STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

WALTER E. HEADLEY, JR., MIAMI LODGE #20, FRATERNAL ORDER OF POLICE, INC., Charging Party, v. CITY OF MIAMI, Respondent.	Case No. CR-2017-001 (Relates to CA-2010-119) ORDER ON MERITS OF UNFAIR LABOR PRACTICE CHARGE Order Number: 17U-269 Date Issued: October 18, 2017

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 Méndez, Kevin R. Jones, and John A. Greco, Miami, attorneys for Respondent.

On September 21, 2010, the Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police Inc. (FOP), filed an unfair labor practice charge alleging, in pertinent part, that the City of Miami (City) violated Section 447.501(1)(a) and (c), Florida Statutes. According to the charge, the City improperly invoked Section 447.4095, Florida Statutes, financial urgency, and the City unlawfully failed to follow the procedures in the financial urgency statute by unilaterally changing the contractual terms and conditions of employment of bargaining unit employees represented by the FOP before completing the impasse resolution procedure set forth in Section 447.403, Florida Statutes.[1] The City denied the FOP's allegations. Both parties requested awards of attorney's fees and litigation costs.

[1]The FOP also alleged that the City engaged in surface bargaining.

After an evidentiary hearing, the hearing officer issued a recommended order (HORO) in which he found that the City had a compelling interest in reopening its contract with the FOP. In sum, he found that the City was experiencing a financial urgency. The hearing officer also found, in pertinent part, that the City altered the terms of the collective bargaining agreement relating to wages and pension benefits of employees represented by the FOP. Additionally, the hearing officer found that Section 447.4095, Florida Statutes, did not require the City to complete the impasse process prior to modifying the collective bargaining agreement.

Regarding an award of attorney's fees, the hearing officer found that the resolution of the FOP's financial urgency charge was dependent on the validity of the City's claim of financial urgency and it was novel, i.e., a case of first impression. He concluded neither party was entitled to an award of attorney's fees and costs of litigation.

A majority of the Commission agreed with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations. *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc. v. City of Miami*, 38 FPER ¶ 330 (2012). On appeal, the District Court of Appeal, First District, concluded that the Commission did not err in interpreting or applying Section 447.4095, Florida Statutes, and affirmed the final order dismissing the FOP's unfair labor practice charge. *Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police, Inc. v. City of Miami*, 118 So. 3d 885, 896 (Fla. 1st DCA 2013) (First District Court). The FOP appealed to the Florida Supreme Court.

The Supreme Court concluded, in pertinent part, that Section 447.4095, Florida Statutes, permits the unilateral implementation of changes to a collective bargaining agreement only after parties have completed the impasse resolution proceedings found in Section 447.403, Florida Statutes, and failed to ratify the agreement. *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc., et al. v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017). The Supreme Court quashed the decision of the First District Court and remanded the case for further proceedings. The First District Court remanded this case to the Commission for further proceedings consistent with the Florida Supreme Court's opinion.

On May 18, 2017, upon consideration of the Florida Supreme Court's opinion and the hearing officer's factual findings, we concluded that the City violated Section 447.501(1)(a) and (c), Florida Statutes, when it unilaterally changed wages, pensions, health insurance, and other monetary items for the employees in the bargaining unit represented by the FOP prior to completing the Section 447.403, Florida Statutes, impasse resolution procedure. § 447.503(6)(a), Fla. Stat. We remanded this case to the hearing officer and directed him to recommend an appropriate remedy and to make a recommendation whether the FOP, as a prevailing charging party, was entitled to an award of attorney's fees and costs.

On July 20, the hearing officer issued a supplemental order in which he recommended directing 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 thirty-seven through thirty-nine of his recommended order. *Headley*, 38 FPER ¶ 330. He recommended 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. The hearing officer also recommended against an award of attorney's fees and costs in favor of the FOP.

On August 3, the FOP filed one exception to the hearing officer's recommendation against awarding its attorney's fees and costs. On August 14, after receiving an extension of time, the City filed four exceptions to the recommended order, a response to the FOP's exception, and a motion for oral argument. On August 25, the FOP filed a response to the City's exceptions.

The City requested oral argument, which the FOP opposes as unnecessary. The Commission does not believe oral argument would assist it in the resolution of this case because the facts and legal arguments have been adequately presented in the briefs and record. Accordingly, the City's motion for oral argument is denied. We now turn to the exceptions.

The City's fourth exception is to the hearing officer's recommended remedy of returning the parties to the status quo ante as of September 29, 2010, the day prior to the effective date of the City's unlawful action. The City argues that any remedy should be prospective only. The gravamen of the City's fourth exception is that its actions were

validated by existing case law, including the Commission's General Counsel's interpretation of Section 447.4095, Florida Statutes, contained in a May 9, 2001, correspondence letter. In support of this argument, the City relies on *Communications Workers of America v. Indian River School Board*, 888 So. 2d 96, 98 (Fla. 4th DCA 2004); *Jacksonville Supervisors Association v. City of Jacksonville*, 26 FPER ¶ 31140 at 255-256 (2000), *rev'd in part on other grounds* 791 So. 2d 508 (Fla. 1st DCA 2001); and *Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School Board of Manatee County*, 62 So. 3d 1176, 1181 (Fla. 1st DCA 2011), *aff'g in part and rev'g in part*, 35 FPER ¶ 46 (2009). The City's reliance on these cases is misplaced.

The *Communications Workers of America* case involved the appeal of a trial court's order vacating an arbitration award, which interpreted Section 447.4095, Florida Statutes, in its favor, on the basis that the arbitrator exceeded his powers under Section 682.13(1), Florida Statutes. There, in an informal correspondence to the School Board, the Commission's General Counsel stated that Section 447.4095, Florida Statutes, was enacted by the Legislature in 1997 and that as of the date of his letter the Commission had not interpreted its provisions in case law. He opined in that letter that in the event of a financial urgency requiring modification of a collective bargaining agreement, an employer is allowed to unilaterally change wages, hours, and terms and conditions of employment after bargaining the impact of the change for a "reasonable period" not to exceed fourteen days. *Communications Workers of America,* 888 So. 2d at 98.

The Commission's General Counsel's correspondence highlights the fact that "to date the Commission has not had an occasion to interpret" Section 447.4095, Florida Statutes. Thus, contrary to the City's argument, there was no existing case law at the time the City unilaterally modified the parties' collective bargaining agreement without first completing the statutory impasse resolution procedure. The General Counsel's informal correspondence does not constitute existing Commission case law; it was simply his opinion. More importantly, the correspondence does not opine that an employer is not obligated to first proceed through the Section 447.403, Florida Statutes, impasse resolution procedure after impasse is reached as required by Section 447.4095, Florida Statutes. In that case, the impasse resolution hearing was conducted pursuant to Section 447.403, Florida Statutes. *Id.*

The *Jacksonville Supervisors Association* case involved a reorganization of three departments, which led management to abolish and create bargaining unit positions. The case involved management rights pursuant to Section 447.209, Florida Statutes, not financial urgency or the application or interpretation of Section 447.4095, Florida Statutes.

The *Manatee Education Association* case involved the employer invoking Section 447.4095, Florida Statutes, to modify salaries based on financial urgency. The union sought to require the employer to prove the existence of a financial urgency before proceeding under Section 447.4095. The court rejected the union's contention stating that, "Requiring proof of financial urgency before resort to section 447.4095 could result

in substantial delays, delays which could effectively eliminate the ability to address a financial urgency, frustrating the obvious purpose of the statute. We affirm PERC's determination that section 447.4095 does not place any temporal preconditions on the initiation of the process section 447.4095 authorizes." *Manatee Education Association*, 62 So. 3d at 1181. However, the court rejected the Commission's determination that a union must participate in Section 447.4095 negotiations in order to file (at some later time) an unfair labor practice charge. *Id.*

The *Manatee Education Association* interpretations of Section 447.4095, Florida Statutes, occurred in 2008 and 2009. However, until now neither the court nor the Commission had interpreted Section 447.4095, Florida Statutes, as it applied to the Section 447.403, Florida Statutes, impasse resolution process. Moreover, until the instant case neither the Commission nor the court had addressed the issue of an employer bypassing the impasse resolution process pursuant to Section 447.4095, Florida Statutes. Thus, the City's contention that its actions were validated by existing case law is without merit.

Similarly, in support of its argument that the remedy should be prospective only, the City relies on *Dade County Police Benevolent Association, Inc. v. Miami Dade County Board of County Commissioners*, 160 So. 3d 482 (Fla. 1st DCA 2015), *review denied sub nom. Miami-Dade County Bd. of County Commissioners v. Dade County Police Benevolent Association*, 177 So. 3d 1269 (Fla. 2015) *rev'g* 40 FPER ¶ 198 (2013);

International Union of Operating Engineers, Local 653 v. Board of County Commissioners of Jackson County, 18 FPER ¶ 23138 (1992), *rev'd on other grounds*, 620 So. 2d 1062 (Fla. 1st DCA 1993); and *Allen v. Miami-Dade College Board of Trustees*, 43 FPER ¶ 6 (PERC 2016), *per curiam aff'd*, 2017 WL 363130 (Fla. 3d DCA January 25, 2017) (unpublished decision).

In *Dade County Police Benevolent Association, Inc.*, the Mayor vetoed the County Commission's resolution of the impasse pertaining to an increase in employee's health insurance contributions and the County Commission did not override the veto. The Commission dismissed the portion of the charge dealing with the mayor's veto but the court reversed the Commission. On remand from the court, the issue before the Commission was whether the remedy should be prospective or retroactive. *Dade County Police Benevolent Association, Inc. v. Miami Dade County Board of County Commissioners*, 43 FPER ¶ 105 (2016). The Commission concluded that the remedy should be prospective only because it was an issue of first impression and the County had the benefit of the General Counsel's summary dismissal in the *Dade County Police Benevolent Association v. City of Hialeah*, 24 FPER ¶ 29000 (G.C. Summary Dismissal 1997) case, which ratified the practice of having the legislative body reconvene to address an issue still at impasse after a mayor's veto.

However, unlike the *Dade County Police Benevolent Association, Inc.*, there is not a General Counsel summary dismissal or Commission case establishing existing case law which created an ambiguity in the law, or upon which the City relied to bypass the

impasse resolution procedure. Although this case involved an issue of first impression, that factor goes to whether either party is entitled to an award of attorney's fees, not to whether the remedy of returning the parties to the status quo ante should be prospective.

In *Board of County Commissioners of Jackson County v. International Union of Operating Engineers*, 620 So. 2d 1062 (Fla. 1st DCA 1993), the court held that the Commission could not declare Jackson County guilty of an unfair labor practice and violating the law when its actions were consistent with prior case law. In *Allen*, the Commission stated that because it significantly clarified prior Commission and General Counsel case law, and since the College may have relied on the prior decisions in deciding how to implement the release time article, it is not appropriate under *Jackson County* to conclude that the College has committed an unfair labor practice.

The *Dade County Police Benevolent Association, Jackson County,* and *Allen* cases are distinguishable because these cases involved changes in the interpretation of existing law upon which the respondents relied. In this case, there was no such change in existing law for the City to rely upon.

In sum, we agree with the hearing officer and the FOP that the remedy in this case should be the traditional remedy when an employer unlawfully changes the parties' collective bargaining agreement; that is, a return to the status quo ante as it existed on September 29, 2010, the day prior to the effective date of the City's unlawful action. Consequently, the City's fourth exception is denied.

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(Relates to CA-2010-119)

The City's first and second exceptions pertain to the City's assertion that the hearing officer failed to consider its affirmative defense of exigent circumstances. In these exceptions, the City argues that if a financial urgency existed then exigent circumstances existed as well. The City claims that the hearing officer did not reach its affirmative defense of exigency because he resolved the FOP's unfair labor practice charge expressly on the merits under the then-existing and developing law as it applied to Section 447.4095, Florida Statutes.

The affirmative defense of exigent circumstances is available in very limited and temporal situations. Examples of exigent circumstances include weather conditions, such as a hurricane or "a proposed sick-out by teachers in the context of an ongoing labor dispute, which warranted the employer implementing a temporary change in the personal reason and sick leave policy." *See Pasco County School Board v. Public Employees Relations Commission*, 353 So. 2d 108, 125 (1977) (citing *NLRB v. Minute Maid Corp.*, 283 F. 2d 705 (5th Cir. 1960)); *Broward Teachers Union v. School Board of Broward County*, 30 FPER ¶ 304 (2004). It could also include a riot or civil disturbance. This defense to a temporary unilateral change of the collective bargaining agreement exists to provide relief to an employer who is forced by an emergency to quickly and immediately suspend, not permanently alter, the contractual terms and conditions of employment of its employees.

In emergency situations such as a hurricane or imminent strike an employer can act immediately to meet the emergency without prior consultation with or agreement by

the certified union. *See, e.g., Florida Classified Employees Association v. Taylor County School Board*, 7 FPER ¶ 12100 at 263-264 (1981). Although an employer facing such emergencies may take immediate action to suspend the contractual terms and conditions, the City fails to cite any cases wherein an employer was authorized to unilaterally alter the terms of the collective bargaining agreement and then impose those new terms on the bargaining unit.

According to the hearing officer's facts, the City knew since April 30, 2010, that it was experiencing a financial urgency but it did not act until August 31. (HORO findings 16, 28, and 32 through 36) This delay plus the fact that the City engaged in negotiations with the FOP contradicts the City's contention that it was experiencing an exigent circumstance such as a hurricane, imminent strike, or riot.

The City's contention that the hearing officer erred by not reaching its affirmative defense of exigency is also without merit. We agree with the hearing officer that if the City's contention is that he did not address its affirmative defense of exigent circumstances, the City was required to timely file an exception and raise that issue with the Commission in order to preserve that issue. The City filed no such exception; thus, the City's first and second exceptions are denied. Likewise, the City's third exception, which seeks to challenge the hearing officer's finding that the FOP was not acting in bad faith to perpetuate the status quo, is denied.

In the recommended order, the hearing officer concluded that although the City was the prevailing party neither party was entitled to an award of attorney's fees. In the

supplemental recommended order, the hearing officer found that the FOP is the prevailing party.

A prevailing charging party is entitled to attorney's fees if the respondent knew or should have known that its conduct was unlawful. *See Leon County PBA v. City of Tallahassee*, 8 FPER ¶ 13400 at 726 (1982), *aff'd*, 445 So. 2d 605 (Fla. 1st DCA 1984); *DeMarois v. Military Park Fire Control Tax District*, 7 FPER ¶ 12065 at 159 (1981), *aff'd*, 411 So. 2d 944 (Fla. 4th DCA 1982); *IBPAT, Local 1010 v. Anderson*, 401 So. 2d 824, 831 (Fla. 1st DCA 1981). Pertinent to this inquiry is whether the law is well-settled in light of prior Commission decisions. *See Fort Walton Beach Fire Fighters Association v. City of Fort Walton Beach*, 11 FPER ¶ 16240 at 660 (1985).

In its sole exception, the FOP excepts to the hearing officer's conclusion that this case involved a novel issue. Relying on *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), the FOP contends that neither the state of the case law nor the clarity of the statute was in doubt. In essence, the FOP argues that the City knew or should have known that it did not have the right to unilaterally modify the collective bargaining agreement. The City, in its response, argues that well established case law governing contractual modifications under Section 447.4095, Florida Statutes, did not exist at the time it was required to act. *See Collier Professional Firefighters and Paramedics, International Association of Firefighters, Local 2396, AFL-CIO v. East Naples Fire Control & Rescue District*, 40 FPER ¶ 176 (2013).

The FOP's reliance on *Chiles* is misplaced because *Chiles* did not involve the interpretation or application of Section 447.4095, Florida Statutes. The Florida Supreme Court issued *Chiles* in 1993 and Section 447.4095, Florida Statutes, was created by the legislature in 1995. *See* Ch. 95-218, § 2, Laws of Fla. Moreover, in *Chiles*, the Supreme Court held that before any unilateral modification could be made, the School Board had to demonstrate a compelling state interest. *Communications Workers of America v. Indian River County School Board*, 888 So. 2d 96, 101 (Fla. 4th DCA 2004). Here, the hearing officer found the City had a compelling interest in reopening its contract with the FOP and altering provisions which related to wages and pension benefits of employees represented by the FOP. In sum, he found that a financial urgency existed.

In the absence of a case interpreting and applying Section 447.4095, Florida Statutes, which would have warned the City that it was acting unlawfully, the City would not know or should not have known that its conduct was violative of Chapter 447, Part II, Florida Statutes. We also note that the City prevailed before the hearing officer, the Commission, the First District Court, and there was an unwritten dissenting opinion within the Florida Supreme Court. We also note that although the City was a prevailing respondent, the hearing officer concluded that neither party was entitled to attorney's fees and costs. Furthermore, we agree with the hearing officer that this case encompassed a novel issue, involving statutory interpretation and application, as well as constitutional issues; thus, neither party is entitled to an award of attorney's fees. *See*,

e.g., Fire Rescue Professionals of Alachua County, Local 3852, IAFF v. Alachua County, 28 FPER ¶ 33158 (2002). Therefore, the FOP's sole exception is denied.

We agree with the hearing officer's analysis of the dispositive legal issues and conclusions of law. Accordingly, the hearing officer's recommended order is incorporated herein.

The appropriate remedy in this case requires the City to rescind the changes in wages and benefits that were legislatively imposed on September 30, reinstate the status quo ante as of September 29, 2010, and make the employees whole.[2] The Clerk of the Commission is directed to open a back pay case and schedule a hearing before Hearing Officer Joey D. Rix.

On September 25, seventy-two City police officers filed a motion to intervene. They allege that their substantial interests may be affected by the outcome of the back pay proceeding. The City and the FOP oppose the motion. The motion is denied as premature with leave to refile in the back pay case.

This is not an appealable final order because the amount of back pay remains for determination. *See Department of Corrections v. Schwarz, et al*, 134 So. 3d 1002 (Fla. 1st DCA 2012). When the amount of back pay is resolved, the Commission will issue a final order that will allow either party to appeal the merits of this order or the amount of back pay.

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[2]The City's argument that the back pay award should be limited to a certain period of time is appropriately addressed by the hearing officer in the back pay case.

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(Relates to CA-2010-119)

It is so ordered.
POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on October 18, 2017.

BY: _____
Clerk

/bjk

cc: Attorneys representing the police officers who filed the motion to intervene:

Hoss Hernandez, Esquire
4551 Ponce Del Leon Boulevard
Coral Gables, Florida 33146-1832

Richard John Diaz, Esquire
3127 Ponce Del Leon Boulevard
Coral Gables, Florida 33134

H.K. "Skip" Pita, Esquire, and
Randy M. Weber, Esquire
9350 South Dixie Highway
Suite 1200
Miami, Florida 33186