STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

BROWARD COUNTY POLICE
BENEVOLENT ASSOCIATION,
INC., ET AL.

Charging party,

v.

Case No. CA-2012-016

CITY OF HOLLYWOOD,

Respondent.

CHARGING PARTY'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER

The Charging Party, the Broward County Police Benevolent Association, Inc. ("PBA"), pursuant to Rule 28-106.217, Florida Administrative Code, by and through the undersigned counsel, and hereby submits its Exceptions to the Hearing Officer's Recommended Order of May 9, 2018.

In support, the PBA states:

Exception No. 1

The Hearing Officer erred in finding no remedy is required as the ULP invalidated the 2011 Pension Ordinance. In *Headley v. City of Miami, 215 So.3d 1* (Fla. 2017), the Florida Supreme Court held the "right to bargain collectively is, as part of the state's constitution's declaration of rights, a fundamental right. As such, it is subject to official abridgment only upon a showing of a compelling state interest." *Id.* at 8. Regarding the fundamental right to contract, the Court articulated that "[v]irtually no degree of contract impairment has been tolerated in this state." *Id.* The Supreme Court's application of the *Chiles* standard to the invocation of financial

urgency, requiring the demonstration of "no other reasonable alternative means of preserving its contract with public workers, either in whole or in part," was "compelled by the Florida Constitution." *Id.* Accordingly, contract changes imposed by the City of Miami without proceeding through the § 447.403 impasse resolution process, violated Florida law. The Supreme Court explained:

> The interpretation set forth by PERC and the First District would allow a local government, once it has declared a financial urgency, the ability to exercise a management right to unilaterally alter the terms and conditions of a contract before completing the procedures set forth by the Legislature in section 447.4095. This interpretation does not comport with our acknowledgment of and respect for the constitutional right of collective bargaining and prohibition of the impairment to contract.

Id. at 10.

Just as the City of Miami violated state constitutional and statutory law, so did the City of Hollywood. The City's imposition of changes to wages and pension benefits without proceeding through the impasse resolution process violated the Declaration of Rights of the Florida Constitution, violated Florida statutes[1], and ran afoul of decades of Florida case law precedent. The ordinances imposing changes upon wages and pension benefits are void *ab initio*: a nullity from inception. Legislation, whether a statute or ordinance, which impairs fundamental rights such as the right to bargain and the right to contract is presumptively invalid. *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004). Any agreement growing out of the illegal legislation would likewise be void from inception. An unconstitutional statute (or ordinance) is deemed void from the time of its enactment. *Bell v. State*, 585 So. 2d 1125 (Fla. 2d DCA 1991). Similarly, the application of void legislation is fundamental error which can be raised at any time. *Lawrence v. State*, 918 So. 2d 368 (Fla. 2d DCA 2005).

[1] See, § 447.403, Fla. Stat.

To be clear, the City is asking the Commission to bless its violation of the Florida Constitution by enforcing an agreement to forgo back pay. Both federal and state law have long recognized the disparity in power in the employee/employer relationship. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardener v. Broderick*, 392 U.S. 273 (1968). The role of the Commission is to balance the interests between the parties due to the employees' inability to strike. The Third District has explained:

> Because there is no statutory procedure afforded the public employee to bring pressure upon an employer to make concessions in collective bargaining, either through a strike or binding arbitration, PERC has been provided broad authority under Section 447.503, as a means of allaying a significant imbalance of bargaining power in favor of the employer.

Miami v. FOP, Miami Lodge 20, 571 So. 2d 1309, 1312 (Fla. 3d DCA 1989), *quoting Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College,* 425 So. 2d 133, 140 (Fla. 1st DCA 1983), *affirmed in part, reversed in part on other grounds,* 475 So. 2d 1221 (Fla.1985).

Enforcing a purported waiver based upon the employer's constitutionally infirm actions violates public policy and emboldens the employer to find ways to repeat its illegal behavior. In many areas of the Florida law, courts have refused to recognize remedies from contracts and laws that are held to be void *ab initio*. *See, e.g. TTSI Irrevocable Tr. v. ReliaStar Life Ins. Co.*, 60 So. 3d 1148 (Fla. 5th DCA 2011) (a party that takes out a life insurance policy on the lives of persons with whom he or she has no insurable interest, are unenforceable and void *ab initio* and the party is not entitled to recover amounts previously paid to insurer); *Thomas v. Ratiner*, 462 So. 2d 1157 (Fla. 3d DCA 1984) (where retainer agreement between patient and doctor who was also lawyer was void *ab initio*, agreement could not be basis of cause of action against patient or against law firm which allegedly tortiously and intentionally interfered with that retainer

agreement); *Morrison v. West*, 30 So. 3d 561 (Fla. 4th DCA 2010) (a contingent fee contract to provide legal services in Florida by an attorney not authorized to practice law in Florida was void *ab initio* and thus unlicensed attorney was not entitled to fee in *quantum meruit).*

Exception No. 2

The Hearing Officer erred in failing to carve out the following categories of protected employees: (1) bargaining unit members who had retired, (2) those eligible to retire, or (3) employees who were not members of the bargaining unit after the commission of the ULP but prior to the 2013 collective bargaining agreement, contravening the holdings in *O'Connell v. State, Dept. of Admin.*, 557 So. 2d 609 (Fla. 3d DCA 1990) and *Bean v. State, Div. of Ret.* 732 So. 2d 391 (Fla. 1st DCA 1999). In her recommended order, the hearing officer treated all police officer employees equally, notwithstanding that many of the members were eligible for normal retirement. The Second District in *Bean* and the Third District in *O'Connell* both held that once a member of a public employee retirement system reaches normal retirement age, the member has a vested right to the benefits in place at the time of normal retirement, notwithstanding whether the employee actually retires. *O'Connell*, 557 So. 2d at 610-11; *Bean*, 732 So. 2d at 392. The members of the bargaining unit did not ratify the collective bargaining agreement language including the waiver until July 16, 2013. Recommended Order, p.8, ¶ 18. Thus, any reductions in retirement benefits as a result of the declaration of financial urgency had no effect on any member who had reached normal retirement before legislative ratification.[2]

Exception No. 3

The Hearing Officer failed to address the necessity for the City to re-enact the 2011 pension ordinance invalidated by the ULP following the 2013 collective bargaining agreement as

required by § 447.309(3). As argued above, in Exception No. 1, enforcing a purported waiver based upon the employer's constitutionally infirm actions violates public policy and emboldens the employer to find ways to repeat its illegal behavior. As a threshold matter, since the facts of the instant case are so similar to the facts of *Headley*, the law set forth by the Supreme Court in its *Headley* decision governs the outcome here. In dismissing the City of Hollywood's petition for review of the Fourth District's finding that the City acted contrary to the *Chiles* standard, the Supreme Court applied the *Headley* holding to Hollywood.

The Miami FOP, in *Headley*, sought review of the First District, based upon the violation of the FOP's fundamental rights under the Florida Constitution. Just as it did here, the *Headley* controversy arose from Miami's use of § 447.4095, Fla. Stat., to unilaterally rewrite the FOP contract and alter the status quo without completing the statutory impasse process. At issue were two matters; first, under what circumstances the financial urgency statute could be triggered, *Headley*, 215 So. 3d at 5, and second, whether an unfair labor practice occurs when a public employer unilaterally imposes changes to terms of employment without following the statutory impasse process articulated in § 447.403, Fla. Stat. *Id.* at 9.

While the Supreme Court adopted the Commission's definition of financial urgency but rejected its interpretation of the law, the Supreme Court held that because fundamental rights were at issue, the strict scrutiny analysis applied to actions taken by public employers pursuant to the financial urgency statute. *Id.* at 5-6. Pursuant to the test articulated in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), a collective bargaining agreement can only be unilaterally modified when the public employer can demonstrate a compelling state interest. *Headley*, at 6. Thus, the Supreme Court held that a public employer cannot alter its bargaining

[2] The Recommended Order's findings of fact do not include the date the collective bargaining agreement was

agreements until the employer has demonstrated no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. That did not happen in Hollywood.

The second holding of *Headley* settled the dispute between the FOP and the City of Miami over the point at which a modification of a collective bargaining agreement can be made. *Id.* at 7. The Supreme Court held, in no uncertain terms, that § 447.4095 allows unilateral modification of a collective bargaining agreement only after the parties have completed the impasse resolution process of § 447.403, Fla. Stat. *Id.* at 10. In explaining its holding, the Supreme Court stated:

> As noted by [the FOP], impact bargaining results from management making decisions outside of the scope of an agreement which affect the agreement in some way. Bargaining under the financial urgency statute, on the other hand, seeks to alter the terms of the agreement itself. Impact bargaining requires a threshold determination as to whether the employer's decision affects employees' wages, hours, or working conditions. Bargaining under financial urgency inherently seeks to change wages, hours, or working conditions. Moreover, altering the agreement effectively alters the "status quo" between the parties that will remain in place until they are changed through bargaining.

Id. The Supreme Court further noted that the procedure approved by the First District (and rejected by the Fourth District) would allow the employer to unilaterally modify a collective bargaining agreement before completing the impasse procedure set forth by the Legislature. Such a result would "not comport with [the Supreme Court's] acknowledgment of and respect for the constitutional right of collective bargaining and prohibition of the impairment of contract." *Id.*

There is no question that the Supreme Court's *Headley* decision found the procedure employed by Miami and Hollywood to be unconstitutional. Since the 1920's, an unbroken line

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memorialized into local ordinance.

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 Supreme Court of Florida has long recognized that since the collective bargaining rights of employees are guaranteed under the Florida Constitution, a union's waiver of the right to collectively bargain is a waiver of rights reserved to employees. *Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 475 So. 2d 1221, 1225 (Fla.1985). That is distinguished, however, from waiving in collective bargaining, the fundamental rights of its members. *See, e.g., Delaney v. City if Hialeah*, 9 FPER ¶ 14339 (1983) (collective bargaining agreement provision that required all bargaining unit employees, including those who are not members of the union, to contribute a portion of their leave time to a pool to be used for union business held to violate Chapter 447 and Article I, Sec. 6 of the Florida Constitution); *Broward County Board of Commissioners v. Port Everglades Firefighters Assoc., IAFF Local 1989*, 23 FPER ¶ 28199 (1997) (contractual provision for binding interest arbitration contrary to the public policy expressed in Chapter 447 by the Legislature; public policy rights may not be waived). As regards the vested pension rights at issue in this case in particular, the individual constitutional and statutory rights to pension benefits under Florida law cannot be surrendered in the majoritarian process of collective bargaining. *See, Alexander v. Garner-Denver Co.*, 415 U.S. 36, 52 (1976) (labor agreement cannot surrender independently created statutory rights). *See also, N.L.R.B. v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974) (union cannot waive fundamental rights of members under Section 7 of the NLRA). Pension statutes are to be liberally construed in favor of the intended recipients. *Board of Trustees v. Town of Lake Park*, 966 So. 2d 448 (Fla. 4th DCA 2007).

Exception No. 4

The Hearing Officer erred as a matter of law in finding that there can be a knowing and intentional waiver of an unknown future act as determined in *Palm Beach Jr. College Bd. of Trustees, v. United Faculty*, 475 So. 2d 1221 (Fla. 1985), particularly the then – yet to be determined – decision reached four years later in *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017). The Hearing Officer further erred in finding that a contractual waiver, even if valid, can have a retroactive effect. To be clear, the City asked the PBA to reopen negotiations in May 2010, which the PBA voluntarily did. After reaching a memorandum of understanding in August 2010, the City declared financial urgency for fiscal years 2010-11. HORO, ¶ 4-6. In May 2011, the City asked the PBA to reopen negotiations again, but when the PBA refused, it declared financial urgency. *Id.* at ¶ 8. After a "short series of bargaining sessions," the City, among other adverse economic impacts, imposed wage reductions and authorized layoffs in June 2011. *Id.* Furthermore, in September 2011 the City held a special referendum to authorize imposition of significant changes to the pension ordinance, imposing reductions and legislatively implementing these changes "prior to the completion of impasse resolution proceedings in Section 447.403, Florida Statutes." *Id.* at ¶ 9. It was only then that, "in exchange for incremental restoration of benefits, the City's proposal included a waiver of all possible damages stemming from the two pending ULP charges." *Id.* at ¶ 13. The City placed the PBA into an untenable position with its illegality and intended to coerce the PBA into agreeing to the waiver language.

Where union members feel compelled to ratify an otherwise unlawful agreement because their rights would be negatively affected, the unlawful action is not waived. *City of Orlando v. IAFF, Local 1365*, 384 So. 2d 941, 945 (Fla. 5th DCA 1978), *affirming* 4 FPER ¶ 4212 (1978); *see also Manatee Education Association v. School District of Manatee County*, 33 FPER ¶ 135 at

305 (2007). Where the ratification is coerced, there is no waiver. *See Dade County, Florida School District Employees, Local 1184, of the American Federation of State, County and Municipal Employees, AFL-CIO, and Dade County School Administrators Association, Local 77, American Federation of School Administrators v. Dade County*, 34 FPER ¶ 256 (2008).

In *City of Orlando*, after the parties submitted their issues for impasse resolution to the legislative body, the city council took no action to resolve the issues at impasse, so the parties continued negotiating. 384 So. 2d at 943. When the IAFF demanded that the city council take action at a later meeting to resolve the impasse issues, the city council made a motion to resolve the impasse, conditioned on a ratification by the union within 10 days, or it would postpone further action until the budget would be considered for the following fiscal year. *Id.* The IAFF subsequently agreed to and ratified the collective bargaining agreement. The Fifth District found as a threshold matter that Chapter 447 prohibits "coercion" and that the city council's refusal to perform their statutory duty, absent an agreement by the union, constituted coercion. *Id.* at 945. Further, the Fifth District held "that neither party had the right to waive requirements of the statute designed to protect the public interest," and that the impasse resolution process was designed by the Florida Legislature to serve the public interest. *Id.* at 946. The Court concluded that the union could not waive the city's "commission of an unfair labor practice." *Id.*

As it was in *City of Orlando*, it is here. The PBA was placed into an untenable position and forced to agree to the waiver language absent further illegal reductions to wages and benefits. The PBA's agreement was illusory, as it could not have been "knowing and intelligent." The Commission has found that the City committed an unfair labor practice, thus a remedy is due. The Florida Legislature has determined that back pay is the proper remedy under these circumstances to make the employees whole. *See,* § 447.503(6)(a), Fla. Stat. In response to PBA

arguments on whether the waivers could be clear and unmistakable, the Hearing Officer attempts to draw a distinction between a waiver of bargaining rights and a waiver of remedies. HORO, p.10, n.4. This is a distinction without a difference. A "remedy" is "the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." REMEDY, Black's Law Dictionary (10th ed. 2014). It thus follows that a waiver of a right could no more be waived than the underlying right that is being enforced. Reliance on the language of the four corners of the document is misplaced where the language is the product of coercion. *City of Orlando, supra.*

Exception No. 6

Having found that the City committed an unfair labor practice, the Hearing Officer erred in failing to distinguish between remedies within PERC's jurisdiction and the continued validity of the 2011 city ordinance which was the product of an unconstitutional act and therefore void ab initio. *See, e.g., Florida Public Employees Council 79 AFSCME v. Dept of Children and Families*, 745 So. 2d 487 (Fla. 1st DCA 1999); *State ex rel Davis v. City of Stuart,* 130 So. 335 (Fla. 1929); *North Florida Women's Health v. State,* 866 So.2d 612 (Fla. 2003). See argument under exceptions 1 and 3 above.

Exception No. 7

Alternatively, the hearing officer erred in failing to find that the constitutionality of the 2011 pension ordinance is matter which can only be resolved by the courts and not PERC as provided in *Smith v. Willis*, 415 So. 2d 1331 (Fla. 1st DCA 1982), relying on *Gulf Pines Memorial Park v. Oaklawn Memorial Park*, 361 So. 2d 695 (Fla. 1978).

Conclusion:

Based on the forgoing, the PBA respectfully requests that the Commission Grant the above exceptions, determine that the City committed an unfair labor practice and issue a Final Order granting the remedies requested by the PBA.

Respectfully Submitted.

BY: _____
Michael Braverman. Esq.
Attorney for the Charging Party

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Charging Parties Proposed Recommended Order was E-filed and a copy delivered to J. Robert McCormack, Esq.@bob.mccormack@ogletreedeakins and Paul T. Ryder, Esq. @ paulryder@laborlawmiami.com this 23rd Day of May 2018.

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