STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

WALTER E. HEADLEY, JR., MIAMI LODGE #20, FRATERNAL ORDER OF POLICE, INC.,

Charging Party,

Case No. CR-2017-001
(Relates to CA-2010-119)

v.

CITY OF MIAMI,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO HEARING OFFICER'S SUPPLEMENTAL RECOMMENDED ORDER AND MEMORANDUM IN SUPPORT

COMES NOW, the Respondent, City of Miami, ("City" or "Respondent"), pursuant to Rule 28-106.217(1), F.A.C., and hereby submits its exceptions to the Hearing Officer's Supplemental Recommended Order of July 20, 2017, and request for oral argument, and in support thereof states the following:

I. Introduction

In its May 18, 2017, Order Remanding Case to the Hearing Officer, the Commission noted that after the City's declaration of financial urgency the parties did not complete the impasse process, and therefore the City was not statutorily authorized by Section 447.4095, Florida Statutes, to unilaterally modify the collective bargaining agreement. In remanding the case, the Commission stated that "the City violated Section 447.501(1)(a) and (c), Florida Statutes, when it unilaterally changed wages, pensions, health insurance, and other monetary items for the employees in the bargaining unit represented by the FOP prior to completing the Section 447.403, Florida Statutes, impasse resolution process." (Remand Order at p. 3). The Commission then

directed the Hearing Officer to make a recommendation on the FOP's motions to return the parties to the status quo ante and for an award of attorney's fees and costs.

The Commission's summary finding that the City committed an unfair labor practice is extraordinary because it overlooked the City's affirmative defenses, including that the exigent circumstances required immediate and decisive action by the City. It is clear from the original Recommended Order that the Hearing Officer did not consider the City's affirmative defenses. Moreover, it is abundantly clear from the Supplemental Recommended Order that the Hearing Officer was constrained by the Commission's premature finding of an unfair labor practice, and coupled with his failure to consider the City's affirmative defenses in the first instance, it contributed to the confusion of the issues and procedural defects that are now back before the Commission.

Accordingly, the City excepts to the Hearing Officer's Supplemental Recommended Order and respectfully requests that the Commission determine that the City acted lawfully under exigent circumstances based on the earlier factual findings and dismiss the FOP's unfair labor practice charge in its entirety. Alternately, the City respectfully requests that the Commission revisit and reconsider its original Remand Order and remand this case again to the Hearing Officer with instructions to consider and make recommendations considering the City's affirmative defenses. Failure to do so would further deprive the City of its right to due process.

II. Procedural History

In Headley v. City of Miami, 215 So. 3d 1 (Fla. 2017), the Supreme Court clarified that section 447.4095, Florida Statutes, incorporated the entire judicially constructed test in Chiles,[1] which required the government demonstrate no other reasonable alternative means of preserving

[1] A decision that pre-dated the Legislature's enactment of section 447.4095, Florida Statutes.

the contract either in whole or in part. Further, finding that both the City's and the FOP's interpretations of the statute were reasonable, and using the rules of statutory construction, the Court held that section 447.4095 permits the unilateral implementation of changes to a collective bargaining agreement only after the parties have completed the impasse resolution proceedings and failed to ratify the agreement. Headley, 215 So. 3d at 9. The Supreme Court "remand[ed] the case for proceedings that are consistent with this decision," but, importantly, stopped there. Even noting that the parties agreed to a special magistrate and the parties did not pursue the impasse resolution process, the Supreme Court **did not** hold that the City had committed an unfair labor practice.

On April 12, 2017, the First District Court of Appeal remanded this case to the Commission for proceedings that are consistent with the Supreme Court decision in Headley. Thereafter, the Commission remanded the case to the Hearing Officer, and in doing so the Commission took the extraordinary step of stating that "the City violated Section 447.501(1)(a) and (c), Florida Statutes, when it unilaterally changed wages, pensions, health insurance, and other monetary items for the employees in the bargaining unit represented by the FOP prior to completing the Section 447.403, Florida Statutes, impasse resolution procedure." This is extraordinary because it overlooked the City's affirmative defense of exigency which, despite being paid lip service in the Supplemental Recommended Order, was not appropriately considered and addressed by the Hearing Officer on the merits.

III. Competent Substantial Evidence[2]

As the competent substantial evidence in the record reflects:

[2] The following findings of fact were determined by the Commission to be supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law, and were adopted by the Commission. See Final Order at pp. 6, 19, Case No. CA-2010-119 (Order Number 12U-080) (PERC March 27, 2012).

The City's total budget was approximately $500 million. (T 227, 440). By law the City is required to adopt a balanced budget prior to October 1 of each year. (T 115, 122, 257, 284).

For fiscal year 2008-2009, the City had an estimated budget deficit of approximately $50 million. (T 225). The City's personnel costs consumed more than eighty percent of its operating budget. (T 230). By May 2010, the estimated operating deficit for fiscal year 2010-2011 was projected at approximately $80 million. (T 227, 325). In addition, assessed property values continued to fall. Based upon the County Property Appraiser's estimates the City's projected budget deficit for fiscal year 2011-2012 increased another $20 million. (T 228, 229, 235). The City estimated its operating deficit to be $100 million. (T 228-229, 441). To rein in expenses the City had been holding back capital expenditures, such as replacing police and fire vehicles and building maintenance. These expenditures inflated the deficit by $15 million bringing the City's estimated operating deficit to over $115 million. (T 229).

The City also received notice from its actuary that the City's pension contribution costs would increase in a single year by $24 million on October 1, 2010. (T 231, 328). Pension costs were escalating at a rate of forty to fifty percent while recurring revenues were declining. (T 231-232). The City would be obligated to contribute approximately $48,000 for each member of the FOP bargaining unit.

To address the budget deficit, the City implemented a hiring freeze, it completed all scheduled layoffs, stopped the City's procurement, and initiated plans for the City's various departments to determine which vacant position could be eliminated. (T 226). The City determined that if it did not act its personnel costs would exceed all revenues and consume one hundred and one percent of its budget. Pension costs alone would have depleted approximately twenty-five percent of the City budget. (T 230). The City employees' salaries had been growing at a rate of five to eight percent annually. (T 236, 273). The City determined that it would not be able to pay

for purchases, improvements, electricity, and fuel for City vehicles or operate City buildings. (T 230).

The City considered raising the millage rate from 7.6 to the maximum allowable rate of ten. (T 233-234). This would generate approximately $60 million in revenue, but would not completely offset the existing deficit. (T 324). The City Commission decided not to raise taxes because it believed that the City's residents could not afford to have additional tax or fee increases. (T 236, 323).

The City's overall unemployment rate was approximately thirteen percent, and some areas twenty-five to thirty percent. (T 442-443). In addition, raising the millage rate to the maximum amount could potentially result in the City receiving negative credit action from rating agencies based upon it having used up all its taxing capacity in a continued down market. (T 463-466). This would have a negative impact on the City's ability to have its debt purchased. (T 465).

The City also considered additional layoffs in lieu of reductions in pension and personnel costs. (T 258-259). It determined that it would have to lay off 1,300 employees or one-third of its workforce. (T 259, 448). The layoffs would have depleted hundreds of police and fire positions, impacted essential services to the citizens, and potentially endangered the health and safety of the City's residents. (T 259, 448-449).

The City Manager Carlos Migoya determined that the most feasible approach was to raise certain fees and focus on reducing expenses. (T 236). The City officials approached the labor organizations representing its employees and requested assistance in resolving the budget deficit. (T 52-53, 441). The FOP officials were aware of the City's escalating deficit and financial status. (T 53-54). FOP President Armando Aguilar met with City officials on several occasions and presented the FOP's ideas for alleviating some of the City's pension costs. (T 54-56, 191).

The FOP and the City are signatories to a three-year collective bargaining agreement that

expired on September 30, 2010. (T 52). On April 12, 2010, the FOP presented its initial proposal to the City as negotiations began for a successor contract. (T 56, 98, 101, 239). **The FOP proposed a wage increase for bargaining unit members and maintaining the status quo for the existing pension plan.** (CP 3; T 99, 239). **By proposing that the pension plan remain status quo, FOP President Aguilar was aware that the cost of maintaining the pension plan would increase the City's pension payment on October 1, 2010.** (T 100). This is because the pension fund's return on investments in the market was lower than expected in previous years, thus increasing the City's costs for payment to the pension plan. (T 100-101).

On April 30, the City presented its full book proposal to the FOP. (T 102). The City's counter-proposal included a wage proposal with a tiered wage reduction. (CP 4; T 102, 246). The weighted average of the reductions proposed by the City would be an approximate five percent reduction in wages for FOP bargaining unit members. (T 247). The City's counterproposal on wages also proposed eliminating all supplemental pay, and proposed no increases in wages for three years. (T 247-248).

The City's counter-proposal also included a proposal on the FIPO pension plan, proposing that the current plan be frozen and a transfer of participants into a defined contribution pension plan. (T 102, 331, 334).

The City sought to conclude its negotiations with the FOP by the end of the fiscal year so that it could balance its budget by October 1, 2010. (T 250-251, 257, 280, 284, 429). The FOP was aware that the City was legally required to adopt a balanced budget prior to the start of each new fiscal year on October 1. (T 115, 122, 257, 284). On May 11, 2010, Attorney Michael Mattimore notified the FOP that "Given the serious financial challenges facing the City, time is of the essence for the parties to meet and start negotiations." (R 38).

On June 7, the parties conducted the first bargaining meeting. (T 57). The City's

representatives proposed that the parties focus on the actual change proposals for reduction in costs for wages, pension and health benefits. (R 15). **The City also indicated that time was of the essence in resolving the pension issues.** (T 69, 73).

The City indicated that it needed to adjust approximately $60 million in the deficit related to the City's labor costs. (T 104). **The FOP proposed a three percent new COLA** and more red light cameras within the city. (R 15).

The FOP indicated that it would not agree to any wage or pension contract article that resulted in a reduction in benefits to the bargaining unit employees it represents. (T 110, 248-249, 274, 408). **The FOP's stated position regarding the pension was to maintain the current defined benefit plan.** (T 123). **The FOP did not provide the City with a written counter-proposal to the City's proposed wage and pension articles.** (T 105-106, 111-120). The next bargaining meeting was scheduled for June 24, 2010. (R 15).

On June 22, 2010, the City sent a letter to the FOP stating that it had considered the FOP's ideas for saving money, but it concluded that the proposals did not address the needed reductions in liabilities and related costs. (R 21; T 107, 109). **The City indicated that immediate action must be taken to reform the FIPO pension plan, reduce the City's pension costs and reduce unfunded liabilities.** (R 21; T 107, 109).

At the June 24, 2010, bargaining meeting, the FOP indicated that it was willing to consider other options for the pension but was not willing to change current benefits. (R 15). **The FOP did not provide the City with a written counter-proposal to the City's proposed wage article.** (T 108-109). The next negotiations session was scheduled for July 1, 2010. (R 15).

At the July 1, 2010, bargaining meeting, the City and the FOP mutually acknowledged that there was a need to identify $60 million to balance the budget through wage, pension and/or health insurance benefits. (R 15). The next bargaining meeting was scheduled for July 8.

At the July 8, 2010, bargaining meeting, the City's representatives notified the FOP's representatives that the monetary savings the FOP advanced were not supported by the documents the FOP had provided. (T 66). **The FOP did not provide the City with a written counter-proposal to the City's proposed wage article.** (T 111). The next bargaining meeting was scheduled for July 19, 2010. (R 15).

At the July 19, 2010, bargaining meeting, the FOP did not provide the City with a written counter-proposal to the City's proposed wage article. (T 111). The next bargaining meeting was scheduled for August 9, 2010. (R 15).

On July 28, 2010, the City notified the FOP in writing, that it was declaring a financial urgency pursuant to Section 447.4095, Florida Statutes. (R 22; T 72, 74). The City stated that it was unable to fund the economic terms of the parties' 2007-2010 agreement for the 2010-2011 fiscal term because of a $116 million projected budget shortfall, and because the FOP would not agree to any reductions in wages or benefits in the ongoing negotiations for a successor agreement. (R 22; T 448). The City indicated that it would implement changes to wages, benefits and other economic terms of employment; it was willing to meet and negotiate with the FOP regarding the impact of the measure it would take to address the financial urgency and it was willing to extend the fourteen-day period of negotiations over the impact of the financial urgency, through August 12, 2010, if requested. (R 22; T 72, 251, 413-414, 417).

The FOP did not request bargaining over the impact of the City's decision to implement changes to wages, benefits and other economic terms of employment. (T 418). The FOP did not request a delay in the fourteen-day period for negotiations set forth in Section 447.4095, Florida Statutes. (T 123). It did not raise any issue regarding the appointment or use of a special magistrate and it did not request that the City participate in an expedited impasse proceeding. (T 86, 407-408).

The decision to declare financial urgency was based on the City's determination that there was insufficient time to successfully negotiate agreements with the three labor organizations to manage expenses and deliver a balanced budget to the State on September 30, 2010. (R 22; T 250-251, 257, 280, 284, 429).

At the August 9, 2010, bargaining meeting, the FOP did not present a counter-proposal regarding wages or pension. (T 112) **The FOP did not identify specific impacts associated with the City's declaration of financial urgency that it wanted to negotiate.** (T 117-118) The next bargaining session was scheduled for August 12. (CP 15).

At the August 12, 2010, bargaining meeting, the FOP did not present a counter-proposal regarding wages or pension. (T 112, 407). Regarding the City's declaration of a financial urgency, the FOP did not identify specific impacts associated with the declaration of financial urgency that it wanted to negotiate. (T 118). **The FOP maintained its position that it would not agree to a change to the parties' contract regarding wages or pension.** (T 118, 408).

In late August, FOP President Aguilar and City Manager Migoya met nearly every day to discuss issues. (T 79). At their negotiating meeting on August 27, 2010, the FOP did not provide the City with a written counter-proposal to the City's pending proposals on wages or pension, or respond to the City's declared financial urgency. (CP 22; T 114-115, 407).

IV. Exceptions to the Hearing Officer's Supplemental Recommended Order[3]

Exception Number 1:

The City contends that the Hearing Officer erred in ignoring the City's affirmative defenses and recommending that the City should be directed to rescind the modification to wages, health

[3] "SRO ___" refers to the appropriate page of the Supplemental Recommended Order, issued by Hearing Officer Joey D. Rix on July 20, 2017; "Remand Order ___" refers to the appropriate page of the Commission's May 18, 2017, Order Remanding Case to the Hearing Officer; and "HORO ___" refers to the appropriate page of the original Recommended Order issued by Hearing Officer Joey D. Rix on July 1, 2011.

care, and pension benefits and the parties should be returned to the status quo ante as of September 29, 2010. (SRO at p. 2-12).

The City raised in the first instance the affirmative defense of exigency, stating that, "Due to exigent circumstances the Respondent acted lawfully in modifying the terms and conditions of employment of its bargaining unit members." See Answer to Charge Against Employer at p. 6, Sixth Affirmative Defense, Case No. CA-2010-119 (Filed October 11, 2010). Critically, the competent substantial evidence in the record supports that due to exigent circumstances the City acted immediately and lawfully to address its financial emergency. This is separate and apart from the then-existing statutory mechanism for addressing a financial urgency. Relying on the record in originally determining that the City had was experiencing a financial urgency, the Hearing Officer concluded that the budget crisis "call[ed] for immediate action," which is the hallmark of an exigency. Thus, if the Hearing Officer had considered the City's defense of exigency, based on the competent substantial evidence on the record it was proper to conclude that, in addition to acting lawfully under the financial urgency statute, the City acted lawfully under exigent circumstances. In the SRO, the Hearing Officer is attempting to change his previous findings that the Commission already instructed were to be followed.

In reaching his erroneous conclusion in the SRO, the Hearing Officer reasoned, "consistent with the Florida Supreme Court's decision in Headley, and as explained by the Commission in the remand order, the City was not authorized to unilaterally modify the collective bargaining agreement." (SRO at p. 7). The Hearing Officer's analysis is confused. Whether the parties completed the impasse resolution process does not factor into the analysis of whether the City acted lawfully under exigent circumstances. Florida Sch. for the Deaf and the Blind, 11 FPER ¶ 16080 (PERC 1985); In Re Petition for Declaratory Statement of the City of Hialeah, 16 FPER ¶ 21338 (PERC 1990).

The record reflects that, apart from its invocation of section 447.4095, Florida Statutes, the City was forced to act quickly and immediately to modify the wages, hours and terms and conditions of employment of its employees. The City's budget crisis was nothing short of an actual emergency, with far reaching impacts for the City's resident's, its employees, the County's residents and the State of Florida. In the period over which the parties were in negotiations concerning the immediate cost reductions necessary to respond to the financial emergency, the City's budget deficit ballooned out of control from an estimated $80 million in May 2010, to $100 million upon receipt of the County Property Appraiser's estimates, and ultimately to over $115 million. (See HORO at ¶¶ 3-9).

As the City argued in its July 7, 2017, Brief to Hearing Officer, there are three situations in which a public employer can affirmatively defend its unilateral change affecting mandatory subjects of bargaining, including wages, pensions, health insurance, and other monetary items for the employees in the bargaining unit. "They are when (1) there is a clear and unmistakable waiver by the certified bargaining agent, (2) legislative action has been taken as a result of impasse pursuant to Section 447.403(4)(d), and (3) there is an exigent circumstance requiring immediate action." Florida Sch. for the Deaf and the Blind, 11 FPER ¶ 16080 (PERC 1985) (internal citations omitted); In Re Petition for Declaratory Statement of the City of Hialeah, 16 FPER ¶ 21338 (PERC 1990). While the Hearing Officer appears to have applied the second part of the analysis,[4] he failed to appropriately apply and analyze the issues and record regarding the separate and distinct third part of the analysis.

To address the City's dire financial circumstances, the City first did all it could reasonably

[4] Notably, the City did not assert in defense of its unilateral change that there was a clear and unmistakable waiver by the certified bargaining agent or that legislative action was taken because of impasse pursuant to Section 447.403(4)(d).

do outside of modifying its labor contracts by immediately implementing a hiring freeze, compelling all scheduled layoffs, stopping the City's procurement, and initiating plans for the City's various departments to determine which positions could be eliminated. (HORO at ¶ 6). The City needed to act immediately and decisively to address the financial emergency. As acknowledged by the Hearing Officer, the situation "call[ed] for immediate action." The Commission took it further, acknowledging that the City's financial situation "**require[ed] immediate attention and demand[ed] prompt and decisive action.**" (Final Order at p. 9) (emphasis added). As succinctly outlined by the Commission:

> **Had the City failed to act, its personnel costs would have exceeded all revenues by consuming a staggering 101% of the City's budget. In that instance, the City would have been in the untenable situation of being unable to pay for essential government purchases, such as improvements, electricity, and fuel for City vehicles. The City would not have been able to operate or maintain its buildings, and its pension costs would have depleted approximately twenty-five percent of the City's budget.**

(Final Order at p. 11) (emphasis added). There was no reasonable alternative, and the City needed to act immediately.

> The City considered additional layoffs in lieu of reductions in pension and personnel costs; however, **this would have necessitated the layoff of 1,300 employees or one-third of the City's workforce. These layoffs would have depleted hundreds of police and fire positions, impacted essential services to the citizens, and potentially endangered the health and safety of City residents.**

(Id.) (emphasis added).

This was a time when City residents could not afford any additional taxes or fees. At the time, the City's overall unemployment rate was approximately 13%, and in some areas the unemployment rate was a staggering 25% to 30%. (T 442-443). There is no doubt that the City was facing a financial emergency not unlike the crushing impact of a Category-5 hurricane or other

enormous natural disaster, and that there was an overwhelming need to protect the public for whom the City exists to serve. There is also no doubt that the financial emergency facing the City required immediate action, and that "[by] implementing the changes, the City acted promptly and decisively as required" under the exigent circumstances. (See Final Order at p. 17); Laborers International Union of North America v. Greater Orlando Aviation Authority, 869 So. 2d 608 (5th DCA 2004); Florida Sch. for the Deaf and the Blind, 11 FPER ¶ 16080.

The change in the law as articulated by the Supreme Court in Headley only strengthens the City's position. The competent substantial evidence demonstrates that the FOP would not make any modifications to its contract even though it recognized the financial crisis. If the City were in the position it was in 2010 and were the recent changes in the law in effect at the time, the City would never have been able to conclude the Headley impasse process by the October 1 deadline, ensuring catastrophe. With the demonstrated inaction and steadfast refusal to act in any meaningful way on the part of the FOP, the inability to resolve the mounting financial emergency through the impasse process as recently articulated by the Supreme Court would have placed greater stress on the need to act quickly and decisively, as the City did, under the contemporary exigent circumstances. The prompt resolution of this financial emergency was in everyone's best interest, including that of the City's residents who needed the security of knowing that services would not be interrupted, but would be delivered at costs that could be met under the City's financial circumstances. See Miami-Dade County v. Transport Worker's Union of America, Local 291, 22 So. 3d 785, 786 (Fla. 3d DCA 2009). Accordingly, the Commission should reject the Hearing Officer's recommendations, and find that the City acted lawfully under exigent circumstances.

Exception Number 2:

The City asserts that the Hearing Officer erred in concluding that the City's argument that its affirmative defenses were not considered is without merit, and erred in not properly considering

the City's affirmative defense of exigent circumstances. (SRO at pp. 2-3). To the contrary, it is unmistakably clear that the City's affirmative defense of exigency was not properly considered by the Hearing Officer in the HORO or in the SRO.

Despite the complete lack of any mention of the City's affirmative defense of exigency in the HORO, the Hearing Officer now glosses over the issue by stating that, "In preparing my [original] recommended order, I considered the City's defenses and concluded that the City did not act unlawfully." (SRO at p. 3). The Hearing Officer then lays the issue at the feet of the Commission, stating that, "The Commission agreed with that conclusion [that the City did not act unlawfully]. Therefore, the City's defenses have been addressed." (Id.). Then, the Hearing Officer reasoned alternatively that, assuming the City's affirmative defenses were not addressed by him in the first place, the City should have filed an exception and raised that issue with the Commission. (Id.). No authority was offered for this premise. The Hearing Officer's conclusion belies reason, foremost, because the Hearing Officer originally and unequivocally found that the City acted lawfully under the financial urgency statute. Where the original findings of fact and conclusions of law established that the City acted lawfully under the financial urgency statute, Section 447.4095, Florida Statutes, there was no basis for the City to file an exception to the HORO.

The Hearing Officer offers no persuasive authority for his premise that, under the circumstances, the City should have excepted to the HORO. (SRO at p. 3). Rather, Fla. Admin. Code Rule 28-106.217(1) states that, "Parties may file exceptions to findings of fact and conclusions of law **contained in recommended orders** with the agency responsible for rendering final agency action within 15 days of entry of the recommended order except in proceedings conducted pursuant to Section 120.57(3), F.S." Where the City was found to have acted lawfully under the statute in question, and where there was no mention of the City's affirmative defenses in the HORO, there is no basis for the Hearing Officer's statement in the SRO that the City should

have filed an exception to the HORO. To the contrary, the Hearing Officer did not reach the City's affirmative defense of exigency because he resolved the FOP's unfair labor practice charge expressly on the merits under the then-existing and developing law as it applied to Section 447.4095, Florida Statutes.

At this juncture, the recommendation to provide relief to the FOP was premature. The decision in Headley defined the process in applying section 447.4095, Florida Statutes, but it did not find a violation of Section 447.501(1)(a) and (c), Florida Statutes, based upon a unilateral change in wages, hours or a term or condition of employment. Such a finding and/or any prescribed remedy must first contemplate the unresolved affirmative defenses raised by the City in this matter, which the Hearing Officer failed to do.

Exception Number 3:

The City contends that the Hearing Officer erred in concluding that the FOP was not acting in bad faith to perpetuate the status quo. (SRO at p. 7). In the SRO, the Hearing Officer stated that the record evidence does not support the City's contention that, based on the FOP's proposals during the negotiations in 2010, the FOP's stated position, and the FOP's refusal to agree to any adjustments in wages, health care, and pension costs, the FOP's bargaining position was a subterfuge to maintain the status quo. (SRO at p. 7). The Hearing Officer reasoned that the FOP "suggested raising the millage tax rate, installing red light cameras, imposing non-union employee layoffs and furloughs, freezing the current cost of living adjustment, and changing the pension funding methodology." (Id.) (generally referring to findings of fact 13-46). However, the record does not reflect or support the conclusion that the FOP advanced any of these cost-saving ideas in good faith. Moreover, by generally crediting these findings to support his reasoning, the Hearing Officer is attempting to change his previous findings and in doing so turns a blind eye to the findings he made that directly contradict his reasoning and that support the City's position.

The FOP's cost-saving proposals are ephemeral at best. Raising the millage tax rate would have increased taxes on residents who were among the poorest in the country and struggling to make ends meet, and would have placed the City's credit rating in jeopardy. (HORO at ¶ 7). The City's overall unemployment rate was approximately 13% percent, and some areas 25% to 30%. (T 442-443). In addition, raising the millage rate to the maximum amount could potentially result in the City receiving negative credit action from rating agencies based upon it having used up all its taxing capacity in a continued down market. (T 463-466). This would have a negative impact on the City's ability to have its debt purchased. (T 465). Again, this was a time when City residents could not afford any additional taxes or fees.

Installing red light cameras would not have provided the City any relief in the short time frame in which it needed to balance the budget (aside from the fact that the City would have had to install cameras in nearly every single intersection in the City). Imposing non-union furloughs and layoffs is an astute way of passing the buck by the FOP, but that effort had already been explored and, to the extent reasonable, implemented by the City. To go further the City would have had to lay off one-third of its workforce in lieu of necessary reductions in pension and personnel costs. (HORO at ¶ 6-8). The layoffs would have depleted hundreds of police and fire positions, impacted essential services to the citizens, and potentially endangered the health and safety of the City's residents. (T 259, 448-449).

Whereas the Hearing Officer would credit that the FOP proposed freezing the current cost of living adjustment, and changing the pension funding methodology, the Hearing Officer also originally found that the FOP "proposed a wage increase for bargaining unit members and maintaining the status quo for the existing pension plan," and that by doing so the FOP President "was aware that the cost of maintaining the pension plan would increase the City's pension payment on October 1, 2010." (HORO at ¶ 11). Regarding the Hearing Officer's crediting of the

FOP's "cost-saving proposals," the Hearing Officer also found that as early as July 8, 2010, the "City's representatives notified the FOP's representatives that the monetary savings the FOP advanced were not supported by the documents the FOP had provided." (HORO at ¶ 26). Moreover, after much discussion away from the bargaining table regarding the FOP's "cost-saving proposals," the record reflects that the "City explained that FOP's proposals for changing the funding and asset smoothing methodology for FIPO were unworkable," and that the FOP's proposals would lead to "subsequently higher costs in the future, and in other instances, resulting in increased costs to the City even in the short term." (HORO at ¶ 46).

The Hearing Officer also erred in rejecting the City's reliance on the City of Naples. Specifically, in Prof'l Fire Fighters of Naples, IAFF, Local 2174 v. City of Naples, 40 FPER ¶ 284 (PERC 2014), the Commission dismissed the union's unfair labor practice charge which alleged that the city had engaged in bad faith bargaining by refusing to accept the union's acceptance of the city's pension proposal during the impasse hearing. In so concluding, the Commission accepted the hearing officer's finding that the city was justified in rejecting the union's acceptance of the city's pension proposal because it was a delay tactic on the part of the union. The union's intent was "to remove the pension issue from the impasse resolution process so the pension plan would remain unchanged." Id. The union had not acted in good faith to maintain the status quo.

Contrary to the Hearing Officer's conclusion, in many ways the FOP's behavior in the instant case as established by the competent substantial evidence is analogous to the union's bad faith behavior in City of Naples. Here, the FOP's bargaining position was most certainly a subterfuge to maintain the status quo. The record reflects that the FOP's proposals and "cost-saving measures" would have increased wages and costs in the face of the City's financial emergency. The FOP concurrently acknowledged that there was a financial crisis, and unreasonably delayed and even maintained a wage proposal and "cost-saving proposals" that would have only

exacerbated matters despite the need to reach agreement on necessary modifications to personnel costs.

At the first bargaining session, the City indicated that it needed to adjust approximately $60 million in the deficit related to the City's labor costs: (T 104). **In response, the FOP proposed a three percent new COLA and indicated that it would not agree to any wage or pension contract article that resulted in a reduction in benefits to the bargaining unit employees it represents**. (R 15); (T 110, 248-249, 274, 408). **The FOP's stated position regarding the pension was to maintain the current defined benefit plan.** (T 123). As it were, the City's pension costs would have depleted approximately 25% of the City's budget. (Final Order at p. 11). The FOP's proposals would plainly have made matters worse, piling on to an already insurmountable $115 million budget deficit that required immediate action.

Throughout the negotiations, and despite the deficit surging to over $115 million (T 229), the FOP did not provide the City with a written counter-proposal to the City's proposed wage and pension articles, **and maintained its position that it would not agree to a change to the parties' contract regarding wages or pension.** (T 105-106, 111-120, 408). Despite regular negotiations to obtain an agreement that addressed the financial emergency that the City, its residents and employees found themselves in, the FOP refused to agree to any adjustments in wages, healthcare, and pension costs – paying lip service to the impending disaster while simultaneously proposing an increase in wages and costs. Accordingly, the FOP's demonstrated recalcitrance and reluctance to act in good faith entirely precludes any right to a remedy in this case, and the Hearing Officer erred in recommending that the Commission grant the FOP's motion to return the parties to the status quo ante on September 29, 2010.

Exception Number 4:

The City excepts to the Hearing Officer's rejection of its argument that the City should not

be held to have committed an unfair practice where the existing law at the time validated the City's position, and that even assuming a remedy were warranted it should be prospective only. (SRO at p. 9-10). Specifically, at the time, the legislature's use of the term "impact" to describe the nature and the scope of the negotiations to be conducted after the declaration of a financial urgency under section 447.4095, Florida Statutes, meant that when an impasse is reached the employer may implement the action and then subsequently complete the impasse resolution process.[5] See Commc'n Workers of America v. Indian River School Board, 888 So. 2d 96, 98 (Fla. 4th DCA 2004).

> Relying largely on the advice of the Commission's General Counsel, the court in Indian River found the School Board's actions complied with the procedural requirements of Section 447.4095, Florida Statutes . . . Under this interpretation of Section 447.4095, the City was only required to bargain over the impact of its decision to modify the collective bargaining agreement affecting the employees represented by the FOP.

(HORO at p. 28).

As set forth in the City's July 7, 2017, Brief to Hearing Officer, even assuming a remedy were justified in this case, given the state of the case law at the time and the novelty of the issue any remedy should be prospectively only. See Dade County Police Benevolent Ass'n, Inc. v. Miami Dade County Bd. of County Comm'rs, 43 FPER ¶ 105 (PERC 2016). In Miami Dade County, the original order of the Commission found that the county had committed certain unfair labor practices, but dismissed the portion of the charge dealing with the county mayor's veto of an impasse resolution on the issue of the employee's health care contributions. The Commission explained that this was a novel issue and that a prior decision of the Commission's General Counsel ratified the practice. On appeal, the First District Court of Appeal rejected the Commission's

[5] (See HORO at pp. 27-28); (see also Final Order at p. 16-17).

conclusion, held that the mayor's veto constituted an unfair labor practice, and remanded to the Commission to determine the appropriate remedy for that unfair labor practice. Considering the fundamental issue of whether it should order a remedy that is retroactive or prospective only, the Commission noted that the precedent to that point had indicated that the County mayor's veto might not constitute an unfair labor practice. Finding that this was an issue of first impression and that the law at the time validated the county's position, the Commission determined it was not appropriate to have retroactive consequences.[6]

The reasons that the Hearing Officer used to justify rejecting the City's legal analysis on this issue, and specifically the analysis in Miami-Dade County, are inapposite and in many ways justify its application in the instant case. Specifically, regarding Miami-Dade County, the Hearing Officer distinguished that case because the instant case involves the City's unilateral change prior to completing the impasse process. (SRO at p. 9-11). However, the Hearing Officer misses the forest for the trees. Miami-Dade County and the instant case are highly analogous in that they involve actions taken which, initially, were determined to be lawful because the law at the time validated the parties' position and the matter was an issue of first impression. Like Miami-Dade County, the City's actions were validated by the existing case law, including the Commission's General Counsel's interpretation of the law. Commc'n Workers of America v. Indian River School Board, 888 So. 2d 96, 98 (Fla. 4th DCA 2004); Jacksonville Supervisors Ass'n v. City of Jacksonville, 26 FPER ¶ 31140 at 255-256 (PERC 2000), rev'd in part on other grounds 791 So.

[6] The Hearing Officer stated that he need not address the City's arguments concerning the scope of any remedy now. (SRO at p. 4, FN 3). Again, even if any retroactive remedy was warranted which under the circumstances it most certainly is not, the City urges that the Commission must first consider the fact that the City and the FOP entered a successor collective bargaining agreement in September 2011, thereby resolving the section 447.4095 impasse and contractually altering the status quo ante. Thereafter, the City and the FOP negotiated and reached multiple successor collective bargaining agreements. Were any retroactive remedy warranted it would only be applicable to current FOP bargaining unit members who were employed by the City as of September 30, 2010, and because of the successor collective bargaining agreement any remedy would be limited to the approximately one year period between September 30, 2010, and the effective date of the 2011 successor collective bargaining agreement.

2d 508 (Fla. 1st DCA 2001); Indian River, 888 So. 2d at 98; Manatee Education Ass'n, FEA, AFT (Local 3821), AFL-CIO v. Sch. Bd. of Manatee County, 62 So. 3d 1176, 1181 (Fla. 1st DCA 2011), aff'g in part and rev'g in part, 35 FPER ¶ 46 (PERC 2009).

"The Florida Supreme Court has held that where existing law validates the position of a party, that party 'should not be held to have committed an unfair labor practice, and the PERC order shall be deemed prospective only . . . .'" Id.; see also Board of County Comm'rs of Jackson County v. Int'l Union of Operating Engineers, 620 So. 2d 1062 (Fla. 1st DCA 1993) (The Commission may not declare an employer guilty of an unfair labor practice and violating the law when its actions were consistent with prior case law.); Allen v. Miami-Dade College Bd. of Trustees, 43 FPER ¶ 6 (PERC 2016), per curiam aff'd, 2017 WL 363130 (Fla. 3d DCA January 25, 2017) (applying the same rationale in a case where there was an ambiguity in the Commission's past rulings, finding that it was inappropriate to conclude that an unfair labor practice occurred, and cautioning employers to prospectively examine their policies in light of the decision). Accordingly, even assuming a remedy is warranted, under these circumstances the only reasonable remedy in this case of first impression would be **prospective only**. Miami Dade County, 43 FPER ¶ 105.

V. Request for Oral Argument

The City respectfully requests that the Commission grant the parties oral argument on the compelling issues raised herein. The City asserts that oral argument should be permitted to fully brief the Commission on the issues presented in this matter. Permitting oral argument would facilitate this Commission's decision and provide both parties an opportunity to fully brief the Commission regarding the legal issues presented by the Hearing Officer's Supplemental Recommended Order. Consequently, the City respectfully requests that oral argument be allowed prior to the Commission's final order being entered in this matter.

VI. Conclusion

Based on the foregoing, the City respectfully requests that the Commission grant the City's exceptions, reject the FOP's exception, determine that the City acted lawfully under exigent circumstances based on the earlier factual findings, and dismiss the FOP's unfair labor practice charge in its entirety. Alternately, the City respectfully requests that the Commission revisit and reconsider its original Remand Order and remand this case again to the Hearing Officer with instructions to consider and make recommendations considering the City's affirmative defenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed with the Clerk of the Florida Public Employees Relations Commission via the ePERC filing portal, and served via email on this 14th day of August, 2017, to:

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