IN THE CIRCUIT COURT FOR
DUVAL COUNTY, FOURTH
JUDICIAL CIRCUIT, FLORIDA

DIVISION: CV-F

CASE NO.: 2013-CA-5799

FRANK DENTON,

Plaintiff,

v.

MAYOR ALVIN BROWN, in his official capacity; THE CITY OF JACKSONVILLE, and THE JACKSONVILLE POLICE AND FIRE PENSION FUND BOARD OF TRUSTEES,

Defendants.
_____/

DEFENDANT, JACKSONVILLE POLICE AND FIRE PENSION FUND, BOARD OF TRUSTEES' MOTION TO DISMISS THE COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Jacksonville Police and Fire Pension Fund, Board of Trustees ("Board"), by and through its undersigned counsel, pursuant to Rule 1.140, Fla. R. Civ. P., hereby files this Motion to Dismiss and Incorporated Memorandum of Law, and in support thereof states as follows:

As set forth in greater detail herein, Plaintiffs' Complaint should be dismissed as Plaintiffs have failed to state a cause of action for violation of Section 286.011, Florida Statutes, and because this Court lacks subject matter jurisdiction over issues governed by Part II of Chapter 447, Florida Statutes.

INTRODUCTION

Rather than report the news, Plaintiff, Frank Denton ("Denton"), Editor of the Florida Times-Union, has decided to be the news. Denton is asking this Court, under the guise of a Sunshine Law lawsuit, to void a Mediation Settlement Agreement (Exhibit "E" to Plaintiff's Complaint) reached after Federal Court ordered mediation in the case of *Randall Wyse, et al, v. City of Jacksonville and Jacksonville Police and Fire Pension Fund Board of Trustees* , United States District Court, Middle District of Florida, Case No. 3:13-cv-121-J-34MCR. Defendant Board is responsible for administering pension benefits for Jacksonville police officers and firefighters. *See* §22.04, Charter of the City of Jacksonville; §121.101(a), Jacksonville Code of Ordinances. Plaintiff's Complaint contains two counts, the first based on a violation of the Sunshine Law, and the second based on a violation of the Sunshine Law as it relates to alleged collective bargaining. Count I is fatally flawed as the mediation meetings at issue did not constitute public meetings subject to the requirements of the Sunshine Law. Count II is equally flawed, as Defendant Board does not meet the

definition of a "bargaining agent" under the collective bargaining laws of the State of Florida. Additionally, any determination of whether the named Defendants in this suit were engaging in collective bargaining falls under the exclusive jurisdiction of the Florida Public Employees Relations Commission.

1. Defendant recognizes that this Court has subject matter jurisdiction over alleged violations of Florida's Sunshine Law and Plaintiff has standing to allege such violations. However, Plaintiff's Complaint, as a matter of law, fails to state a cause of action.

2. Florida Statute §286.011 sets forth the provisions of the Sunshine Law. The statute provides as follows:

> "1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings."

3. Plaintiff's sole allegation in Count I as to a Sunshine Law violation is that "The City of Jacksonville and the Pension Fund Board violated the Sunshine Law

by taking official action - i.e., entering the Mediation Settlement Agreement - at a private meeting." See, Complaint, paragraph 42. Taking this allegation as entirely true, there is no Sunshine Law violation as a matter of law. Plaintiff fails to recognize that the mediation sessions were not meetings of a "board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." See, Section 286.011(1). In order to be subject to the open meeting requirements of the Sunshine Law, there needs to have been a meeting of a government or a governmental agency, which there was not. Plaintiff correctly recognizes the persons in attendance at the mediation sessions from the City and the Board. See Complaint, paragraphs 22-23. Court ordered mediation sessions, during which representatives of the City and Board were present, are not subject to the provisions of the Sunshine Law. No members of the City Council, and no trustees of the Board, were present at the mediation.

4. Defendant Board did not have a public meeting wherein two or more of the trustees who are responsible for the administration of the pension fund were present. The obvious intent of the Sunshine Law is to cover the gathering of a board where two or more members meet to discuss action that may come before the Board in the foreseeable future. *Sarasota Citizens for Responsible*

Government v. City of Sarasota, 48 So.3d 755, 764-65(Fla 2010); *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3rd DCA 1973); *Godheim v. City of Tampa*, 426 So.2d 1084 (Fla. 2nd DCA 1983). As the mediation sessions were not meetings between two public officials of the same government board or committee, it is legally impossible for the Sunshine Law to have been violated. *Id.*

5. On March 26, 2013, United States Magistrate Judge Monte C. Richardson entered an Order granting Joint Motion for Stipulation of Mediator and Scheduling of Mediation in the matter of *Randall Wyse, et al, v. City of Jacksonville and Jacksonville Police and Fire Pension Fund Board of Trustees*, United States District Court, Middle District of Florida, Case No. 3:13-cv-121-J-34MCR. (Attached hereto as Exhibit "A.")

6. The federal mediation sessions is what Plaintiff claims violated the provisions of Florida's Sunshine Law. Local Rule[1] 9.07(b) of the United States District Court, Middle District of Florida provides:

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[1]Federal Rule of Procedure 83 and 28 U.S.C. §2071 grants District Court Judges the authority to adopt and amend local rules. The latest Middle District Local Rules were adopted on July 1, 1984. A valid local rule has the force of law and is binding upon the parties. [See, *Cheshire v. Bank Of America*, 351 Fed. Appx 386 (11th Cir. 2009)- local rule of Middle District has the force of law; *See also, Mid-Continent Casualty Company v. Basdeo*, 2011 WL 2077802 (S.D. Fla. 2011)].

> "(b) **Restrictions on the Use of Information Derived During the Mediation Conference.** All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference, unless a settlement is reached."

This Local Rule prevents the parties from complying with Florida's Sunshine Law. The parties would be in violation of the law if they were to violate the Local Rule requiring the mediation proceedings to be "privileged in all respects."

7. Under the Supremacy Clause, the Florida statutory provisions which set forth the Sunshine Law are in conflict with and are impliedly preempted by the Local Rules of the Middle District concerning the privileges attached to federal mediation, as compliance with both is an impossibility. See, *State of Florida v. Harden*, 938 So.2d 480 (Fla. 2006). Plaintiff cannot use the State Sunshine Laws to erode the privileges attached to federal mediation provisions.

8. In *News-Press Publishing Company v. Lee County*, 570 So.2d 1325 (Fla 2nd DCA 1990), a newspaper sought review of an order denying it access to mediation proceedings involving counties and cities. The scope of the mediation was narrow in that the representatives did not have the full authority

to settle the case. The Court held that due to the narrow scope of the mediation, it was not required to be open to the public. In the present case, the agreement reached during the mediation is subject to final approval of the City Council and the Unions, a fact which is ignored by the Plaintiff[2]. The allegations in the Complaint fully disregards relevant language contained in the Exhibits Denton has attached to the Complaint[3]. For instance, the Mediation Settlement Agreement (Exhibit "E" to the Complaint) provides that:

> "WHEREAS, all Parties represent that they will in good faith, present and support the terms of this Mediation Settlement to their respective elected and/or appointed officials and use their best efforts to obtain approval of said officials necessary for the implementation of this Mediated Settlement Agreement."

The Agreement also required the City and the Pension Fund to "urge approval of this Agreement, and the implementation of its terms, by each of their governing bodies." Additionally, the Joint Motion to Approve Mediation Settlement Agreement (Exhibit "F" to the Complaint) specifically provides for

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[2] The Board and City are mandated to discuss changes to the pension fund with each other before the changes become effective. No legislation can be adopted by the City Council altering the terms of the pension fund without the legislation having first been referred to the Board for consideration and comment. The Board may also recommend legislative changes to the Council for their consideration as ordinances. See, §22.07(b), City of Jacksonville Charter.

[3] "Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control and may be the basis for a motion to dismiss." *Hunt Ridge at Tall Pines, Inc. V. Hall*, 766 So.2d 399, 401(Fla 2nd DCA 2000).

judgment being entered "upon the completion of the legislative process and approval by the Board of Trustees for the Trust." Lastly, Denton acknowledges that further legislative action must be taken for the Agreement to be become final as he has attached the ordinance requiring City Council passage to his Complaint as Exhibit "G". These Exhibits should have made it entirely clear to Denton that the parties to the mediation did not have the ultimate authority to settle the suit without further legislative action. The Mediation Settlement Agreement is a public document, to be reviewed and approved by the parties in the Sunshine prior to its terms taking effect.

9. In *City of Miami v. Metropolitan Dade County*, 745 F. Supp 683 (S.D. Fla. 1990), the Miami Herald sought to obtain certain photographs pertaining to a federal criminal prosecution under the Florida Public Records Law. The photographs had been provided by the City of Miami and the State Attorney's Office to the United States Attorney's Office pursuant to the Federal Rules of Criminal Procedure governing discovery. The Court refused the Herald access to the photos, recognizing that if Chapter 119, Florida Statutes was interpreted to apply to proceedings outside the State of Florida, both the State and Federal Governments would lose control of their criminal prosecutions. *Id*, at 687. The Court held that the Herald's interpretation of the Chapter 119 "absurdly

imputes the behavior of one sovereign, the Federal Government, to another, the State of Florida." *Id.* Similarly, the open meeting provisions of the Sunshine Law should not be applied to Court ordered federal mediation[4]. [See also, *Paranzino v. Barnettt Bank of South Florida*, 690 So.2d 725, 728 (Fla. 4th DCA 1997) - "the confidentiality afforded to parties involved in mediation proceedings must remain inviolate."]

10. Count II in Plaintiffs' Complaint fails to state a cause of action because by definition, the Board cannot "collectively bargain" with the City as the Board is not a "bargaining agent" as defined in Section 447.203(12), Florida Statutes. Section 447.605(2), Florida Statutes provides that "[t]he collective bargaining negotiations between a chief executive officer, or his or her representative, and a bargaining agent shall be in compliance with the provisions of s. 286.011 [the Sunshine Law]." Simply put, Section 286.011 requires that public meetings be open to the public, with adequate public notice, and that minutes of the proceedings are recorded and open for public inspection. Section 447.203(12) provides as follows:

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[4]Florida law similarly provides for the confidentiality of mediation proceedings, even acknowledging that written communications in a mediation proceeding are exempt from the requirements of Chapter 119, Florida Statutes, the Public Records Act. See, Sections 44.102(3),a and 44.405, Florida Statutes.

> "Bargaining agent" means the employee organization which has been certified by the commission as representing the employees in the bargaining unit, as provided in s.447.307, or its representative."

11. Plaintiff asserts in his Complaint that "Mayor Brown and the Unions conducted collective bargaining negotiations at the private mediation." See, Complaint paragraph 49. As a matter of law, the Mayor is the Chief Executive Officer of the City. The Fraternal Order of Police, Lodge 5-30 (the "FOP"), is the exclusive bargaining agent for police officers employed by the Jacksonville Police Department. The International Association of Firefighters, Local 122 (the "IAFF"), is the exclusive bargaining agent for firefighters employed by the Jacksonville Fire and Rescue Department. Because under the plain language of Florida law the Board is not a "bargaining agent" and therefore cannot "collectively bargain" with the City, Count II Plaintiffs' Complaint must necessarily fail.

12. Plaintiff argues that the Mayor and the Unions engaged in collective bargaining. See, Complaint, paragraph 49. There is no allegation that Defendant Board conducted collective bargaining negotiations (See, *Complaint*-paragraph 49), and the Unions are not parties Defendant to this action. Plaintiffs' claim of improper closed-door collective bargaining sessions must fail as the Board cannot, by definition, engage in collective bargaining,

and the Complaint fails to allege that the Board participated in collective bargaining.

13. The Board is not certified by PERC as a bargaining agent and Plaintiffs have not alleged otherwise. The Board could not have violated Section 447.605(2) if it is not subject to that section. The term "collective bargaining" is expressly defined to include only bargaining agents and public employers. The Board is neither. Section 447.203(14) states as follows:

> *"Collective bargaining" means the performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.*

As a City and a pension fund cannot collectively bargain, the Board cannot violate the Sunshine Law, as it relates to collective bargaining.

14. Additionally, even if the Board was a bargaining agent, which it is not, in order to prevail on Count II of their Complaint, Plaintiff must first prove that the parties were engaging in collective bargaining, which would then subject negotiation sessions to the Sunshine Law. Plaintiff alleges that the Mayor and the Unions "conducted collective bargaining negotiations." See, *Complaint*, paragraph 49.

15. Plaintiff fails to recognize that the City and the Unions waived their right to collectively bargain pension benefits when they agreed to participate in the federal mediation. As set forth in the Mediation Settlement Agreement (Attached to Plaintiff's Complaint as "Exhibit E"), "the City and the Unions agree that the resolution of their differences as set forth hereinafter permits the Unions to waive collective bargaining while prohibiting unilateral action by the City regarding the terms of the Retirement Plan during the term of this agreement."

16. It is clear that a union may waive the right to collectively bargain issues that would otherwise be a term or condition of employment subject to bargaining. See, *Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 475 So.2d 1221, 1225 (Fla. 1985); *City of Miami v. Fraternal Order of Police, Miami Lodge 20*, 511 So.2d 549, 551 (Fla. 1987). As the Unions herein have waived the right to collectively bargain pension benefits, Count II of Plaintiff's Complaint should be dismissed.

17. Even assuming that the non-party unions did not waive collective bargaining of pension terms, Count II fails to state a cause of action as this Court lacks subject matter jurisdiction of the issues in this case as the Public Employees Relations Commission has jurisdiction of what constitutes collective bargaining. The Third District Court of Appeal's recent opinion in *Miami*

Ass'n of Firefighters Local 587 v. City of Miami, 87 So. 3d 93 (Fla. 3d DCA 2012), is dispositive of the issues in this case. In *Miami Ass'n of Firefighters*, at issue was whether a collective bargaining-related meeting held out of the sunshine violated Chapters 447 and 286.

18. Just as the case was in *Miami Ass'n of Firefighters*, at issue in the instant case is whether meetings held outside of the sunshine violate Chapters 447 and 286. Before the Court can even reach the question of whether the alleged meetings violate Chapter 286, the Court must first determine whether the meetings constituted "collective bargaining." That is a decision that only the Public Employee Relations Commission ("PERC") can make. *See Maxwell v. Sch. Bd. of Broward County,* 330 So. 2d 177, 179 (Fla. 4th DCA 1976) (holding that PERC has exclusive jurisdiction even when the activities involved are *arguably* unfair labor practices covered by Chapter 447, Florida Statutes, or the type of labor matter or dispute within the contemplation of Part II of Chapter 447); *see also Florida Education Association, v. Wojcicki,* 930 So. 2d 812 (Fla. 3d DCA 2006) (holding that a claim alleging a union's negligence in selecting an attorney arguably falls under section 447.501 and is thus within PERC's exclusive jurisdiction).

19. In this case the facts and relevant law show that (1) the Board is incapable of engaging in "collective bargaining" and, therefore, could not possibly violate

Chapter 447; and (2) the question of whether the Board violated Chapter 286 by virtue of its alleged collective bargaining sessions out of the sunshine is a matter purely within PERC's jurisdiction. Due to the fact that Count II of Plaintiffs' Complaint is based upon allegations of PERA violations, Plaintiffs cannot possibly state a cause of action for violations of the Sunshine Law. As such, this Court should dismiss Count II of the Plaintiff's Complaint.

WHEREFORE, Defendant, Jacksonville Police and Fire Pension Fund, Board of Trustees, respectfully requests that this Honorable Court grant this Motion to Dismiss with prejudice, and for such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court via the Florida Courts eFiling Portal and served via electronic mail to the below-named addressees on this 2nd day of July, 2013, to:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Randall Wyse, et al,

Plaintiffs,

vs. Case No. 3:13-cv-121-J-34MCR

City of Jacksonville,

Defendant,

and

Jacksonville Police and Fire Petition Fund
Board of Trustees,

Defendant (as Rule 19 party).
_____/

Jacksonville Police and Fire Pension Fund
Board of Trustees,

Cross-Plaintiff,

v.

City of Jacksonville,

Cross-Defendant.
_____/

ORDER

THIS CAUSE is before the Court on the parties' Joint Motion for Stipulation of Mediator and Scheduling of Mediation (Doc. 18) and Plaintiffs' Unopposed Motion for Extension of Time to Strike Affirmative Defenses (Doc. 19), filed March 22, 2013. According to the Motions, the parties wish to mediate this action with Rodney Warren

serving as the Mediator, with the mediation to be concluded by April 26, 2013. In addition, Plaintiffs requests that any motion to strike affirmative defenses be filed within seven days after the Mediator's report is filed.

After due consideration, it is

ORDERED:

The parties' Joint Motion for Stipulation of Mediator and Scheduling of Mediation (Doc. 18) and Plaintiffs' Unopposed Motion for Extension of Time to Strike Affirmative Defenses (Doc. 19) are **GRANTED.** The Mediator's report shall be filed no later than April 29, 2013, and any motion to strike affirmative defenses shall be filed within seven days thereafter. The parties' case management report shall be filed no later than May 7, 2013.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 26th day of March, 2013.

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Counsel of Record