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COURT OF APPEALS

STATE OF NEW YORK

GRESS, ET AL.,

Respondent,

-against-

No. 203

MAYOR BYRON BROWN AND CITY OF BUFFALO,

Respondent,

AND BUFFALO FISCAL STABILITY AUTHORITY (BFSA),

Appellant.

20 Eagle Street
Albany, New York 12207
October 17, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 203. Counsel,
2 would you like any rebuttal time?

3 MR. BUZARD: Yes, good afternoon, Chief
4 Judge Lippman, I'd like to reserve three of my eight
5 minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: You've got it. Go
7 ahead, counsel.

8 MR. BUZARD: The decisions of the court
9 below, of both courts below, in holding that the
10 statute of limitations had not expired on this action
11 for declaratory judgment, even though it was four
12 years after the administrative action complained of,
13 is directly contrary to this court's rule in Solnick,
14 which was - - - which is a landmark case - - - and in
15 which the court held that if an action could be
16 brought - - - a declaratory judgment action could be
17 brought within four months, or it could be brought as
18 a - - -

19 JUDGE SMITH: If I understand what your
20 adversary is saying - - -

21 MR. BUZARD: Yes.

22 JUDGE SMITH: - - - they're saying that you
23 did - - - they're not attacking the administrative
24 action. They're attacking the city's
25 misinterpretation of the administrative action. They

1 say all the administrative action did was freeze as
2 many wages as they could legally freeze. And they
3 say, that's fine, but you can't freeze ours. So it's
4 the Mayor's fault, not the agency's, and we've got
5 six years to sue him.

6 MR. BUZARD: Well, sounds like an article
7 78 to me. They're challenging an administrative
8 action. They had to bring - - -

9 JUDGE SMITH: Their position is they're
10 just challenging that they got paid less than the law
11 requires them to be paid.

12 MR. BUZARD: Well, they're wrong. They
13 brought - - - when they brought the initial action
14 against the city, most of the unions - - - most of
15 the other parties, with the exception of one, always
16 sued the BFSA as a result of the wage freeze. And in
17 some cases, they sued only the BFSA.

18 CHIEF JUDGE LIPPMAN: Why aren't they just
19 challenging its application to them?

20 MR. BUZARD: Well, it is. It's challenging
21 the app - - - well, what they're saying is - - - the
22 way they frame it is - - -

23 CHIEF JUDGE LIPPMAN: It's not the right to
24 freeze; it's whether the freeze applies to them.

25 MR. BUZARD: Then, what - - - no - - -

1 CHIEF JUDGE LIPPMAN: They're just saying
2 they haven't gotten paid and it has nothing to do
3 with it.

4 MR. BUZARD: Well, they brought a - - -
5 they amended their complaint to - - - for a
6 declaratory judgment that the BFSA did not have the
7 authority to freeze their wages.

8 JUDGE CIPARICK: And you say that
9 circumvents the four-month rule, the article 78 - - -

10 CHIEF JUDGE LIPPMAN: Aren't they saying is
11 they don't come under the act? Isn't that what
12 they're saying?

13 MR. BUZARD: Yes, they're saying - - -
14 well, what they're saying is - - -

15 CHIEF JUDGE LIPPMAN: You can only freeze
16 the category of positions that come under the act,
17 right?

18 MR. BUZARD: What their complaint says is -
19 - - what they're - - - their complaint against us was
20 that the BFSA did - - - lacked statutory authority to
21 freeze our wages.

22 JUDGE CIPARICK: And you say they should
23 have brought that within four months?

24 MR. BUZARD: They brought that after four
25 years, but it should have been - - -

1 JUDGE CIPARICK: But you say it should - -
2 -

3 MR. BUZARD: - - - brought in four months,
4 sure.

5 JUDGE CIPARICK: Under article 78?

6 JUDGE GRAFFEO: Four months from what?
7 When they didn't get their first pay raise or - - -

8 MR. BUZARD: Well, it could - - -

9 JUDGE GRAFFEO: - - - or four months from
10 when the act was passed?

11 MR. BUZARD: It had been four months from
12 the resolution, from the freeze itself, which was
13 contemporaneous with their not getting a - - -

14 JUDGE GRAFFEO: How did they know they were
15 covered by the freeze at that juncture?

16 MR. BUZARD: Well, all - - - every employee
17 in the City of Buffalo knew about it, and they didn't
18 get an increase. They didn't get any increase.

19 CHIEF JUDGE LIPPMAN: Yes, but they're not
20 within the category of those employees, right?

21 MR. BUZARD: I beg your pardon?

22 CHIEF JUDGE LIPPMAN: That's their argument
23 is that they're not subject to collective bargaining;
24 they're not in that category.

25 MR. BUZARD: Well, I understand - - -

1 CHIEF JUDGE LIPPMAN: Every employee in the
2 City of Buffalo is not subject to it.

3 MR. BUZARD: Well, I understand, but it's a
4 classic evasion of the attempt to avoid the four-
5 month statute of limitations for an article 78. The
6 issue is did the BFSA exceed it's authority in
7 applying the wage freeze to all employees, any and
8 all employees. A wage freeze - - -

9 CHIEF JUDGE LIPPMAN: Well, don't we have
10 to go to the act to know that?

11 MR. BUZARD: No, we go to the resolution.

12 CHIEF JUDGE LIPPMAN: And doesn't the
13 resolution relate to the act?

14 MR. BUZARD: Yes, but the resolution - - -

15 CHIEF JUDGE LIPPMAN: The resolution says
16 that okay, for those employees affected by the act,
17 we're going to put the freeze in, right?

18 MR. BUZARD: No, it - - -

19 CHIEF JUDGE LIPPMAN: What does it say?

20 MR. BUZARD: The resolution says that all
21 wages of all employees, any increases in wages, all
22 employees are - - - the wages of all employees are
23 being frozen. There are no exceptions under the
24 freeze.

25 JUDGE SMITH: To be clear, before they said

1 that, first they say, we're going to freeze
2 everything "to the full extent authorized by the
3 act."

4 MR. BUZARD: Right.

5 JUDGE SMITH: Then they go on to say - - -

6 MR. BUZARD: Right.

7 JUDGE SMITH: - - - shall apply to prevent
8 and prohibit wages - - - increases in wages, et
9 cetera, for any employees. If you only had the first
10 paragraph there, if they just said "We hereby freeze
11 to the full extent of the act," then wouldn't you - -
12 - you'd lose this case, wouldn't you?

13 MR. BUZARD: Wouldn't what?

14 JUDGE SMITH: You'd lose this case if all
15 you had was the paragraph in the resolution that said
16 - - -

17 MR. BUZARD: No.

18 JUDGE SMITH: - - - "we freeze to the full
19 extent authorized by the act."

20 MR. BUZARD: Absolutely not. "To the full
21 extent authorized by the law" - - - by the law - - -
22 was not there as a limitation. The only - - - the
23 obvious person of that - - - purpose of that phrase
24 had to be that the BFSA was saying we are freezing
25 everything. We have a list here. If it's not - - -

1 CHIEF JUDGE LIPPMAN: Well, they can't
2 freeze for people not coming under the act, right?

3 MR. BUZARD: Well, Your Honor - - -

4 CHIEF JUDGE LIPPMAN: Not authorized by the
5 act?

6 MR. BUZARD: That's - - -

7 CHIEF JUDGE LIPPMAN: That's clear right?

8 MR. BUZARD: No. That's falling into the
9 trap - - -

10 CHIEF JUDGE LIPPMAN: They can have it as
11 an act, and then they can freeze people that are not
12 authorized to be frozen under the act?

13 MR. BUZARD: But in determining whether or
14 not the action is timely, you can't look beyond it
15 and say, well, they didn't have the authority. They
16 didn't have the authority to do it.

17 JUDGE SMITH: You're saying - - -

18 MR. BUZARD: Therefore, you didn't have to
19 bring an act. That's a huge hole in Solnick.

20 JUDGE SMITH: You're saying that maybe they
21 didn't have the authority, but if they did something
22 they didn't have the authority to do, then the
23 plaintiffs only had four months to challenge it.

24 MR. BUZARD: Correct. That's exactly
25 correct.

1 CHIEF JUDGE LIPPMAN: But what's your
2 answer to Judge Graffeo's question before? How did
3 they know they were coming under the act?

4 MR. BUZARD: With all the - - - this was a
5 widely known - - -

6 JUDGE GRAFFEO: Were there notices sent to
7 all the employees advising them of the resolution or
8 the act?

9 MR. BUZARD: Well - - -

10 JUDGE GRAFFEO: Because that would have
11 triggered a four-month statute, wouldn't it?

12 MR. BUZARD: Well, we say the thing that
13 triggered it was the adoption. There's no - - -
14 there's never been an issue raised in this case they
15 didn't have notice. What they didn't have notice of
16 was their rights under - - - they claim - - - under
17 the Living Wage Ordinance. They claim they didn't
18 know about that until some community group called - -
19 - came along and told them about it three years
20 later. There's no issue about notice of the wage
21 freeze. I mean, it was a - - - every union in the
22 city brought an action.

23 JUDGE SMITH: But people generally find out
24 pretty quick when their wages are frozen?

25 MR. BUZARD: I beg your pardon?

1 JUDGE SMITH: People generally find out
2 pretty quick when their wages are frozen?

3 MR. BUZARD: Yes, I would say so. None of
4 the unions or anybody else. Every - - - in terms of
5 the authority, every employee in the City of Buffalo
6 had their wages frozen. Everybody. Nobody got an
7 increase, period.

8 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
9 have rebuttal.

10 MR. BUZARD: Thank you.

11 CHIEF JUDGE LIPPMAN: Okay.

12 JUDGE GRAFFEO: Why shouldn't it have been
13 really clear to them that since they got a paycheck
14 from the City of Buffalo, that their wages were
15 frozen?

16 MR. BALL: It - - -

17 JUDGE GRAFFEO: They follow the usual
18 statute of limitations for challenging an
19 administrative action?

20 MR. BALL: It should have been clear, Your
21 Honor. The BFSA, the control board as it were,
22 passed resolution 4-35 and the language is
23 unambiguous. It says all employees, all wage rates,
24 all - - -

25 JUDGE SMITH: Just to make clear, you're on

1 Mr. Buzard's side of the argument.

2 MR. BALL: I am.

3 JUDGE SMITH: - - - even though you're
4 sitting on this side of the table?

5 MR. BALL: I am. I am. I am a respondent,
6 but I am appearing on behalf of the Mayor and the
7 City of Buffalo.

8 CHIEF JUDGE LIPPMAN: But weren't - - -
9 isn't the contentions of their making - - - didn't
10 they have - - - start in 2002, before this whole
11 business?

12 MR. BALL: Well, their specific contention
13 in their amended complaint is that the Buffalo Fiscal
14 Stability Authority's resolution, which froze all
15 wages, did not apply to them because the BFSA didn't
16 have the authority. The issue before - - -

17 CHIEF JUDGE LIPPMAN: But they say since
18 2002, they're not paid what they're required to under
19 the ordinance, right?

20 MR. BALL: But the issue before the court
21 is whether or not the BFSA had the authority to
22 freeze their wages when it passed the resolution in
23 2004, and what the applicable statute of limitations
24 is to that action. The city relied upon - - -

25 JUDGE LIPPMAN: Do you agree that the act

1 doesn't cover them? You're just saying they can't
2 challenge it. You agree the act by its terms does
3 not cover these people?

4 MR. BALL: I don't agree with that
5 contention because the BFSFA in its interpretation in
6 the act and in passing the resolution - - -

7 JUDGE SMITH: You don't agree with it - - -

8 MR. BALL: - - - froze everything - - -

9 JUDGE SMITH: You don't agree with it, but
10 you're stuck with it for the purposes of this appeal.

11 MR. BALL: Correct.

12 CHIEF JUDGE LIPPMAN: Okay, thanks,
13 counsel.

14 MR. BALL: Thank you.

15 CHIEF JUDGE LIPPMAN: Counsel, why is there
16 a six-year statute of limitations?

17 MR. LICHTENTHAL: Your Honor, there's a
18 six-year statute of limitations solely for the
19 proposition of trying to find out whether or not - -
20 - I'm sorry - - - plaintiffs, to the extent that
21 they're questioning whether plaintiffs are
22 challenging the article 78, the six-month - - - I'm
23 sorry, the four-month article 78 statute of
24 limitations simply doesn't apply. As we've touched
25 on - - -

1 CHIEF JUDGE LIPPMAN: Why? What are you
2 challenging?

3 MR. LICHTENTHAL: For the purposes of this
4 inquiry - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MR. LICHTENTHAL: - - - plaintiffs aren't
7 challenging anything. They're not challenging - - -

8 CHIEF JUDGE LIPPMAN: Well - - - yeah, go
9 ahead.

10 MR. LICHTENTHAL: Okay. They're not
11 challenging the wage freeze, because the wage freeze
12 by its own express terms limited itself to that which
13 was - - -

14 CHIEF JUDGE LIPPMAN: So what are you
15 challenging?

16 MR. LICHTENTHAL: Well, we're certainly not
17 challenging the wage freeze. We're certainly not
18 challenging the - - - we're certainly not challenging
19 the act, the Buffalo - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but you have a
21 lawsuit.

22 MR. LICHTENTHAL: Correct.

23 CHIEF JUDGE LIPPMAN: What does the lawsuit
24 allege?

25 MR. LICHTENTHAL: All right, thank you,

1 Your Honor. The lawsuit is challenging the city.
2 The city had a duty under the Living Wage Ordinance
3 to pay plaintiffs at a specific rate.

4 JUDGE PIGOTT: But can the Mayor say, love
5 to pay you. I buy the Living Wage, want to do that.
6 Unfortunately, if you look down the street, there's
7 the BFSA and they control our purse strings, and they
8 say I can't.

9 MR. LICHTENTHAL: Well, first of all,
10 that's not entirely what happened.

11 JUDGE PIGOTT: No, I know. But what then
12 happened is that you then had to implead the BFSA
13 because they're a necessary party, and that gets you
14 back to, if they're a necessary party, then they're
15 necessary because they imposed a wage freeze and you
16 had four months to challenge it.

17 MR. LICHTENTHAL: They're a necessary party
18 because the city raised that as a defense.

19 JUDGE PIGOTT: Right, but, I mean, the
20 point is, you sued the wrong people. That's what the
21 Mayor is saying. He's saying, I'll give you the
22 money; it's just they won't let me. And what the
23 surmise is that you knew you couldn't sue the BFSA,
24 so you sued the mayor and tried to get to the BFSA
25 through a six-month statute of limitations, when in

1 fact, the Mayor's saying, I can't do it. You should
2 have - - - if you're right about this, you should
3 have sued the BFSA when you knew that all wages were
4 freezed - - - were frozen, excuse me - - - and
5 didn't.

6 MR. LICHTENTHAL: Well, first of all,
7 there's a number a issues to address that question.
8 First of all, there's nothing in the record showing
9 that plaintiffs were aware that the wage freeze ever
10 applied to them. We had - - -

11 JUDGE PIGOTT: That doesn't stop statutes
12 of limitations. I mean, if you don't know there's a
13 three-year statute of limitations on negligence, you
14 can't say, I didn't know I had three years to sue
15 that guy, and so give me six.

16 MR. LICHTENTHAL: No, understood, but they
17 weren't even aware that the wage freeze applied to
18 them.

19 CHIEF JUDGE LIPPMAN: But that - - - did
20 you get any notices about that there's a wage freeze
21 - - - any VOP?

22 MR. LICHTENTHAL: No, Your Honor. There
23 was no notice.

24 JUDGE CIPARICK: And why is that? Because
25 they weren't part of a collective bargaining

1 agreement?

2 MR. LICHTENTHAL: They were not part of a
3 collective bargaining agreement. Plaintiffs in this
4 case - - -

5 JUDGE CIPARICK: They thought they were
6 exempt from this, or they just didn't think about it?

7 MR. LICHTENTHAL: That gets us to the case
8 which dictates the outcome of this question,
9 Patrolmen's Benefit (sic) Association. That which
10 was not specifically addressed in the control act is
11 necessarily excluded.

12 CHIEF JUDGE LIPPMAN: Well, assume that's
13 the case. How does it still get you to the longer
14 statute of limitations?

15 MR. LICHTENTHAL: Okay.

16 CHIEF JUDGE LIPPMAN: Assuming you're
17 omitted from the statute, how do you get to the - - -
18 is that you didn't know that it applied to you, or
19 what is it that makes it - - - is there no triggering
20 event for you? What's your argument?

21 MR. LICHTENTHAL: The triggering event is
22 when the city raised that as a defense. Before that,
23 there was no - - -

24 JUDGE SMITH: You're saying that's when the
25 statute starting running?

1 MR. LICHTENTHAL: Well, for the purposes of
2 this specific question, yes, because the - - -

3 JUDGE SMITH: So you could have waited
4 twenty years, and then sued, and waited until the
5 city raised that defense?

6 MR. LICHTENTHAL: No, because the Living
7 Wage Ordinance had its own statute of limitations.
8 And once plaintiffs became aware of their rights
9 under the Living Wage Ordinance, they filed and - - -

10 JUDGE SMITH: And what started that statute
11 running?

12 MR. LICHTENTHAL: That was based on
13 knowledge, and once the plaintiffs had knowledge - -
14 -

15 JUDGE SMITH: There's something in the
16 Living Wage Ordinance that says you've got X years
17 from the date you find out your wages are frozen to
18 sue?

19 MR. LICHTENTHAL: That's correct, Your
20 Honor. And I can point to the exact - - -

21 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

22 MR. LICHTENTHAL: - - - language, if you
23 prefer.

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 MR. LICHTENTHAL: Okay.

1 CHIEF JUDGE LIPPMAN: Yeah, point to it.

2 MR. LICHTENTHAL: I call the court's
3 attention to the record, starting page 46, down at
4 the very bottom, subsection F, Enforcement. "Private
5 right of action. An employee claiming violation to
6 this section shall have the right to file an action
7 against an employer in the appropriate court, within
8 two years after discovery of the alleged violation."

9 So the record - - - there's evidence in the
10 record that the plaintiffs were not aware that the
11 Living Wage reached them until they were made aware
12 by the Coalition for Economic Justice.

13 JUDGE SMITH: And so what this turns on is
14 whether you're subject to that statute or the four-
15 month statute.

16 MR. LICHTENTHAL: It's - - - I don't
17 believe it does, all right, because the initial
18 complaint, the initial action here was against the
19 city, subject to the Living Wage Ordinance.

20 JUDGE SMITH: Well, you can't - - - I mean,
21 if - - - let's assume that the city - - - I mean, I
22 understand that you say they did - - - that the
23 resolution didn't do anything except say we're
24 following the law. But suppose an agency tells the
25 city: you may not pay this amount of money, and your

1 four months at that moment starts running against the
2 agency, you can't avoid the statute by suing the city
3 and leaving the agency out of the case, can you?

4 MR. LICHTENTHAL: That may be true, but
5 notably in this case, there's no evidence whatsoever
6 that the city was under the impression that the wages
7 for the plaintiffs were ever frozen.

8 JUDGE SMITH: Well, what about the language
9 in the resolution, which you made me look at
10 something else - - - you made me lose my page.

11 JUDGE PIGOTT: That's what I was going to
12 bring up. It says "To all wages, wage rates, salary
13 amounts, all employees, nonexempt covered
14 organizations, and effective immediately shall apply
15 to" prevent - - - "prohibit any increase in wages,
16 salaries for any employee of the city."

17 JUDGE SMITH: You took the words right out
18 of my mouth.

19 MR. LICHTENTHAL: We're, of course,
20 addressing page 57 of the record, and paragraph 2 on
21 page 57, specifically calls the reader's attention to
22 the act. And it says - - -

23 JUDGE SMITH: Yeah, but the same point I
24 was making with your adversary. You'd be a lot
25 better off if there were no paragraph 3, but there is

1 a paragraph 3, and Judge Pigott just read it; it said
2 we freeze everything.

3 MR. LICHTENTHAL: Okay, there is a
4 paragraph 3, but notably, going back to paragraph 2,
5 "to the full extent authorized by the act," that
6 definition then becomes a defined term, a term of art
7 for the rest of this - - -

8 JUDGE PIGOTT: Yeah, but your workers
9 didn't stand around one summer and say, boy, am I
10 glad that we don't fall within the "all employees"
11 segment. We can go to work here and then at some
12 point we'll go after that low wage or that prevailing
13 wage thing, did they?

14 MR. LICHTENTHAL: Well, no, but then that
15 raises the question what kind of savvy - - - legal
16 savvy - - - does the Authority contribute to - - -

17 JUDGE SMITH: But suppose - - - can't the
18 resolution be read as saying two things. First, we
19 freeze wages to the full extent we're authorized to,
20 and second, we think that full extent, is to freeze
21 every wage in the city. Isn't that a fair reading of
22 the resolution?

23 MR. LICHTENTHAL: Well, first of all, no, I
24 don't think that is a fair reading of the resolution,
25 since it does specifically talk about the act. The

1 case of Patrolmen's Benevolent Association is out
2 there making it quite clear that what is not
3 specifically listed within the act must be excluded.
4 The state legislature took the ruling from
5 Patrolmen's Benevolent Association and then used that
6 later and adopted how they wrote the statute for the
7 Buffalo Fiscal Stability Authority. So it's quite
8 clear that there's no way to read this other than
9 that that language restricts that action to what is
10 authorized by law.

11 And second of all, and back to the third
12 paragraph there, once that becomes a defined term,
13 "Wage Freeze", capital W, capital F, it's referred
14 back to in that third paragraph. That this Wage
15 Freeze, capital W, capital F, shall apply to, and
16 that's where the very broad language steps in. But
17 because it's a defined term it relates back to the
18 second paragraph where that term is defined. That
19 term as defined is what is authorized by the full
20 extent of the act. Patrolmen's Benevolent
21 Association makes it crystal clear. The Buffalo
22 Fiscal Stability Authority did not - - -

23 JUDGE SMITH: But I mean it says - - - I
24 assume that what you're demonstrating is that when
25 they said this wage freeze shall apply to everybody,

1 they were wrong. But if they were wrong that
2 triggered your four months to sue them, didn't it?

3 MR. LICHTENTHAL: Your Honor, with all due
4 respect, at no point do the plaintiffs say they were
5 wrong by - - - the clear language here is - - - that
6 they're referring back to when they're referring to
7 all employees or any employees, they're referring to
8 the wage freeze as a defined term. The wage freeze
9 as a defined term is restricted.

10 JUDGE GRAFFEO: From the fairness
11 standpoint, why should the people you represent get
12 the higher wages versus everyone else who's subject
13 to the freeze?

14 MR. LICHTENTHAL: Well, from a fairness
15 standpoint, the issue is what the Buffalo Fiscal
16 Stability Act had the power to do and not to do, all
17 right. And simply put, the act did not have the
18 authority to freeze wages for the plaintiffs. If the
19 state legislature wanted to give the authority that
20 power to freeze wages for at-will employees - - -

21 CHIEF JUDGE LIPPMAN: But are you different
22 than the employ - - - does the at-will employee make
23 it, again, from a policy or a fairness perspective,
24 does that entitle you in your mind that you wouldn't
25 be subject to it, because you're an at-will employee?

1 MR. LICHTENTHAL: I think it certainly
2 changes the nature of the inquiry.

3 CHIEF JUDGE LIPPMAN: Subject to the Living
4 Wage Ordinance.

5 MR. LICHTENTHAL: Because - - - and I see
6 my time is up. May I - - -

7 CHIEF JUDGE LIPPMAN: No, no, finish.

8 MR. LICHTENTHAL: - - - answer the
9 question? Okay. Because we're not talking about
10 employees that are represented by a union, a union
11 with resources to hire legal counsel to obviously to
12 keep abreast of what the latest city ordinances are
13 and resolutions, and - - -

14 JUDGE PIGOTT: But isn't your better
15 argument - - - I'm not trying to make it up for you -
16 - - but not so much the at-will, but the Living Wage?
17 I mean, the ordinance reads like we want to have a
18 floor. I mean, there's - - - we're not going with a
19 minimum wage for now; we're going to go a little
20 better than that. And that's what the city was
21 trying to do for the people you purport to represent:
22 a living wage.

23 MR. LICHTENTHAL: That's correct, Your
24 Honor.

25 JUDGE PIGOTT: So the BFSA, when they did

1 what they did, did it, but a credible argument can be
2 made that that does not mean that we're going to
3 destitute the seasonal workers in the sanitation
4 department.

5 MR. LICHTENTHAL: That's correct, Your
6 Honor. And there's also the equitable issue that my
7 clients would have to have seen through to understand
8 that first of all, that the Living Wage applied to
9 them, which they weren't aware of until they were
10 made aware by a community organization; second of
11 all, that the living wage - - - or, I'm sorry, that
12 the wage freeze applied to the Living Wage despite
13 the clear language within the wage freeze restricting
14 it, despite the language within the Buffalo Fiscal
15 Stability Act restricting the Authority's power to
16 freeze those wages. So the equitable argument here
17 is, you're asking my clients to have this incredible
18 legal savvy that is the subject of a question before
19 the highest court in the state.

20 JUDGE GRAFFEO: I asked the question
21 because usually seasonal workers don't have benefits
22 greater than full-time employees, so that's why we're
23 trying to figure out why should - - - where the
24 equities lie in terms of handling them almost in a
25 preferred status here in terms of the wage freeze.

1 So it's strictly the Living Wage Act, you think, that
2 sets them apart?

3 MR. LICHTENTHAL: It's the Living Wage Act
4 that sets them - - - what sets them outside - - -

5 JUDGE GRAFFEO: Because the full-time
6 sanitation workers, the year-round sanitation
7 workers, are frozen.

8 MR. LICHTENTHAL: Absolutely, because the
9 Authority had the power to - - - as given to them by
10 the - - -

11 CHIEF JUDGE LIPPMAN: But on an equity
12 basis, I think what the judge keeps asking is, is it
13 because they're lower paid and they're subject to the
14 Living Wage Ordinance that makes them different and
15 therefore it's equitable, even though the - - - I
16 don't want to make your argument for you - - - but
17 even though the regular sanitation workers are
18 subject to it, they earn more to begin with. Is that
19 the - - -

20 MR. LICHTENTHAL: Well, it's certainly true
21 that my clients don't have benefits. They don't even
22 have a guarantee of employment. They're certainly
23 separate and apart from all those employees
24 represented by unions who had benefits.

25 JUDGE PIGOTT: But you can't argue at-will;

1 otherwise the deputy mayor's going to come in here
2 asking for a raise.

3 MR. LICHTENTHAL: I don't know. The deputy
4 mayor may have a contract with the city.

5 JUDGE PIGOTT: He's at-will, I guarantee
6 you.

7 MR. LICHTENTHAL: He may be, and if that's
8 the case - - -

9 JUDGE SMITH: But he's probably making a
10 living wage already.

11 MR. LICHTENTHAL: At least a living wage,
12 Your Honor.

13 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
14 you.

15 Counsel, why aren't these folks different,
16 in that you're talking about the people who are at
17 the lowest end of the rung. There's a Living Wage
18 Ordinance that I think Judge Pigott said sets a
19 floor. Why aren't they different?

20 And why, given that situation, the second
21 part of your adversary's argument, how is it that
22 they would know, given that they're not collective
23 bargaining people? There's no notice sent to them.
24 So answer the two prongs of that: the equity side
25 and then the knowledge side.

1 MR. BUZARD: Well, the equity side is that
2 they were actually paid more than the living wage,
3 because they were working twenty-five hours a week,
4 and being paid as forty. But if I could, this is a
5 case strictly - - -

6 CHIEF JUDGE LIPPMAN: What about the
7 knowledge side, now, before you go - - -

8 MR. BUZARD: All right. The knowledge
9 side. There's no claim in the papers up until today,
10 really, that they didn't know about the living wage.
11 What they didn't know about was the ordinance - - - I
12 mean, they didn't know about the wage freeze. I'm
13 sorry. What they didn't know about was the Living
14 Wage Ordinance. There's nothing about - - -

15 CHIEF JUDGE LIPPMAN: Do you agree under -
16 - -

17 MR. BUZARD: - - - whether or not they knew
18 about the Living Wage.

19 CHIEF JUDGE LIPPMAN: Do you agree under
20 the ordinance that if they didn't know, then they
21 have two years from the time that they knew?

22 MR. BUZARD: Probably. But the problem is
23 this is a statute of limitations case involving an
24 article 78 masquerading as a declaratory judgment
25 action. And Judge Smith was exactly correct, that

1 they are claiming that because we didn't have - - -
2 we, the BFSA - - - didn't have the authority to
3 freeze, they claim, their wages, therefore, they were
4 never reached; it was never to the full extent of the
5 law, and therefore, we had - - -

6 CHIEF JUDGE LIPPMAN: You're saying they
7 didn't have the authority and we had no way of
8 knowing that - - - they thought they had the
9 authority.

10 MR. BUZARD: Well, there's - - - there are
11 complicated - - -

12 CHIEF JUDGE LIPPMAN: I think is what
13 they're saying.

14 MR. BUZARD: The issue of notice should
15 relate solely to the four-month statute.

16 JUDGE PIGOTT: Your point is that even if
17 you're wrong, they had four months - - - four weeks -
18 - -

19 MR. BUZARD: Absolutely.

20 JUDGE PIGOTT: - - - four months to tell
21 you you were wrong and then - - - but after that,
22 it's over.

23 MR. BUZARD: You - - - if this lower court
24 - - - these lower court decisions are allowed to
25 stand, you will have carved a major exception in what

1 has been a bright line and very important rule in
2 this state guiding the judges and lawyers: that you
3 can't bring a declaratory judgment action after four
4 months, when it should have been an article 78.

5 CHIEF JUDGE LIPPMAN: What about the - - -

6 MR. BUZARD: That's what the courts below
7 did.

8 CHIEF JUDGE LIPPMAN: Go back to the two-
9 year thing that he cited to us. What impact does
10 that have? What relevance does that have?

11 MR. BUZARD: None.

12 CHIEF JUDGE LIPPMAN: Why?

13 MR. BUZARD: Because there's a complaint
14 against the BFSA in this record at page 83 which - -
15 - the amended complaint - - - which says that they
16 are seeking a declaratory judgment that "the Buffalo
17 Fiscal Stability Authority does not authorize or
18 empower the Authority to freeze or control wages of
19 plaintiffs in the class." And that's an article 78
20 claim.

21 JUDGE PIGOTT: The other part of that, I
22 guess, is that when the BFSA was instituted, I don't
23 think the Mayor was necessarily in favor of it, and
24 so, at least to the extent that these seasonal
25 workers, or any workers, could or could not have been

1 covered by this could have been raised by the Mayor,
2 could have been raised by any number of individuals,
3 and was not under any circumstance within the four
4 months.

5 MR. BUZARD: Right. Let me explain - - -
6 let me - - -

7 CHIEF JUDGE LIPPMAN: Quickly, counsel,
8 your lights on. Go ahead.

9 MR. BUZARD: There was great reliance on
10 the Patrolmen's case - - -

11 CHIEF JUDGE LIPPMAN: Right.

12 MR. BUZARD: - - - which - - - in which
13 this Court held they didn't have the - - - there was
14 no authority to freeze the police officer's wages
15 because they were not subject to a collective
16 bargaining agreement. Well, based upon that case,
17 the police in Buffalo brought Meegan v. Masiello,
18 cited in the brief, for the exact same proposition:
19 you, Buffalo Fiscal Stability Authority, didn't have
20 the power to freeze our wages because our wages came
21 from a judgment, not a collective bargaining
22 agreement.

23 That case was brought as an article 78
24 proceeding within one month, decided by the Fourth
25 Department that BFSA did have the authority, but in a

1 decision by Judge Pigott. That was one of their very
2 early Buffalo Fiscal Stability Authority cases. But
3 it's the precise case here.

4 If the police had waited six years - - - if
5 police in Buffalo - - - and said this doesn't reach
6 us, because you didn't have the authority, because
7 this is from a judgment, not from a wage freeze, we'd
8 - - - the City of Buffalo would have been dealing - -
9 - and the Buffalo Fiscal Stability Authority would
10 have been dealing with a bill to the city police for
11 six years, and that's just exactly - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. BUZARD: - - - the kind of financial
14 turmoil that Judge Jones - - -

15 CHIEF JUDGE LIPPMAN: Thank you.

16 MR. BUZARD: - - - in that decision - - -

17 CHIEF JUDGE LIPPMAN: Thank you.

18 MR. BUZARD: - - - did not want to happen.

19 CHIEF JUDGE LIPPMAN: Thank you, thank you,
20 all of you. Appreciate it.

21 MR. BUZARD: Yes.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of BFSa v. BUFFALO and BROWN; GRESS et al., No. 203 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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