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,	:	HEARING OFFICER'S SUPPLEMENTAL RECOMMENDED ORDER
Respondent.	:	

Robert D. Klausner, Plantation; Paul A. Daragjati, Jacksonville; Ronald J. Cohen, Fort Lauderdale; and Osnat K. Rind, Miami, attorneys for charging party.

Michael Mattimore, Tallahassee; Luke C. Savage, Coral Gables; and Victoria Mendez, Kevin R. Jones, and John A. Greco, Miami, attorneys for respondent.

RIX, Hearing Officer.

On May 18, 2017, the Commission issued an order concluding that the City of Miami (City) was not statutorily authorized to unilaterally modify a collective bargaining agreement between it and the Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc. (FOP).[1] The Commission found that in so doing the City violated Section 447.501(1)(a) and (c), Florida Statutes, (2016),[2] by unilaterally changing wages, pensions, health insurance, and other monetary items prior to completing the

[1]The Commission's order resulted from the Florida Supreme Court's recent decision in *Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police, et al. v. City of Miami, Florida,* 215 So. 3d 1 (Fla. 2017).

[2]All references to the "Florida Statutes" are to the 2016 edition of the Florida Statutes. I note that the 2010 edition of the Florida Statutes was in effect when the FOP's unfair labor practice charge was filed. However, any interim revisions to the Florida Statutes do not affect the statutory provisions at issue and have no impact on the outcome of this case.

Section 447.403, Florida Statutes, impasse resolution procedure. Therefore, the Commission remanded this case to me with instructions to rely on the existing record and make a recommendation on the FOP's motion to return the parties to the status quo ante and its motion for an award of attorney's fees and costs of litigation.

Consistent with the Commission's order, I afforded the parties an opportunity to file written argument on the motions prior to issuance of my supplemental recommended order. Following two extensions of time for filing, on July 7, the FOP filed a memorandum in support of its motions; the City filed a brief along with a proposed hearing officer's recommended order. I have considered the parties' submissions in preparing this supplemental recommended order.

Procedural Issue

The City initially argues that the affirmative defenses it raised on October 11, 2010, must be addressed. In its answer to the FOP's unfair labor practice charge the City asserted that "[d]ue to exigent circumstances the [City] acted lawfully in modifying the terms and conditions of employment of its bargaining unit members." In my recommended order, I accepted the City's evidence and argument that in July 2010, it was facing an operating deficit of over $115 million. In an effort to address its budget deficit, the City implemented a hiring freeze, implemented all scheduled layoffs, stopped procurement, and initiated plans for the various City departments to determine which positions could be eliminated. The City determined that, if it did not take action, its personnel costs would exceed all revenues and consume 101% of its budget. Pension

costs alone would have depleted approximately twenty-five percent of the City's budget. In addition, the City was legally obligated to enact a balanced budget by October 1, 2010. At hearing and in its post-hearing document, the FOP acknowledged that it did "not dispute for purposes of this hearing that the City was projecting a large budget deficit for fiscal year 2010." In preparing my recommended order, I considered the City's defenses and concluded that the City did not act unlawfully. The Commission agreed with that conclusion. Therefore, the City's defenses have been addressed.

However, even assuming that the City's affirmative defenses were not addressed, the City could have filed an exception after issuance of the recommended order pursuant to Section 120.57(1)(k), Florida Statutes, and raised the issue with the Commission. *See also* Fla. Admin. Code Rule 28-106.217(1). The Commission's records reflect that the City did not except to the recommended order. Therefore, the City's argument regarding its affirmative defenses is without merit. I turn now to the FOP's motions.

The FOP's Motion to Return the Parties to the Status Quo

As stated above, the Commission has determined that the City violated Section 447.501(1)(a) and (c), Florida Statutes. The FOP argues that, consistent with the long-established remedy for unfair labor practices relating to unilateral changes to terms and conditions of employment by public employers, the appropriate remedy is to return the parties to "status quo ante." In this case the status quo ante is the position the parties were in on September 29, 2010, the day prior to the City's adoption of its budget.

The FOP contends that for seven years the City has solved its financial difficulties on the backs of its employees by unlawfully withholding millions of dollars from employee wages and benefits to fund municipal operations, after taking the politically popular path of lowering ad valorem taxes.[3] It argues that failing to order a return to the status quo ante would reward the City for its constitutional and statutory violations of FOP members' rights, which the Supreme Court held were "fundamental."

In findings of fact 2 and 37-39 of my recommended order, I determined that the FOP is the certified bargaining agent for separate units of police and detention personnel employed by the City. On August 31, 2010, the City Commission passed a resolution adopting modifications to the wages, health care, and pension benefits of employees represented by the FOP, effective September 30, 2010. The modifications included tiered wage reductions, elimination of education pay supplements, conversion of supplements from a percentage to a flat dollar amount, increase of crime prevention pay to $2,700.00, no longer allowing supplemental pay to roll into base pay for calculation of overtime, and freezing step and longevity pay.

The pension plan modifications included a change in the normal retirement date to the "Rule of 70", and modification of the benefit formula to 3% per year for all future

[3]The City disputes the FOP's claim regarding the extent of the bargaining unit employees' losses. According to the City, if a retroactive remedy is 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. I need not address this dispute at this time.

service. The detention officers represented by the FOP participated in the "GESE" pension plan (as opposed to the FIPO plan).[4] The City Commission also modified the "GESE" pension plan on August 31, 2010. Some of the modifications were effective October 1, 2010, and other changes were to take effect on October 1, 2011; October 1, 2012; and October 1, 2013. The City changed its FIPO ordinance effective September 30, 2010.

The FOP contends that the City's actions referenced above should be deemed "void ab initio." Alternatively, the FOP proposes that the parties be given an opportunity to seek a settlement within a discrete time period, and failing an agreement, the status quo ante will be restored. Finally, as further explained below, the FOP contends that it should be awarded its attorney's fees.

The City counters, arguing that (1) competent substantial record evidence supports the conclusion that, due to exigent circumstances, the City acted immediately and lawfully to address its financial emergency; (2) the FOP's failure to act in good faith obviates any right to a remedy; and (3) assuming a remedy is warranted, the remedy should be prospective only. For the reasons discussed below, I recommend that the Commission grant the FOP's motion to return the parties to the status quo ante on September 29, 2010.

[4]The "FIPO" plan refers to the Fire Fighter and Police Officer Retirement System.

The Florida Legislature has authorized the Commission to fashion a remedy in unfair labor practice cases pursuant to Section 447.503(6)(a), Florida Statutes, which states, in pertinent part:

> If, upon consideration of the record in the case, the commission finds that an unfair labor practice has been committed, it shall issue and cause to be served an order requiring the appropriate party or parties to cease and desist from the unfair labor practice and take such positive action, including reinstatement of employees with or without back pay, as will best implement the general policies expressed in this part.... If, upon consideration of the record in the case, the commission finds that an unfair labor practice has not been or is not being committed, it shall issue an order dismissing the case.

In the instant case, the Florida Supreme Court and the Commission determined that the City unilaterally altered the parties' collective bargaining agreement without proceeding through the impasse resolution process in Section 447.403, Florida Statutes.

The traditional remedy for an unfair labor practice relating to unilateral changes in terms and conditions of employment by public employers is to return the parties to the status quo ante. *See, e.g., International Union of Police Associations v. State, Department of Management Services*, 855 So. 2d 76, 77–78 (Fla. 1st DCA 2003); *Palm Beach Junior College v. United Faculty of Palm Beach Junior College,* 475 So. 2d 1221, 1227 (Fla.1985); *Martin County Education Association v. School District of Martin County,* 34 FPER ¶ 85 (2008); *Fire Rescue Professionals of Alachua County, Local 2852, IAFF v. Alachua County*, 28 FPER ¶ 33158 (2002).

I am unpersuaded by the City's contention that, due to exigent circumstances, it acted immediately and lawfully to address its financial emergency. This contention overlooks the undisputed fact that the City failed to proceed through the Section 447.403, Florida Statutes, impasse resolution proceedings as required by Section 447.4095, Florida Statutes, prior to modifying the parties' collective bargaining agreement. Therefore, 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.

The City's second contention is that the FOP's failure to act in good faith obviates any right it has to a remedy. The City contends that based on the FOP's proposals during the negotiations, its stated positions, and its 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. The record evidence does not support the City's contention.

Rather, the record evidence shows that the FOP's negotiators met and bargained with the City's negotiators from June through October 2010. The parties reached agreement on several contract articles and worked on cost-saving proposals. 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. *See* Recommended Order, findings of fact 13-46.

"Collective bargaining" is defined in Section 447.203(14), Florida Statutes, which, in pertinent part, provides "neither party shall be compelled to agree to a proposal or be required to make a concession...." Additionally, the Commission has held that a party's obligation to bargain in good faith does not require it to retreat from a lawful bargaining position. *See Local Number 3510, Columbia County EMS Association, International Association of Firefighters v. Columbia County Board of County Commissioners*, 38 FPER ¶ 331 (2012); *IAFF, Local 1621 v. City of Riviera Beach, 7 FPER ¶ 12370 (1981); Duval Teachers United, FEA-AFT v. Duval County School Board,* 3 FPER 96 (1977). Thus, the FOP was not compelled to agree to the City's proposed adjustments in wages, health care, and pension costs. In sum, the credited evidence does not support the City's contention that the FOP's bargaining position was a subterfuge to maintain the status quo.

Furthermore, the City's reliance on *Professional Fire Fighters of Naples, IAFF, Local 2174 v. City of Naples,* 40 FPER ¶ 284 (2014), in support of its contention that the FOP failed to act in good faith is misplaced. In that case, unlike the instant case, the Commission determined that the city did not commit an unfair labor practice. In addition, in *City of Naples,* the hearing officer determined that the union accepted the city's pension proposal, not to reach an accord with the city, but to derail the impasse resolution process and perpetuate the status quo. *Id.* at 575. In this case, the credited evidence does not establish that the FOP attempted to derail the impasse resolution process and perpetuate the status quo.

In its third contention, the City initially argues that it should not be held to have committed an unfair practice where the existing law at the time of its actions validated its position that 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. This contention again overlooks the Commission's conclusion that the City failed to proceed through the Section 447.403, Florida Statutes, impasse resolution proceedings prior to modifying the parties' collective bargaining agreement as required by Section 447.4095, Florida Statutes. Thus, the Commission concluded that that City violated Section 447.501(1)(a) and (c), Florida Statutes. Simply stated, I do not have the authority to reject the Commission's conclusion regarding the City's unlawful action.

The City next argues that, assuming a remedy is warranted, the remedy should be prospective only given the state of the case law at the time of its actions and novelty of the issue. The City cites *Dade County Police Benevolent Association, Inc. v. Miami-Dade County Board of County Commissioners,* 43 FPER ¶ 105 (2016); *Allen v. Miami-Dade College Board of Trustees,* 43 FPER ¶ 6 (2016), *per curiam aff'd,* 2017 WL 363130 (Fla. 3d DCA Jan. 25, 2017); and *Board of County Commissioners of Jackson County v. International Union of Operating Engineers,* 620 So. 2d 1062 (Fla. 1st DCA 1993), in support of this contention. The *Allen* and *Jackson County* cases are inapposite because

in neither case were the employers found to have committed an unfair labor practice which would trigger the Commission's authority to fashion a remedy pursuant to Section 447.503(6)(a), Florida Statutes. Moreover, while I agree with the City that its position finds some support in *Miami-Dade County*, the instant case is distinguishable.

As the City correctly states, in *Miami-Dade County* the Commission found that the county 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 employees' health care contributions. On appeal, the First District Court of Appeal rejected the Commission's conclusion, held that the mayor's veto constituted an unfair labor practice, and remanded the case to the Commission to determine the appropriate remedy for that unfair labor practice. The issue before the Commission was whether it should order a retroactive or prospective remedy. 43 FPER at 159.

The Commission remanded the case to me, as hearing officer, to consider that issue. I issued an order recommending, among other things, that the Commission direct the county to void a January 24, 2012, impasse resolution requiring union members to contribute an additional 4% of their base salaries toward the county's cost of health care and refund the 4% of base salaries deducted from the bargaining unit members' paychecks from February 6 through September 30, 2012, plus interest at a lawful rate.

As here, the county contended that only a prospective remedy was appropriate. Specifically, the county argued that the prospective remedies of issuing a cease and desist directive regarding future vetoes by the mayor and requiring the posting of a notice

were appropriate and the Commission should reject the recommended retroactive remedies involving refunding of health care contributions to bargaining unit members.

The Commission agreed with the county and held that the holding in the case should be applied only prospectively. The Commission reasoned that the issue was an issue of first impression, and there existed a General Counsel decision which ratified the mayor's practice of vetoing such resolutions. In addition, the Commission reasoned that the fact that the legislative body, rather than the mayor, subsequently instituted the 4% contribution made it inappropriate to order a retroactive remedy in *Miami-Dade County* under the circumstances.

In my view, the instant case is factually distinguishable because it involves the City's unlawful change to bargaining unit members' wages, pensions, health insurance, and other monetary items prior to completing the Section 447.403, Florida Statutes, impasse resolution procedure. Finally, in *Miami-Dade County,* the Commission found that the legislative body, rather than the mayor, subsequently instituted the 4% contribution. Thus, the overall effect of the mayor's unlawful action was mitigated somewhat by the legislative body's subsequent lawful action. The factors the Commission considered in fashioning a prospective remedy, along with a cease and desist order, in *Miami-Dade County* do not exist here.

Having considered the parties' arguments, I agree with the FOP that, having found that the City violated Section 447.501(1)(a) and (c), Florida Statutes, by unilaterally changing wages, pensions, health insurance, and other monetary items prior to

completing the Section 447.403, Florida Statutes, impasse resolution procedure, the appropriate remedy is to return the parties to the status quo ante as of September 29, 2010. This recommendation is consistent with the *Chiles* and *Headley* decisions. *See Chiles v. United Faculty of Florida,* 615 So. 2d 671, 673 (Fla. 1993) (directing the employer to adjust the pay and pay records of employees covered by the applicable collective bargaining agreements and to take steps to retroactively implement the pay raise covered by the court's opinion). In *Headley,* the Court reaffirmed its decision in *Chiles* stating "[f]inding that the Legislature did not satisfy the requirements of this test, we ordered the reinstatement of the pay raises." 215 So. 3d at 7. This remedy is also consistent with the Commission's authority to take such positive action as will best implement the general policies expressed in Chapter 447, Part II. *See* § 447.503(6)(a), Fla. Stat.

The FOP's Motion for Attorney's Fees and Costs

The FOP is the prevailing party in this case. Pursuant to Section 447.503(6)(c), Florida Statutes, the Commission "may award to the prevailing party all or part of the costs of litigation, reasonable attorney's fees, and expert witness fees whenever the commission determines that such an award is appropriate."

The FOP contends that, inasmuch as the City unilaterally modified a collective bargaining agreement without employing the impasse resolution procedures in Section 447.403, and based on the overwhelming body of Commission decisions that such

actions violate the law, the City knew or should have known that it was violating well-established law when it unilaterally altered the terms and conditions of the bargaining unit members' employment. The City argues that the state of the law at issue was not well settled, and the record evidence does not show that it knew or should have known that its conduct was unlawful.

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. However, the Florida Supreme Court disagreed, reversed, and remanded the case. Under these circumstances I cannot conclude that the City knew or should have known that its actions were unlawful. Therefore, I recommend against an award of attorney's fees and costs in favor of the FOP.

RECOMMENDATION

As stated above, the Commission has determined that the City violated Section 447.501(1)(a) and (c), Florida Statutes, by unilaterally changing wages, pensions, health insurance, and other monetary items prior to completing the Section 447.403, Florida Statutes, impasse resolution procedure. I recommend that the Commission direct the City to rescind its modifications to the wages, health care, and pension benefits of employees represented by the FOP beginning on September 30, 2010, as described in findings of fact 37-39 of my recommended order. I also recommend that the

Commission direct the parties to return to the status quo ante as of September 29, 2010, the day prior to the effective date of its unlawful action.

As stated above, the FOP proposes that the parties be given an opportunity to seek a settlement within a discrete time period, and failing an agreement, the status quo ante would be restored. However, there is no indication that the City joins in this proposal. Therefore, I do not agree with the FOP's request that the Commission "order" the parties to negotiate the terms of a resolution for a period not in excess of sixty days. If, however, the City joins in the FOP's request for a sixty-day period to negotiate over a settlement agreement, the parties should be given that opportunity prior to issuance of the Commission's final order in this case.

I recommend against an award of attorney's fees and costs in favor of the FOP. The parties' exceptions must be filed in accordance with the Commission's remand order issued on May 18, 2017.

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 20th day of July, 2017.

Joey D. Rix

JOEY D. RIX
Hearing Officer

JDR/bjk

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