and dismissed the case. The plaintiff appealed to the Fifth DCA. The DCA overturned the result, holding the four-year statute of limitations was the correct time period for three reasons: (1) Chapter 95 contains an exception clause that provides its limitation periods are superseded by other statutes if a different period is specified, (2) the statute of limitations in Section 768.28 supersedes other statutes in suits against the government and does contain a different time limitation period, and (3) the specific exceptions to the statute of limitations in Section 768.28(14) do not include prisoner claims under Chapter 95. Therefore, the Fifth DCA reversed the decision of the trial court and remanded the case for further proceedings. *Patricia Calhoun v. Alvin Nienhuis, etc.,* 38 Fla. L. Weekly D428 (Fla. 5th DCA February 22, 2013).

Taxation – Tourist Development Tax – Scope – Tourist Development Tax does not apply to entire amount online travel companies collect from hotel customers who reserve their hotel rooms through the companies – Tax applies only to the amount of money the companies send to the hotels for reserved rooms, and not to additional compensation retained by the companies – The privilege being exercised for purposes of the Tourist Development Tax is renting rooms to tourists.

Online travel companies take reservation requests from customers for a variety of services, including hotel rooms. Following a reservation request, the companies contact a hotel on behalf of the customer to make the reservation at a given price. The companies collect the entire amount owed from the customer, forward a portion to the hotel, and retain the remaining portion for their services. At issue in the instant case is whether the Tourist Development Tax applies to the full amount paid by the customer, or just the amount that is remitted to the hotel. Currently, only the amount received by the hotels is being taxed. Since only the amount received by hotels is currently being taxed, the trial court held the Legislature, not the courts, must clearly inform the online travel companies of what is to be taxed. The trial court found the tax statute was ambiguous and, since statutes must be read strongly in favor of the taxpayer and against the government, resolved the instant case in the companies' favor.

The First DCA agreed with the trial court that the central question in the instant case is whether the tax is intended to tax the activity of renting a room to a tourist, or renting a room from a hotel. Since the statute requires the hotel, not the tourist, to impose, collect and remit the tax to the proper authority, the First DCA held it logically follows

that the tax was intended to be imposed on hotels for the privilege of engaging in the business of renting rooms to consumers. Therefore, only the amount collected by the hotel itself should be subject to the tax. With regard to whether the online travel companies have morphed into entities that rent rooms to tourists, the First DCA held, in the absence of statutory definition, the plain meaning of the statute applied the tax only to businesses that have sufficient control of the property to actually grant access and use. Since the online travel companies are merely conduits through which reservations are made and have no authority to actually convey use of the property, they are not subject to the tax. Based on the above reasoning, the First DCA upheld the trial court and held only the amount actually collected by the hotel is subject to the tax. *Alachua Cnty., et. al v. Expedia, Inc., et al.*, 38 Fla. L. Weekly D482 (Fla. 1st DCA February 28, 2013).

Real property – Municipal corporations – Action against city under Bert J. Harris, Jr., Private Property Rights Protection Act – Limitation of actions – One-year period within which property owner must file claim against local government did not commence at time of amendment of ordinance where impact of amendment was not readily ascertainable to property owner.

Plaintiffs owned property in a National Register of Historic Places District in the City of St. Augustine. In 2005, the city amended its ordinance relating to the demolition of historic structures, authorizing its Historic Architectural Review Board to deny demolition or relocation requests indefinitely for three types of structures, including those located in a National Register of Historic Places District. On September 28, 2007, the plaintiffs submitted an application to demolish the seven structures located on their property. On December 5, 2007, the review board denied all seven demolition permits, finding the structures contributed to the historic district. The plaintiffs appealed to the City Commission, which upheld the decision of the review board. The plaintiffs timely filed a petition for writ of certiorari and a claim for declaratory and injunctive relief on May 23, 2008, but voluntarily dismissed the action on April 5, 2010. In May 2010, the plaintiffs submitted a Harris Act claim to the city. The plaintiffs rejected St. Augustine's written offer and filed an action in circuit court under the Harris Act on July 14, 2011. The trial court dismissed the complaint with prejudice, holding the impact of the 2005 ordinance was readily ascertainable and the action was not timely filed because the plaintiffs failed to file a Harris Act claim against the city within one year of the enactment of the 2005 ordinance as required.

The plaintiffs appealed to the Fifth DCA. The Fifth DCA was presented with three questions: (1) when was the impact of the 2005 ordinance readily ascertainable; (2) was the Harris Act claim timely submitted to the city; and (3) was the Harris Act claim timely submitted to the circuit court? The Fifth DCA held the impact of the 2005 ordinance was not readily ascertainable when enacted because the ordinance only sets forth procedures and general standards related to the demolition of historic structures. Additionally, the ordinance provided the city with wide discretion regarding the decision to approve or deny a demolition permit. The Fifth DCA concluded the impact of the ordinance was not readily ascertainable until the denial of the plaintiffs' demolition permit on December 5, 2007.

Regarding the submission of the Harris Act claim to the city, the Fifth DCA held Section 70.001(11), Florida Statutes, tolls the period for filing a claim with a city until the conclusion of any outstanding legal proceedings. Thus, the one-year time limitation for filing a Harris Act claim against the city ran from the denial of the permit in December 2007 until the first circuit court claim was filed in May 2008, then was tolled until the voluntary dismissal in April 2010. The time limitation began running again following the April 2010 dismissal. When the plaintiffs submitted their Harris Act claim to the city in May 2010, only six months of the Harris Act time limitation had elapsed. Therefore, the plaintiffs timely filed the Harris Act claim with the city in the one-year time limitation period. The Fifth DCA further held the Harris Act action in circuit court was timely filed inside the four-year statute of limitations period that would have run in December 2011. The Fifth DCA reversed the order of the trial court and remanded the case for further proceedings. *Donna R. Wendler, et al. v. City of St. Augustine, Fla.*, 38 Fla. L. Weekly D622 (Fla. 5th DCA March 15, 2013).

Section 3. Recent Decisions of the U.S. Supreme Court.

None Reported.

Section 4. Recent Decisions of the U.S. Court of Appeals, Eleventh Circuit.

None Reported.

Section 5. Recent Decisions of the U.S. District Courts for Florida.

Civil rights – Municipal corporations – Ordinances – Alcoholic beverages.

Plaintiff Dylan Jones, who was 19 years old, received a citation for violating a City of Fort Myers ordinance that, subject to several exceptions, prohibits persons under

the age of 21 from entering an establishment that serves alcoholic beverages. Jones was attending a petition drive for a political purpose. Plaintiffs filed a 42 §1983 action alleging the ordinance violated their rights under the First and Fourteenth Amendments to the U.S. Constitution. After initiating suit, plaintiffs moved for a preliminary injunction, alleging the ordinance was vague and overbroad. To obtain a preliminary injunction, the movant must demonstrate: (1) there is a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury outweighs the damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. The U.S. District Court for the Middle District of Florida held the plaintiffs failed to show a substantial likelihood of success on the merits of their complaint and denied the request for a preliminary injunction. The U.S. Court of Appeals for the 11th Circuit upheld the district court's ruling. The 11th Circuit held the right to enter an establishment that serves alcohol or host individuals under the age of 21 in an establishment that serves alcohol is not constitutionally protected conduct, but rather a normal business activity. Also, the ordinance did not violate the plaintiffs' First Amendment rights because it was not a prior restraint on speech. The 11th Circuit further held the ordinance was not vague because all relevant terms (21 years of age, alcoholic beverage establishment and a list of exceptions) were explicitly defined in the text of the ordinance. *The Indigo Room, Inc., Raymond Aulen, Dylan Jones v. City of Fort Myers, et al.,* 24 Fla. L. Weekly Fed. C75 (11th Cir. 2013).

Civil rights – Counties – Vicarious liability – County cannot be held liable under theory of respondeat superior, and plaintiff failed to allege that county policy or custom constituted deliberate indifference to a constitutional right.

Plaintiff filed suit against several government agencies, including Escambia County and its employees, for false imprisonment in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. The plaintiff was arrested, charged with a violation of probation and incarcerated pending trial. The plaintiff alleges he was falsely imprisoned because both the assistant state attorney and the judge who sentenced him to probation stipulated he would not be incarcerated for a probation violation. A municipality cannot be held liable for depravation of civil rights at the hand of an employee. To prove a municipality violated a constitutional right, a plaintiff must prove: (1) his or her constitutional rights were violated; (2) the municipality or county had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) the policy or custom at issue caused the constitutional violation. In the instant case, the court held the plaintiff made no allegations that would have satisfied any of these elements. *John Aaron Vanderburg v. Escambia Cnty., Fla. et al.,* 23 Fla. L. Weekly Fed. D426 (N.D. Fla. 2013).

Section 6. Announcements.

Mark Your Calendar
Florida Municipal Attorneys Association's next seminar:

July 24-26, 2014; Hyatt Regency Coconut Point, Bonita Springs

FMAA Seminar Notebooks Available
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Attorney General Opinion of Note.

AGO 2013-03
May a city impose a fee when documents are downloaded and submitted by electronic mail, in lieu of photocopying, to the requestor?

A city may only charge the actual cost of duplication for email forwarding of documents to a public records requestor. Labor or overhead costs may not be factored into the calculation of actual cost. If the nature or volume of the public records request requires extensive use of information technology resources or labor, a city may charge based on the cost actually incurred by the city agency in complying with the public records request. The fact the request requires the use of information technology resources is not sufficient to charge an additional fee.