

STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

BROWARD COUNTY POLICE :
BENEVOLENT ASSOCIATION, INC., :
CHARTERED BY THE FLORIDA :
POLICE BENEVOLENT :
ASSOCIATION, INC., :

Charging Party, :

v. :

CITY OF HOLLYWOOD, :

Respondent. :

Case No. CA-2012-016

HEARING OFFICER'S
RECOMMENDED ORDER

Michael Braverman, Fort Lauderdale, attorney for Charging Party.

J. Robert McCormick, Tampa, and Paul T. Ryder Jr., Sunrise, attorneys for Respondent.

INGRAM, Hearing Officer.

On March 12, 2012, Broward County Police Benevolent Association, Inc., Chartered by the Florida Police Benevolent Association, Inc. (PBA), filed an unfair labor practice (ULP) charge against the City of Hollywood (City). According to the charge, the City improperly invoked financial urgency, pursuant to Section 447.4095, Florida Statutes (2017),¹ and failed to follow the legislatively required procedures by unilaterally changing the contractual terms and conditions of employment of bargaining unit employees represented by the PBA before completing the impasse resolution procedure set forth in

¹Statutory citations are to the 2017 edition of the Florida Statutes. To the extent that events discussed herein took place before 2017, it can be assumed that the applicable statutory language at the time was not substantively different from the 2017 version.

Section 447.403, Florida Statutes. The City denied the PBA's allegations. Both parties requested awards of attorney's fees and litigation costs. A notice of sufficiency was issued on March 19, a hearing officer was appointed, and an evidentiary hearing was scheduled.

On July 27, 2011, prior to filing the instant case, the PBA filed a similar ULP charge against the City for its decision to declare financial urgency for fiscal year 2010-2011, which was docketed as Commission Case Number CA-2011-098. On July 18, 2012, the Commission decided in favor of the City in a final order, which the PBA appealed to the First District Court of Appeal. See *Broward County Police Benevolent Association, Inc., Chartered by the Florida Police Benevolent Association, Inc. v. City of Hollywood*, 39 FPER ¶ 62 (2012), *per curiam aff'd*, 115 So. 3d 362 (Fla. 1st DCA 2013). On August 29, upon the PBA's request, the Commission stayed the instant case until the appellate court issued a decision in CA-2011-098.

Subsequently, the Florida Supreme Court issued its opinion in *Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police, Inc. v. City of Miami*, holding that once a local government declares a financial urgency, it does not have the ability to unilaterally alter the terms and conditions of a collective bargaining agreement (CBA) before completing the procedures required by the Legislature in Sections 447.4095 and 447.403, Florida Statutes. 38 FPER ¶ 330 (2012), *rev'd*, 215 So. 3d 1 (Fla. 2017). Based on that decision, the Commission directed the parties to show cause why the stay should not be lifted. In their November 13 and November 27, 2017, responses, the City

and the PBA, respectively, requested that the stay be lifted and raised disputed issues of fact that required an evidentiary hearing. On December 5, the Commission issued an order lifting the stay. The case was reassigned to the undersigned hearing officer on December 11, and a new hearing date was set.

In light of *Headley* and the City's admission that it declared financial urgency for fiscal year 2011-2012 and modified the parties' CBA prior to completing the impasse process in Section 447.403, Florida Statutes, I issued an order directing the parties to narrow the scope of the hearing to the remedy to be afforded under the circumstances, including whether a contractual waiver of any remedy applies.

After due notice and without objection, a telephone hearing was held between Tallahassee and Hollywood before the undersigned hearing officer on March 6, 2018. Both parties were given an opportunity to appear, present evidence, examine and cross-examine witnesses, and fully participate in the hearing. Both parties elected to file post-hearing documents in lieu of presenting oral closing argument at the hearing. Following two extensions of time granted by the Commission, the parties timely filed post-hearing documents, which I have considered in preparing this recommended order. An official transcript also was filed.

ISSUES

1. Whether the City committed an unfair labor practice in violation of Section 447.501(1)(a) and (c), Florida Statutes, by declaring financial urgency for fiscal year

2011-2012 and modifying the parties' CBA prior to completing the impasse process required by Section 447.403, Florida Statutes?

2. If so, what is the appropriate remedy for the unlawful conduct, or did the PBA agree to a clear and unambiguous waiver of any and all remedies should an unfair labor practice be found to have occurred?

FINDINGS OF FACT

Based on the record as a whole, including the testimony, exhibits, stipulations, and my credibility determinations, I make the following factual findings:²

1. The City is a public employer pursuant to Section 447.203(2), Florida Statutes. (Joint Ex. 1)

2. The PBA is an employee organization pursuant to Section 447.203(11), Florida Statutes, and the certified agent for a bargaining unit that includes all City police officers, sergeants, and lieutenants. (Joint Ex. 1)

3. During the time period at issue, the parties were signatories to a CBA for the periods of October 1, 2009, through September 30, 2012; October 1, 2012, through

²The parties' stipulations appear in Joint Exhibit 1. For stylistic preference and continuity, I have incorporated the parties' stipulations, modified slightly but not substantively, into my findings of fact. Citations to the official transcript are identified as "T. at" followed by the page number(s). The PBA's exhibits are identified as "PBA-Ex." followed by the exhibit number(s). The City's exhibits are identified as "City-Ex." followed by the exhibit number(s). Use of a particular citation does not represent the sole support for any finding of fact.

September 30, 2014; and October 1, 2014, through September 30, 2017. (Joint Ex. 1; PBA-Exs. 1-3)

Declarations of Financial Urgency

4. In May of 2010, the City advised the PBA that it was facing revenue shortfalls for fiscal year 2010-2011 and asked the PBA to help the City find cost savings. The PBA voluntarily reopened negotiations on the CBA, and on August 30, 2010, the parties reached an agreement, which was set forth in a memorandum of understanding (MOU). (Joint Ex. 1)

5. On September 7, 2010, before executing the MOU, the City declared financial urgency for fiscal year 2010-2011, pursuant to Section 447.4095, Florida Statutes. On October 4, 2010, the PBA informed the City that its membership had ratified the MOU. (Joint Ex. 1) The MOU was executed on October 28, 2010. (Joint Ex. 1)

6. On May 4, 2011, the City informed the PBA that there was an additional revenue shortfall for fiscal year 2010-2011 and a projected shortfall of \$25 million for fiscal year 2011-2012. The City asked the PBA to voluntarily reopen negotiations, but the PBA declined. (Joint Ex. 1)

7. On May 18, 2011, the City declared financial urgency for fiscal year 2011-2012 and informed the PBA of the same by letter dated May 20, 2011. (Joint Ex. 1; PBA-Ex. 4)

8. Following a short series of bargaining sessions, the City voted to impose wage reductions, eliminate merit pay raises, and authorize layoffs on June 13, 2011.

(Joint Ex. 1; PBA-Exs. 5-11) Other adverse economic impacts of the City's decision included removal of longevity and increases to employee pension contributions. (T. at 35; City-Ex. 7)

9. On September 21, 2011, the City held a special referendum election on whether the City should implement imposed changes to the pension ordinance. Specifically, the changes froze the then-current pension plan, created a new plan, and deleted all language from the then-current CBA that was inconsistent with the new plan. The referendum passed, and in light thereof, the City imposed the changes, effective October 1, 2011. (Joint Ex. 1)

10. These changes were implemented in City Ordinance 0-211-27 prior to completion of the impasse resolution proceedings in Section 447.403, Florida Statutes. (Joint Ex. 1)

11. On March 12, 2012, the PBA filed the instant ULP charge against the City.
Post-Financial Urgency Negotiations

12. On or about December 11, 2012, the City submitted to the PBA proposals in an attempt to incrementally restore some of the salaries and benefits impacted by the declaration of financial urgency. (City-Ex. 3)

13. Paul Ryder, outside labor counsel for the City during the time, testified that the City did not have the financial resources at the time to restore all pay and benefits in that fiscal year, but wished to continue working with the PBA to reach additional agreements toward that end. (T. at 11, 13) In exchange for the incremental restoration

of benefits, the City's proposal included a waiver of all possible damages stemming from the two pending ULP charges, should the PBA prevail on the merits, but still allow the PBA to pursue a determination on the underlying legal issue of how to properly declare "financial urgency." (T. at 13-14; City-Exs. 3 and 6 at pg. 3)

14. A similar proposal containing the waiver language had been presented to, and agreed upon, by the Hollywood Firefighters, Local 1375, IAFF, Inc. (T. at 13; City-Ex. 6 at pg. 5) Ryder was partly responsible for crafting the waiver language and explained that it was derived from the City's attempt to alleviate the financial impact to unit members sooner than later in light of ongoing litigation on several fronts that had the potential for costly financial remedies. (T. at 12-13)

15. On December 20, 2012, the parties notified the Commission that they had reached impasse in their collective bargaining and requested a list of special magistrates to hear the disputed issues. (City-Ex. 4) A special magistrate proceeding was scheduled for April 18, 2013. (City-Ex. 5)

16. Meanwhile, the parties continued to engage in substantial negotiations, with several individuals involved, including the PBA's legal counsel, Michael Braverman, and the PBA's president, Jeffery Marano, who was the PBA's chief negotiator during the time periods at issue. (T. at 15, 34) The City's request for a waiver of remedies was included in each proposal presented to the PBA from December 2012 to May 15, 2013, when the parties reached a tentative agreement, ending the impasse. (T. at 23-24; City-Exs. 6-11, 14)

17. On July 10, 2013, the City provided the PBA a final draft of the two-year agreement in legislative format to post for unit members to review in advance of the ratification vote scheduled for July 15 and 16, 2013. (City-Exs. 15-16) Article 37.9 of the draft agreement provided, in whole:

The Union agrees for itself and for all bargaining unit employees to waive, renounce, and forego any and all remedies and payments whatsoever related to the modifications to any part of the Collective Bargaining Agreement or the Pension Plan Ordinance made by the City pursuant to financial urgency to which it or they are or may become eligible to receive, whether resulting from an award by any tribunal or through settlement of any matter related to such changes, including the pending unfair labor practice charges that are on appeal Case Number 1D12-3901 and PERC Case No. CA-2011-098 and/or the unfair labor practice charges that are stayed in PERC Case No. CA-2012-216 [sic].

(City-Ex. 16 at pg. 55) While the contract provision references PERC Case Number "CA-2012-216," the understanding was that it referred to CA-2012-016, the ULP charge that was stayed at the time. (T. at 29)

18. On or about July 16, 2013, the PBA's members voted to accept the modifications to the terms and conditions of the new two-year agreement. The agreement was made retroactive to October 1, 2012, and expired September 30, 2014. (PBA-Ex. 2; City-Ex. 1)

19. A subsequent three-year contract was ratified and made effective October 1, 2014 through September 30, 2017. Article 37.6 of that contract contained the exact same waiver provision from the prior agreement. (PBA-Ex. 3 at pgs. 50-51; City-Ex. 2 at pgs. 50-51) To date, the parties have not reached a new successor agreement.

20. The parties agreed during the hearing to withdraw their respective claims for attorney's fees and costs. (T. at 38)

ANALYSIS AND DISCUSSION

I begin this discussion by acknowledging that the City has conceded, by stipulation, that it committed an unfair labor practice in violation of Section 447.501(1)(a) and (c), Florida Statutes, by declaring financial urgency for fiscal year 2011-2012 and modifying the parties' contract prior to completing the impasse process in Section 447.403, Florida Statutes. See *Headley*, 215 So. 3d at 10 (Fla. 2017). This concession, coupled with the parties' withdrawal of their respective requests for attorney's fees, leaves only one issue for resolution: the appropriate remedy, if any, to be afforded the PBA under the circumstances.

Generally speaking, upon finding a violation of Section 447.501(1)(a) and (c), the Commission may, among other things, order the offending party to post a notice, direct the parties to return to the status quo ante, and/or order a special proceeding to determine the amount of back pay owed to injured employees. However, given the existence of an agreement between the PBA and the City to waive any right to a remedy that might result from the resolution of this case, it is not necessary for me to offer the Commission a recommendation of an appropriate remedy.

Here, following the City's declaration of financial urgency and prior to a final determination on the two ULP charges that were filed as a result, the parties negotiated two consecutive CBAs, which contained the following provision:

The Union agrees for itself and for all bargaining unit employees to *waive, renounce, and forego any and all remedies and payments whatsoever related to the modifications to any part of the Collective Bargaining Agreement or the Pension Plan Ordinance made by the City pursuant to financial urgency to which it or they are or may become eligible to receive*, whether resulting from an award by any tribunal or through settlement of any matter related to such changes, including the pending unfair labor practice charges that are on appeal Case Number 1D12-3901 and PERC Case No. CA-2011-098 and/or the unfair labor practice charges that are stayed in PERC Case No. CA-2012-216 [sic].³

(Emphasis added) (City-Exs. 1 at pgs. 52-53 and 2 at pgs. 50-51) This language is clear and unambiguous.

Under general principles of contract construction, a contract is to be construed according to its clear and unambiguous language.⁴ Where the terms of a contract are

³While the contract provision references PERC Case Number "CA-2012-216," the only ULP charge involving the parties that was stayed at the time was the instant case, CA-2012-016. This fact was understood by the parties during the negotiations and was uncontroverted during the hearing. (T. at 29)

⁴In its pre-hearing and post-hearing submittals, the PBA avers that a "clear and unmistakable" standard should be applied in analyzing the contract provisions at issue here. However, that standard historically has applied to waivers of bargaining rights, which is different from the PBA's waiver of possible legal remedies in this case. *Cf. Palowitch v. Orange County Classroom Teachers Association*, 2 FPER 280, 282 at n. 14 (1977); *see also FOP, Miami Lodge 20 v. City of Miami*, 12 FPER ¶ 17029 (1985) (stating that a clear and unmistakable contractual waiver must be one that explicitly and expressly delineates specific working conditions which an employer can unilaterally change).

unambiguous, the parties' intent must be determined from within the four corners of the document. See *Crawford v. Barker*, 64 So. 3d 1246, 1255 (Fla. 2011). "In such a situation, 'the language itself is the best evidence of the parties' intent, and its plain meaning controls.'" *Id.* (quoting *Richter v. Richter*, 666 So. 2d 559, 561 (Fla. 4th DCA 1995); see also *Federation of Public Employees v. City of Pompano Beach*, 9 FPER ¶ 14111 at 219 (1983) (stating that absent some ambiguity in the language of a contract, there is no occasion to resort to evidence outside the four corners of the document); see also *Holmes County Teachers' Association v. The School Board of Holmes County*, 9 FPER ¶ 14207 (1983). Parol evidence may not be used to supplement or contradict the clear language of a written contract. See *id.*; *Paradise Beach Homes, Inc. v. South Atlantic Lumber Company, Inc.*, 118 So. 2d 825 (Fla. 1st DCA 1960).

The explicit provisions contained in the parties' contracts allow for only one interpretation: that the PBA agreed to "waive, renounce, and forgo any and all remedies and payments whatsoever" related to the instant case. The language is so explicit that it references the financial urgency declaration giving rise to the two ULP charges, CA-2011-098 and CA-2012-016, that were filed as a result thereof. Therefore, I conclude that the PBA expressly agreed to an unequivocal waiver of any and all remedies, including economic and non-economic remedies. Notwithstanding, this waiver of remedies provision does not preclude a finding that the City committed an unfair labor practice by prematurely declaring financial urgency.

The PBA asserts that the waiver provision is void by operation of Article 38.2 of the CBA, which states in pertinent part: "It is understood and agreed that if any part of this Agreement is in conflict with mandatory Federal or State Laws ... such parts shall be renegotiated and the appropriate mandatory provisions shall prevail." Essentially, the PBA argues that the City's actions were voided by the *Headley* decision and, therefore, any subsequent agreement stemming from that decision is void. The PBA's application of this contract language to the court's holding in *Headley* is a strained one. The *Headley* court held that the lower court's interpretation of the financial urgency statutory provisions violated the Florida Constitution by permitting unilateral changes to a CBA. The court's decision merely rendered unlawful the City's actions in bypassing the impasse procedures while declaring financial urgency, not the underlying statutes. Further, no part of the negotiated waiver provisions at issue here is in conflict with mandatory federal or state laws. Moreover, the PBA cites to no case law to suggest that it is unlawful for a party to agree to forego its rights to certain legal remedies in exchange for incremental restoration of certain wages and benefits.

Also, I reviewed the parties' bargaining history during the period of declared financial urgency to fully understand the procedural posture of this case. It is apparent from that review that the parties' agreement to forego any and all remedies was the result of lengthy and robust collective bargaining. It would be unreasonable to assume that the bargained-for provision at issue here represents anything other than valid legal promises on one side which were supported by valid legal promises on the other side. As part of

the collective bargaining process, the PBA was free to reject the waiver provision and pursue both a legal determination and a full legal remedy in this case, at whatever point in the future it was afforded. The fact that the exact same "waiver" provision appears in two consecutive bargaining agreements following the City's declaration of financial urgency and the PBA's filing of two related ULP charges suggests that the PBA took a risk by accepting the City's offer of incremental restoration of wages and benefits at that time as opposed to awaiting a final determination from an adjudicatory body. It is important to note that at the time the contracts containing the waiver provisions were ratified, the City's position regarding financial urgency was the prevailing position. By enforcing the waiver provision, the Commission would not be imposing an obligation on the parties that they themselves did not voluntarily enter into, but instead would be giving effect to the parties' own earlier decision on how they wished to govern themselves as it relates to the ULP charges filed against the City.

CONCLUSIONS OF LAW

1. The City committed an unfair labor practice in violation of Section 447.501(1)(a) and (c), Florida Statutes, by declaring financial urgency for fiscal year 2011-2012 and modifying the parties' CBA prior to completing the impasse process required by Section 447.403, Florida Statutes.

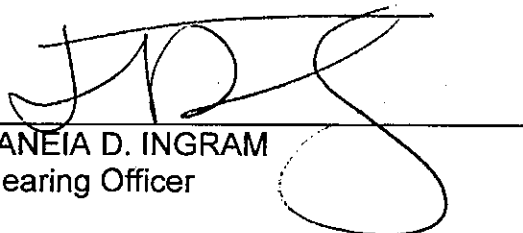
2. Pursuant to a clear and unambiguous contract provision, the PBA waived any and all remedies that shall arise out of the resolution of this case, which voids the need to determine an appropriate remedy as a result of the City's unlawful conduct.

RECOMMENDATION

I recommend that the Commission adopt the foregoing findings of fact, analysis, and conclusions of law, incorporate this recommended order into the final order, and DISMISS the PBA's charge.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within **fifteen** days from the date of this order. See Fla. Admin. Code R. 28-106.217(1). An extension of time for filing exceptions will not be granted unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 28-106.216 and SERVED on all parties this 9 day of May, 2018.



JANEIA D. INGRAM
Hearing Officer

JDI/bjk

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Fax: (305) 278-1129	Pages: 15
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May 9 2018 11:27am

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Fax: (954) 791-2141	Pages: 15
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