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August 16, 2017

Board of Trustees
Hollywood Police Pension
4205 Hollywood Blvd., Ste. 4
Hollywood, FL 33021

Re: Impact of Supreme Court decision in *Headley v. City of Miami*
Our File: 160007

Dear Trustees:

This is in response to a request by the Board of Trustees of the Hollywood Police pension Plan for guidance concerning the effect of the Florida Supreme Court decision in *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017) as it relates to the City of Hollywood.

As you are aware, the *Headley* case resulted from a review of the Florida Supreme Court of two conflicting decisions from the First District Court of Appeal in the case of Miami and Fourth District Court of Appeal in the case of Hollywood. The Fourth DCA had found that the City of Hollywood violated the Florida Constitution in the manner of its application of Section 447.4095, Fla. Stat. also know as the Financial Urgency Law.

In its decision, the Supreme Court found that the Fourth DCA decision concerning Hollywood was the correct view of the law and that the First DCA decision concerning Miami was wrong. The First DCA decision was quashed and the Court adopted the Fourth DCA's reasoning in Hollywood. See *Headley*, at p. 10. The Hollywood ULPs were stayed, but the remedy must be the same. It is for that reason, that we have advised deferring action until PERC issues a final order in the Miami case.

You have also inquired whether the intervening referendum changes the result. It does not. In *City of Miami v. Board of Trustees*, 91 So. 3d 237 (Fla. 3d DCA 2012), a case argued by the City of Hollywood's counsel, the Third District Court of Appeal consider a

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challenge by the Miami Beach Police and Fire Pension Fund to the implementation of a collective bargaining agreement without conducting a referendum on the changes to the pension plan. The Third DCA held that a referendum affecting the rights of municipal employee pensions violated the constitutional rights of employees under the collective bargaining provision of the state constitution. The ordinance which was submitted to the electors in Hollywood was void because it was the product of a violation of the constitutional bargaining rights of the Hollywood city employees. The electors cannot vote to ratify an unconstitutional act that deprives plan members of their rights. As the *Miami Beach* case establishes, local referendums cannot supplant the constitutional bargaining rights of the employees.

In the current collective bargaining agreement between the Broward County PBA and the City, there is a waiver of back pay and remedies for bargaining unit members but does not waive the unfair labor practices themselves. Customarily, in a failure to bargain unfair labor practice, the remedy is a "make whole remedy," which means that the parties are restored to the positions which they occupied on the day before the unfair labor practice was committed.

Following the Headley decision, the matter was ultimately remanded to the Public Employees Relations Commission (PERC) to determine the proper remedy. A PERC hearing officer has recommend a make whole remedy and that every action taken under the Financial Urgency statute be rescinded. A final order from PERC is expected in the next few months.

Assuming that remedy is ultimately adopted by PERC, the effect would be to invalidate the ordinances in Miami and Hollywood which reduced retirement benefits. This would effectively mean that the last valid ordinance is the one in effect prior to 2011.

Based on the collective bargaining agreements, an argument could be made that even if this occurs, that the City would not owe back damages during this period. While the union and the City may bargain over the economic damages for bargaining unit members only, if the ordinance was adopted in an unconstitutional act, the ordinance is void *ab initio*. A void law is of no effect as if it had not been adopted.

The basis of our reasoning is as follows:

The Florida Supreme Court has rejected the City's construction of Section 447.4095 and it is now *res judicata* that in 2011 the City violated Section 447.501 by breaching its collective bargaining agreement by unilaterally imposing changes to wages, pensions, health insurance and other monetary items. Under such circumstances, the long-established 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." *Int'l Union*

of Police Associations v. State, Dep't of Mgmt. Servs., 855 So.2d 76 (Fla. 1st DCA 2003); *see also Escambia Educ. Ass'n v. Escambia County Sch. Bd.*, 10 FPER 15160 (1984); *Nassau Teachers Ass'n v. Sch. Bd. of Nassau County*, 8 FPER 13206 (1982). The Florida Legislature designed the Public Employees Relations Act to reflect this philosophy, providing that if the Commission finds 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.

See § 447.503(6)(a), Fla. Stat. The Supreme Court has recognized that labor relations between public employees and their employers are a "sensitive area," and that the Act provides public employees with the same collective bargaining rights as those of private workers, except for the ability to strike. *Dade County Classroom Teachers' Association v. Ryan*, 225 So.2d 903, 905 (Fla. 1969). A make-whole remedy is standard in private sector cases. *Camelot Terrace, Inc. v. N.L.R.B.*, 824 F.3d 1085, 1092-93 (D.C. Cir. 2016) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976); *N.L.R.B. v. Haberman Const. Co.*, 618 F.2d 288 (5th Cir. 1980). Accordingly, it is the proper standard for Florida public employees.

> Three decades ago, the Fourth District analyzed § 447.503(6)(a) and stated: [T]he legislature has designated PERC as the forum for resolving matters...involving public employees, and has specifically directed PERC to take positive action in resolving the dispute, which, in its discretion, may include allowing or disallowing back pay in order to effectuate the policy interests involved in this act.

Town of Pembroke Park v. Florida State Lodge, Fraternal Order of Police, 501 So.2d 1294, 1296 (Fla. 4th DCA 1986). In *Pembroke Park*, the Town contracted away its police department without bargaining and displaced a number of employees who the Sheriff did not want to take on. PERC ordered rescission of the contract with the Sheriff, back pay and reinstatement. The question before the court was whether the Commission was empowered by the legislature to include various elements in its calculations of back pay after finding an unfair labor practice, including interim wage increases, overtime, detail work and interest. *Id.* at 1298. The Fourth District found that PERC's order of broad, remedial relief was a reasonable exercise of the Commission's discretion and conformed to public policy. *Id.*

Furthermore, the Commission's restorative power extends to ordering affirmative actions to comply with Chapter 447. In *Fraternal Order of Police, Lodge 59 v. City of Miramar*, the employer issued a memorandum prior to a legislative impasse hearing telling the union that if it rejected the special master's impasse recommendations, the local

legislative body would impose less favorable wages, hours and terms of employment. 12 FPER ¶ 17332 (1986). In its defense, the employer argued the memorandum was issued before the "insulated period," thus it was a legitimate communication. The Commission disagreed, explaining that sanctioning the issuance of the City's memorandum because it was issued days before the start of the "insulated period," would allow a public employer to quickly end bargaining merely by announcing that rejection of its bargaining proposals will ensure imposition of less favorable terms. The Commission further explained that the "insulated period" was designed to regulate communication addressed *to* the legislative body, not communications issued *by* the legislative body. According to the Commission, the employer's actions equated to a "take it or leave it approach," condemned by the courts of Florida. Stressing this point, the Commission quoted the Fifth District in *City of Orlando v. IAFF, Local 1365*:

> It is this type of overreaching that the statute seeks to prohibit. The public entity, once it purports to be acting in its legislative or quasi-judicial capacity, may not, with impunity, wield the power implicit in that capacity as a cudgel to coerce the union into accepting terms of employment offered by the same public entity in its capacity as employer.

384 So.2d 941, 945 (Fla. 5th DCA 1980). With those considerations, the Commission returned the parties to their status before the legislative action, and ordered the Miramar City Commission to rescind the impasse resolution. PERC's order was affirmed without opinion by the Fourth District Court of Appeal. *City of Miramar v. Florida State Lodge*, 509 So.2d 321 (Table)(Fla 4th DCA 1987).

On the rare occasions the Commission has declined to restore the status quo ante, it has generally been in either failure to arbitrate cases where there has been a finding that the grievance was unlikely to succeed on the merits, *see, e.g., Kallon v. United Faculty of Florida,* 15 FPER ¶ 20047 (1988), or in a *Weingarten* violation where the employee does not prevail on the underlying offense. *Bacchus v. Metropolitan Dade County*, 11 FPER ¶ 16250 (1985). In a recent impasse resolution case, the Commission applied its ruling prospectively concerning mayoral veto of an impasse resolution, based on the "state of the case law" at the time of the unfair labor practice. *Dade County PBA v. Miami Dade County*, 43 FPER 105 (2016), *on remand, Dade County PBA v. Miami-Dade County*, 160 So.3d 482 (Fla. 1st DCA 2015).

The present case stands in stark contrast, as the Supreme Court was clear in *Headley* that neither the state of the case law, nor the clarity of the statute, was remotely in doubt. In citing to its decision in *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993), the Court explained:

> We have previously set forth the standard that must be followed where a government attempts to change a labor agreement to address a revenue shortfall... Section 447.4095 is the codification of the strict scrutiny standard we outlined in *Chiles*.

Headley v. City of Miami, 215 So.3d 1, 6 (Fla.2017). Further, the Supreme Court held that when the *Chiles* test is not met the remedy is equally clear, "...we ordered the reinstatement of the pay raises." *Id.* There is nothing ambiguous or novel about the *Chiles* test, which has been in place for nearly 25 years. The constitutional analysis protecting contracts under Article I, Sections 6 of the Florida Constitution is even older. *Hillsborough Cty. Govtl. Emps. Ass'n v. Hillsborough Cty. Aviation Auth.*, 522 So.2d 358 (Fla.1988). Analysis of the anti-impairment language in Article I, Section 10 of the Florida Constitution is older still. *Yamaha Parts Distribs., Inc. v. Ehrman,* 316 So. 2d 557 (Fla.1975). The only novel aspect of the legal analysis is that the Supreme Court's unequivocal holding in *Chiles*, as reaffirmed in *Headley*, was not followed.

Since the 1920's, an unbroken line of cases has held that an unconstitutional act is void *ab initio*. *See e.g., State ex rel. Davis v. City of Stuart*, 120 So. 335 (Fla.1929), *State ex rel. Nuveen v. Green*, 102 So. 739 (Fla.1924); *North Florida Women's Health and Counseling Services, Inc. v. State of Florida*, 866 So.2d 612 (Fla.2003); *Bell v. State*, 585 So. 2d 1125 (Fla. 2d DCA 1991).

The unilateral imposition of contract in violation of the constitutional right to bargain has been uniformly disapproved by the Commission, dating back to *Pembroke Park*, and jurisprudence requiring rescission and reinstatement of the status quo ante is substantial.[1]

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[1] This list excludes those cases listed in n.2, below.

IUPA v. City of Groveland, 41 FPER ¶ 350 (2015) (rescind dismissal);
ATU v. Hillsborough Area Regional Transit, 139 So.3d 345 (Fla. 2d DCA 2014) (rescind impasse);
Levy County Educ. Ass'n v. School District of Levy County, 40 FPER ¶ 218 (2013) (rescind agreement);
IUPA v. Sheriff of Lee County, 40 FPER ¶ 172 (2013) (rescind bonuses);
Orange County Classroom Teachers Ass'n v. School District of Orange County, 40 FPER ¶ 151 (2013) (rescind denial of union's request);
City of Hialeah v. AFSCME, 38 FPER ¶ 323 (2012); 37 FPER ¶ 70 (2011) (rescind impasse);
United Correctional Officers v. Miami Dade County, 37 FPER ¶ 72 (2011) (rescind contractual provision);
Beightol v. School District of Miami Dade County, 36 FPER ¶ 484 (2010) (rescind discriminatory contractual provision);
Office & Professional Employees v. City of Ormond Beach, 36 FPER ¶ 333 (2010) (retroactively pay wage increase);
Polk Education Ass'n v. School District of Polk County, 36 FPER ¶ 260 (2010) (reinstate status quo);

The administrative burdens likely to be claimed by the City are not unprecedented. The Board should be mindful of the effect that a return to the status quo ante may have on the City. In recognition of such circumstances and claims in prior cases, the Commission and the courts have previously ordered parties to seek a settlement within a discrete time period and failing an agreement, the status quo ante would be restored. See e.g., *Martin County Education Association v. School District of Martin County*, 34 FPER 85 (2008) (modification to debit card program of teacher stipends modified with agreement of the Union); *City of Dunedin*, 8 FPER 13102, 1982 WL 951517 (PERC 1982) (20 day settlement discussion period and failing agreement reimbursement of imposed increased insurance rates); *Int'l Union of Police Associations v. State, Dep't of Mgmt. Servs.*, 855 So.2d 76 (Fla.

Polk County Non-Industrial Employees v. School District of Polk County, 36 FPER ¶ 261 (reinstate status quo);
Taylor Educ. Ass'n v. School District of Taylor County, 36 FPER ¶ 176 (2010) (pay back pay);
Jeffrey Stanley v. Sheriff of Broward County, 36 FPER ¶ 11 (2010) (pay back wages, make offer of employment);
Volusia County FF v. Volusia County, 35 FPER ¶ 211 (2009) (rescind impasse);
Florida School for Deaf and Blind, 11 FPER ¶ 16163 (1985) (restore status quo);
Indian River County Educ. Ass'n v. School District of Indian River County, 35 FPER ¶ 207 (2009) (rescind requirement);
Steven Dickey v. David Gee, Sheriff, 35 FPER ¶ 191 (2009) (rescind suspension);
PMSA v. City of West Palm Beach, 35 FPER ¶ 24 (2009) (rescind policy);
PLEA v. Miami Dade County, 34 FPER ¶ 178 (2008) (rescind memorandum);
Martin County Educ. Ass'n v. School District of Martin County, 34 FPER ¶ 85 (2008) (reinstate status quo);
IAFF v. City of Tampa, 34 FPER ¶ 82 (2008) (pay increase);
United School Employees v. School District of Pasco County, 33 FPER ¶ 321 (2008) (rescind policy);
Pasco Prof. FF v. Pasco County, 33 FPER ¶ 225 (2007) (rescind procedure);
24. *Local 1158 Clearwater FF Ass'n v. City of Clearwater* 32 FPER 210 (2006) (rescind policy);
25. *IUPAT v. City of Bartow*, 32 FPER 139 (2006) (rescind agreement provision) ;
26. *Volusia County FF v. Volusia County*, 32 FPER 89 (2006) (rescind wage increase);
27. *IUPAT v. City of Sweetwater* 31 FPER 52 (2005) (reinstate status quo);
28. *IUPA v. State of Florida* 29 FPER 339 (2004) *on remand from* 29 FPER 128 (2003) (reinstate status quo);
29. *Gov't Supervisors Ass'n v. Miami Dade County* 29 FPER 265 (2003) (reinstate schedule);
30. *Fire Rescue Professionals v. Alachua County* 28 FPER 33158 (2002) (reinstate status quo);

1st DCA 2003), *supra,* (parties given a 60 day period to resolve the remedy and failing a remedy status quo ante will occur).

Despite these practical efforts to bring an orderly end to employers' unfair labor practices, the court in *IUPA* made it clear to employers, unions, and PERC that, "The detrimental effect caused by unlawful action cannot be used as a shield to avoid imposition of the proper remedy." 855 So.2 at 79. Relying on *Pembroke Park*, the First District considered the Commission's refusal to return the parties to the status quo ante after a union's charge claiming the employer's unilateral change of work schedules constituted an unfair labor practice. *Id.* at 77. The hearing officer sustained the charge and ordered the parties return to the status quo before the change, however the Commission did not adopt that part of the hearing officer's order returning the parties to the status quo ante. On appeal, the employer did not contest that it violated Section 447.501, but argued that the Commission should be affirmed because returning to the status quo by rescinding the work schedules would have had a disruptive effect on its operations. *Id.*

The First District began its analysis by explaining, "The traditional remedy for an unfair labor practice relating to unilateral changes in terms and conditions of employment by public employees is to return the parties to the status quo ante." Id. at 77-78 (internal quotations omitted). The court then recounted the variety of contexts where unilateral changes to terms of employment were restored, status quo ante.[2] Next, the First District

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[2] *Id.* at 78.

Monticello Prof'l Fire Fighters Ass'n v. Monticello, 15 FPER ¶ 20225 (1989) (ordering City to offer immediate reinstatement to employees terminated when fire department abolished);

1. *Leon County PBA v. City of Tallahassee, 8 FPER ¶ 13400 (1982) (ordering City to reimburse officers for increase in payroll deductions for health insurance);*
2. *Florida Nurses Ass'n v. Pub. Health Trust, 14 FPER ¶ 19312 (1988) (ordering Trust to reinstate past practice of contributing toward dependent HMO coverage);*
3. *SPALC v. Sch. Bd. of Lee County, 26 FPER ¶ 31105 (2000) (ordering School Board to re-establish policy of providing employees with leased uniforms);*
4. *Southwest Florida Prof'l Fire Fighters v. Ft. Myers Beach Fire Control Dist., 23 FPER ¶ 28209 (1997) (ordering District to rescind change in minimum manning level until union provided opportunity to bargain impact of its decision);*
5. *IAFF, Local 754 v. City of Tampa, 13 FPER ¶ 18129 (1987) (ordering City to rescind practice of paying fire fighters for actual hours worked and reinstate past practice of paying fire fighters the average of 104 hours of work each pay period regardless of hours worked);*

Escambia Educ. Ass'n v. Escambia Sch. Bd., 10 FPER ¶ 15160 (1984) (ordering School Board to recognize additional year of service credit and pay eligible teachers accumulated salary experience increments with interest);

considered the employer's argument that a return to the status quo ante would have such a disruptive effect, affirmance was required. The court quickly dispatched this theory, explaining the employer had time to take the necessary steps, before imposition, to alleviate the effects of the schedule change and that failing to restore the status quo would be akin to rewarding the employer for its "unlawful act." *Id.*

In *Amalgamated Transit Union, Local 1701 v. Sarasota County Board of Commissioners*, the Commission resolved a series of competing unfair labor practice charges, holding that the local government body was without power to impose terms of a collective bargaining agreement when the parties were no longer at impasse. 36 FPER ¶ 453 (2010). In its final order, the Commission returned the parties to the status quo prior to the void imposition and awarded employees affected by the illegal imposition, "pay and benefits they would have received but for the implementation of those changes between the dates of implementation and the date of rescission." *Id.* The Commission also applied "interest at the lawful rate," for the award. *Id.* Shortly thereafter, the employer filed a notice of appeal, followed by a motion to stay the Commission's final order.

In its motion to stay, Sarasota County argued it would "suffer irreparable harm if a stay is not granted because [the county would] be required to make retroactive changes to employee pay and benefits to implement the remedy ordered by the Commission." *ATU Local 1701 v. Sarasota County Board of County Commissioners*, 37 FPER ¶ 105 (2011). The Commission rejected the county's argument, noting a series of appellate decisions holding, "where the only injury is calculable monetarily, the damage is not irreparable, no matter how large the amount." *Id.* The Commission explained it was "not unmindful of the difficulties inherent in restoring benefits retroactively and the administrative burden that such action imposes. However, case law teaches that restoration of the status quo is both the appropriate and necessary consequence of an employer's unlawful unilateral action irrespective of the difficulty it entails." *Id.* (*citing I.U.P.A., supra*).

The case law on this issue has not changed. In *Monticello Professional Firefighters v. City of Monticello*, 15 FPER ¶ 20225 (1989), the employer was ordered to rehire the entire fire department it had laid off and unconditionally offer re-employment and back pay. Commissioners Mattimore, Sloan and Poole held that where the actions of a public employer are the consequence of its own illegal decision, a make whole remedy of restoring the parties to the status quo ante, and an award of attorneys' fees is appropriate. This is fully consistent with longstanding PERC and judicial rulings.[3]

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[3] *IAFF v. City of St. Petersburg*, 13 FPER 18116 (1987) (ordering City to pay annual progressive raises retroactive to expiration of agreement)

Consistent with Florida law, federal courts interpreting the National Labor Relations Act have held, "The thrust of affirmative action redressing the wrong incurred by an unfair labor practice... is to restore the economic status quo that would have obtained but for the

The City may argue that the scope of a remedy restoring the status quo would be unlike any previously ordered, however, as the Florida Supreme Court said in the recent redistricting cases, the remedy must be commensurate with the constitutional violation. *League of Women Voters v. Detzner*, 172 So.2d 363, 413 (Fla. 2015). This is in accordance with United States Supreme Court jurisprudence, which has articulated, "Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Hills v. Gaitreaux*, 425 U.S. 284, 293-294 (1976). Here the violation was to deprive hundreds of police officers of a substantial sum in salary and pension benefits. The monetary damages are calculable and not irreparable. The amount of the damages is not a defense to their payment. *ATU*, supra.

The City may argue that over the years, the union has recovered a substantial amount of the wage and pension cuts in subsequent collective bargaining agreements. However, "contrary to the City's argument on this point, subsequent agreements or rescission of unlawful restrictions on employee rights do not render an unfair labor practice moot." *Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood*, 12 FPER ¶ 17136, n.1 (1986)(internal citations omitted). "An unfair labor practice occurs at the moment prohibited conduct occurs and, even though corrected by subsequent action, remains a violation under Chapter 447, Part II, Florida Statutes (1985)." *Id.*

This places the Board in the position of having to decide how to address the matter going forward. We believe the Board has three options:

One - It can defer to the PBA and the City to bargain the effect of the void ordinance in an effort to voluntarily reach a resolution. PERC has customarily given an employer sixty (60) days to reach an agreement with the union but at the end of the period, if no agreement is reached, PERC orders a return to the status quo ante. As the parties are currently in negotiations for a successor agreement, this presents an opportunity for resolution without further litigation. However, failing to reach an agreement within a reasonable period of time such as 60 days, the Board should proceed to Option Two, below.

Two - The Board can treat the ordinance as invalid. In this case, the Board will have to determine the actuarial impact of the restoration of the status quo and act accordingly in setting the contribution rate. This will likely result in the filing of a legal action against the

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company's wrongful act. The task of the [National Labor Relations Board] in applying § 10(c) [of the NLRA] is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Camelot Terrace, Inc. v. Nat'l Labor Relations Bd.*, 824 F.3d 1085, 1092–93 (D.C. Cir. 2016) (*citing Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976) (some alterations in original) (citations and internal quotation marks omitted) See discussion at p. 3, *supra*.

Fund by the City. In such a circumstance, the Fund should join the PBA as a party as well as the unrepresented members, if the City doesn't, as its substantial interests and that of its members will be at issue.

Three - the Board can file an action for declaratory relief seeking direction as to its obligations. In such an action, the PBA and the non-represented employees should be joined as parties as the declaratory relief statute contemplates that all affected persons and entities should be joined in the action. Section 86.091, Fla. Stat.

We hope that the foregoing will assist the Board in addressing this important issue.

Sincerely,

ROBERT D. KLAUSNER

STUART A. KAUFMAN

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