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.
_____/

RESPONSE TO THE FOP'S EXCEPTION TO THE HEARING OFFICER'S SUPPLEMENTAL RECOMMENDED ORDER

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

I. PROCEDURAL HISTORY:

Hearing Officer Joey D. Rix issued his Supplemental Recommended Order ("SRO") on July 20, 2017, in accordance with Fla. Admin. Code. Rule 28-106.216. On August 2, 2017, the FOP filed one (1) Exception to the SRO.[1]

II. STANDARD OF REVIEW:

A Hearing Officer's Recommended Order should not be rejected or modified by the Commission unless a review of the entire record shows the findings and conclusions were not

[1] On August 1, 2017, the City filed an unopposed motion for extension of time to file its exceptions to the SRO. On August 2, 2017, the Commission granted the City's motion, extending the deadline to file exceptions to August 14, 2017.

supported by competent, substantial evidence and/or the Commission determines that the underlying legal proceedings upon which the Hearing Officer's findings of fact are based failed to comply with the essential requirements of applicable law. The City respectfully submits that a thorough review of the entire record reveals that the Hearing Officer's recommendation concerning the FOP's motion for attorney's fees and costs is supported by competent substantial evidence, and that the underlying legal proceedings with respect to that issue comply with the essential requirements of law.[2] Therefore, the FOP's Exception No. 1 should be denied.

III. SPECIFIC RESPONSE TO FOP'S EXCEPTION NO. 1

City's Response to FOP's Exception No. 1:

The FOP's contention that an award of attorney's fees in this matter is appropriate is unfounded, and the City respectfully submits that the Commission should reject the FOP's Exception No. 1.

Pursuant to Section 447.503(6)(c), Florida Statutes, the Commission may, in its discretion, award reasonable attorney's fees and costs to a prevailing party if it determines such an award to be appropriate. The standard is whether the offending party knew or should have known that its action constituted a violation of protected rights of public employees. School Dist. of Indian River County v. Fla. PERC, 64 So. 3d 723, 730 (Fla. 4th DCA 2011). Where the state of law at issue is not well settled or the case is one of first impression, Commission case law dictates an award of attorney's fees is inappropriate. Jacksonville Supervisors Ass'n v. City of Jacksonville, 26 FPER ¶ 31140 (PERC 2000); Orange County Prof'l Fire Fighters, I.A.F.F., Local 2057 v. Orange County Board of County Comm'rs, 38 FPER ¶ 131 (PERC 2011).

[2] This statement only pertains to the Exception filed by the FOP. The City has filed Exceptions as to other issues.

In a similar case, for example, Collier Prof'l Firefighters and Paramedics, International Ass'n of Firefighters, Local 2396, AFL-CIO v. East Naples Fire Control & Rescue Dist., 40 FPER ¶ 176 (PERC 2013), the Commission adopted the hearing officer's recommendation against awarding attorney's fees and costs to the union even though the union was the prevailing party. In his recommended order, the hearing officer found:

> This is a case involving an emerging area of the law: the interpretation and application of Section 447.4095, Florida Statutes. The Fire District tested the parameters of this statutory provision like Local 2396 is testing the Commission's decision in City of Miami. Because this is a case of first impression, Local 2396 is not entitled to an award of attorney's fees.

Id. The Commission ultimately agreed with the hearing officer's determination that the case was one of first impression, and therefore the respondent could not have been said to have knowledge that it acted unlawfully. Id.

In the instant case, the FOP has failed to prove that the City knew or should have known that its conduct violated Chapter 447, Florida Statutes. As indicated to by the hearing officer in Collier Prof. Firefighters, well established case law governing contractual modifications under section 447.4095, Florida Statutes, did not exist at the time the City was required to act. In fact, the City was following the body of law in existence at the time, which conclusively permitted the City to unilaterally modify the bargaining agreement prior to completing the impasse resolution procedure after properly declaring a financial urgency. Furthermore, both the Commission and the First District Court of Appeals issued opinions in the City's favor after reviewing the City's modification of the bargaining agreement pursuant to the financial urgency statute. Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc., v. City of Miami, 38 FPER ¶ 330 (PERC 2012) ("If an employer is required to complete the entire impasse process before the contact can be changed, it could lose the ability to address the financial urgency, a result not intended by

the statute"); Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police v. City of Miami, 118 So. 3d 885, 887 (Fla. 1st DCA 2013) ("[T]he Union contends that PERC erred in construing section 447.4095 to allow the City to unilaterally modify the CBA without first proceeding through the impasse resolution process set forth in section 447.403. We disagree.").

Additionally, prior to the Florida Supreme Court granting review, it remained unclear whether a public employer was required to demonstrate that funds were unavailable from any other possible source prior to unilaterally modifying a CBA. Headley, 215 So. 3d at *1. In its opinion, the Florida Supreme Court twice was obligated to use canons of statutory construction, because "both parties provide[d] reasonable interpretations of the statute and the statute is ambiguous as to when a modification may be made." Id. at *9.

> The Commission has consistently held that in the absence of a case precisely on point which would have warned a respondent that it acted unlawfully, the respondent would not know or should have known that its conduct was violative of Chapter 447, Part II, Florida Statutes. As a novel issue, neither side would be entitled to an award of attorney's fees and costs.

City of Naples, 40 FPER ¶ 284. At the very least, the same can be said here. Therefore, an award of attorney's fees and costs to the FOP is not appropriate, and the Commission should reject the FOP's Exception No. 1.

IV. CONCLUSION

In sum, in the present case, the Hearing Officer, the Commission, and the First District Court of Appeal determined that the City's actions were not unlawful. Moreover, although the Florida Supreme Court clarified section 447.4095, Florida Statutes, in doing so, the Florida Supreme Court found that both the City's and the FOP's interpretations of the statute were

reasonable. Accordingly, the Hearing Officer is correct that under these circumstances it cannot be concluded that the City knew or should have known that its actions were unlawful.[3]

Respectfully submitted,

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[3] Notwithstanding, for the reasons set forth in the City's Exceptions to Hearing Officer's Supplemental Recommended Order filed August 14, 2017, the competent substantial evidence in the record supports that due to exigent circumstances the City acted immediately and lawfully to address its financial emergency.

By: */s/ Michael Mattimore*
MICHAEL MATTIMORE

By: */s/ Luke Savage*
LUKE SAVAGE

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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