STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

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| BROWARD COUNTY POLICE BENEVOLENT ASSOCIATION, INC., CHARTERED BY THE FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., | : | |
| Charging Party, | : | Case No. CA-2012-016 |
| v. | : | FINAL ORDER |
| CITY OF HOLLYWOOD, | : | Order Number: 18U-201 |
| | : | Date Issued: August 14, 2018 |
| Respondent. | : | |

Michael Braverman, Fort Lauderdale, attorney for Charging Party.

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

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On March 12, 2012, the Broward County Police Benevolent Association, Inc., Chartered by the Florida Police Benevolent Association, Inc. (PBA), filed an unfair labor practice (ULP) charge against the City of Hollywood (City).[1] According to the charge, the City improperly invoked financial urgency, pursuant to Section 447.4095, Florida Statutes (2018),[2] and failed to follow the legislatively required procedures by unilaterally changing the contractual terms and conditions of employment of bargaining unit employees represented by the PBA before completing the impasse resolution procedure set forth in section 447.403, Florida Statutes. The PBA charged that these alleged actions violated

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[1]This case comes before us with a long procedural history. We commend the hearing officer's succinct recitation of that history, some of which we repeat here.

[2]Statutory citations are to the 2018 edition of the Florida Statutes. To the extent that events discussed herein took place before 2018, the applicable statutory language at the time was not substantively different from the 2018 version.

section 447.501(1)(a) and (c), Florida Statutes. The City denied the PBA's allegations. Both parties requested awards of attorney's fees and litigation costs. A notice of sufficiency was issued on March 19, a hearing officer was appointed, and an evidentiary hearing was scheduled.

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

Subsequently, the Florida Supreme Court issued its opinion in *Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police, Inc. v. City of Miami*, 215 So. 3d 1 (Fla. 2017), holding that once a local government declares a financial urgency, it does not have the ability to unilaterally alter the terms and conditions of a collective bargaining agreement (CBA) before completing the procedures required by the Legislature in sections 447.4095 and 447.403, Florida Statutes. Based on that decision, the Commission directed the parties to show cause why the stay should not be lifted. In their November 13 and November 27, 2017, responses, the City and the PBA requested an evidentiary hearing. On December 5, the Commission issued an order lifting the stay.

The case was reassigned to a hearing officer on December 11, and a new hearing date was set.

In light of *Headley* and the City's admission that it declared financial urgency for fiscal year 2011-2012 and modified the parties' CBA prior to completing the impasse process in section 447.403, Florida Statutes, the hearing officer issued an order narrowing the scope of the hearing to the remedy to be afforded under the circumstances, including whether a contractual waiver of any remedy applies. The hearing officer arrived at this conclusion to limit the scope of the hearing, which we hereby endorse, based in part on our decision on remand in the *Headley* case wherein we concluded that the City of Miami violated section 447.501(1)(a) and (c), Florida Statutes, when it implemented changes to a CBA prior to completion of the impasse resolution proceedings. *Headley*, 44 FPER ¶ 128 (2017).

Following additional proceedings that do not need to be repeated here, a telephone hearing was held between Tallahassee and Hollywood on March 6, 2018. On May 1, the Respondent filed a copy of the transcript from the hearing.

On May 9, the hearing officer issued a recommended order, in which she concluded that the City committed an ULP in violation of section 447.501(1)(a) and (c), Florida Statutes, by declaring financial urgency for fiscal year 2011-2012 and modifying the parties' CBA prior to completing the impasse process required by section 447.403, Florida Statutes. However, the hearing officer also concluded that pursuant to a clear and unambiguous contract provision, the PBA waived any and all remedies that arose out of the resolution of the case, which voided the need to determine an appropriate remedy

as a result of the City's unlawful conduct. As such, the hearing officer recommended that the charge be dismissed.

On May 23, the PBA filed eight[3] exceptions to the hearing officer's recommended order. On June 11, the City filed its responses to the PBA's exceptions.

The facts relevant to ruling on the PBA's exceptions are as follows. During the time period at issue in this case, the PBA and City were parties to three different CBAs, for the periods of October 1, 2009, through September 30, 2012; October 1, 2012, through September 30, 2014; and October 1, 2014, through September 30, 2017. In May of 2010, the City advised the PBA that it was facing revenue shortfalls for fiscal year 2010-2011 and asked the PBA to help the City find cost savings. The PBA voluntarily reopened negotiations on the first CBA, and on August 30, 2010, the parties reached an agreement, which was set forth in a memorandum of understanding (MOU). On September 7, 2010, before executing the MOU, the City declared financial urgency for fiscal year 2010-2011, pursuant to section 447.4095, Florida Statutes. On October 4, 2010, the PBA informed the City that its membership had ratified the MOU. The MOU was executed on October 28, 2010.

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

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[3]The PBA has exceptions numbered one through four and six through nine, skipping the number five. For purposes of clarity, we use the PBA's numbering in discussing the exceptions, recognizing that there is no reason to address exception five because it does not exist.

declined. On May 18, 2011, the City declared financial urgency for fiscal year 2011-2012 and informed the PBA of the same by letter dated May 20, 2011.

Following a short series of bargaining sessions, the City voted to impose wage reductions, eliminate merit pay raises, and authorize layoffs on June 13, 2011. Other adverse economic impacts of the City's decision included removal of longevity pay and increases to employee pension contributions.

On September 21, 2011, the City held a special referendum election on whether the City should implement the proposed changes to the pension ordinance. Specifically, the changes froze the then-current pension plan, created a new plan, and deleted all language from the then-current CBA that was inconsistent with the new plan. The referendum passed and, in light thereof, the City imposed the changes, effective October 1, 2011. These changes were implemented in City Ordinance 0-211-27 prior to completion of the impasse resolution proceedings in section 447.403, Florida Statutes. On March 12, 2012, the PBA filed the ULP charge at issue in this case against the City.

On or about December 11, 2012, the City submitted to the PBA proposals in an attempt to incrementally restore some of the salaries and benefits impacted by the declaration of financial urgency. In exchange for the incremental restoration of benefits, the City's proposal included a waiver of all possible damages stemming from the two pending ULP charges, should the PBA prevail on the merits, but still allow the PBA to pursue a determination on the underlying legal issue of how to properly declare "financial urgency." A similar proposal containing the waiver language had been presented to, and

agreed upon by, the Hollywood Firefighters, Local 1375, IAFF, Inc. On December 20, 2012, the parties notified the Commission that they had reached impasse in their collective bargaining and requested a list of special magistrates to hear the disputed issues. A special magistrate proceeding was scheduled for April 18, 2013. Meanwhile, the parties continued to engage in substantial negotiations. The City's request for a waiver of remedies was included in each proposal presented to the PBA from December 2012 to May 15, 2013, when the parties reached a tentative agreement, ending the impasse.

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

> The Union agrees for itself and for all bargaining unit employees to waive, renounce, and forego any and all remedies and payments whatsoever related to the modifications to any part of the Collective Bargaining Agreement or the Pension Plan Ordinance made by the City pursuant to financial urgency to which it or they are or may become eligible to receive, whether resulting from an award by any tribunal or through settlement of any matter related to such changes, including the pending unfair labor practice charges that are on appeal Case Number 1D12-3901 and PERC Case No. CA-2011-098 and/or the unfair labor practice charges that are stayed in PERC Case No. CA-2012-216 [sic].[4]

[4]While the contract provision references PERC Case Number "CA-2012-216," the understanding was that it referred to CA-2012-016, the ULP charge that was stayed at the time.

On or about July 16, 2013, the PBA's members voted to accept the modifications to the terms and conditions of the new two-year agreement. The agreement was made retroactive to October 1, 2012, and expired September 30, 2014. A subsequent three-year contract was ratified and made effective October 1, 2014, through September 30, 2017. Article 37.6 of that contract contained the exact same waiver provision from Article 37.9 of the prior agreement.

We turn now to the PBA's exceptions. Exceptions one, three, and six revolve around arguments relating to the City's 2011 pension ordinance. The exceptions consist primarily of a recitation of the Florida Supreme Court's *Headley* decision, the importance of the Constitutional rights recognized in the *Headley* decision, and arguments that the ordinance should be void *ab initio* because of the nature of the ULP violation that occurred when the City made unilateral changes to the CBA and pursued the ordinance without going through the impasse process in section 447.403, Florida Statutes.

The argument accompanying these exceptions is somewhat confusing to follow as it seems to be directed toward finding that an ULP occurred. As noted above, and reiterated here, we agree with the hearing officer's conclusion that the City violated section 447.501(1)(a) and (c), Florida Statutes, when it made unilateral changes to the CBA without completing the impasse process in section 447.403, Florida Statutes. Indeed, after the hearing officer narrowed the scope of the hearing based on our decision in the *Headley* case on remand, 44 FPER ¶ 128 (2017), the City conceded and stipulated to this ULP. Therefore, to the extent that the PBA's arguments recite and recount how

the ULP occurred in this case, rather than focus on the issue of the remedy and whether it was waived, those arguments are unavailing.

Furthermore, we agree with the City that the arguments accompanying the PBA's exceptions are undermined by the recent decision in *City of Miami v. City of Miami Firefighters' and Police Officers' Retirement Trust & Plan,* 43 Fla. L. Weekly D1270 (Fla. 3d DCA 2018), which recognized that the Florida Supreme Court did not invalidate a similar pension ordinance in Miami in its *Headley* decision. The PBA's arguments are further undermined by the Florida Supreme Court's recent decision in *Fraternal Order of Police v. City of Miami*, 243 So. 2d 894, 899 (Fla. 2018), which upheld the underlying financial urgency statute in section 447.4095, Florida Statutes, against a number of facial constitutional challenges.

Nevertheless, the main flaw, and our reason for denying these exceptions, is that none of the PBA's arguments against the 2011 ordinance alter the fact that the PBA waived any and all remedies with regard to its ULP charge. As the hearing officer noted, the language of the waiver was unequivocal and was the result of lengthy and robust collective bargaining. The waiver language appeared in two consecutive CBAs, both of which followed the City's declaration of financial urgency, the 2011 ordinance, and the filing of two ULP charges. Furthermore, the waiver language specifically references the pension ordinance. Therefore, exceptions one, three, and six are denied.

In exception two, the PBA argues that the hearing officer erred in not carving out certain categories of protected employees. The PBA contends that bargaining unit members who had retired, those who were eligible to retire, or those who were not

members of the bargaining unit after the commission of the ULP, but were members prior to the enactment of the CBA containing the waiver, should not be covered by the agreed-upon waiver language. The hearing officer made no findings related to different categories of employees, and in arguing this exception the PBA does not point to any evidence in the record supporting a different treatment of these different categories of employees. Moreover, the argument that these categories of employees should be treated differently was not mentioned in the charge, prehearing statement, at hearing, or in post-hearing documents. We agree with the City that these arguments were not adequately argued or preserved before the hearing officer and are therefore waived. *See Local 1158, Clearwater Fire Fighters Association, Inc., IAFF, v. City of Clearwater*, 32 FPER ¶ 178 (2006); *Alcorn v. City of Jacksonville*, 16 FPER ¶ 21507 (1990); *Bass v. Department of Transportation*, 1 FCSR ¶ 10084 (1986). Moreover, even if this argument had been preserved and argued, the fact remains that the PBA completely and unequivocally waived any remedy from the ULP charge filed in this case. While we do not need to definitively decide the point, the PBA does not provide an explanation for why that waiver would not extend to the categories of employees laid out for purposes of any remedy that the Commission could provide based on its charge. Exception two is denied.

In exception four, the PBA argues that 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, which in the present case, it argues, would be the Florida Supreme Court's decision in *Headley*. We reject the underlying premise of this exception that the waiver was of an unknown future act. While the ultimate decision of the Florida Supreme Court might have

been unknown, the potential for the Court to reverse and remand the case for a remedy was certainly knowable at the time the PBA and its members agreed to the waiver. Therefore, exception four is denied.

In exception seven, the PBA returns to the issue of the 2011 pension ordinance, alleging that the hearing officer erred in failing to find that the constitutionality of the 2011 pension ordinance is a matter that can only be resolved by courts and not by the Commission. There is no suggestion in the hearing officer's order that the constitutionality of the 2011 pension ordinance was the basis for her decision. Rather, it was the fact that any entitlement to a remedy as a result of the ULP charge in this case had been waived in two CBAs. Exception seven is denied.

In exception eight, the PBA argues that the hearing officer erred in failing to find that the waiver was illegal or unenforceable based on the provision of the CBA that addresses generally if a portion of the CBA were deemed to be in conflict with mandatory federal or state laws. We agree with the hearing officer's conclusion on this point:

> The PBA asserts that the waiver provision is void by operation of Article 38.2 of the CBA, which states in pertinent part: "It is understood and agreed that if any part of this Agreement is in conflict with mandatory Federal or State Laws ... such parts shall be renegotiated and the appropriate mandatory provisions shall prevail." Essentially, the PBA argues that the City's actions were voided by the *Headley* decision and, therefore, any subsequent agreement stemming from that decision is void. The PBA's application of this contract language to the court's holding in *Headley* is a strained one. The *Headley* court held that the lower court's interpretation of the financial urgency statutory provisions violated the Florida Constitution by permitting unilateral changes to a CBA. The court's decision merely rendered unlawful the City's actions in bypassing the impasse procedures while declaring financial urgency, not the underlying statutes. Further, no part of

> the negotiated waiver provisions at issue here is in conflict with mandatory federal or state laws. Moreover, the PBA cites to no case law to suggest that it is unlawful for a party to agree to forego its rights to certain legal remedies in exchange for incremental restoration of certain wages and benefits.

(Hearing Officer's Recommended Order at p. 12) For the reasons stated by the hearing officer in rejecting the argument when it was made to her, we similarly deny exception eight.

Finally, in exception nine the PBA claims that a scrivener's error in the case number listed in the waiver should render the waiver void. This essentially challenges factual findings by the hearing officer in paragraph 17 and footnote 3 that the parties understood the reference in the waiver to be the instant case despite the scrivener's error in the case number. The Commission's review of a hearing officer's findings of fact is limited to whether they are supported by competent substantial evidence. § 120.57(1)(l), Fla. Stat.; *see, e.g., Boyd v. Department of Revenue*, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996); *Heifetz v. Department of Business and Professional Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). In the instant case, there is competent substantial evidence in the record to support the hearing officer's findings. Therefore, exception nine is denied.

Upon consideration, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law. Accordingly, we adopt the hearing officer's findings of fact. § 120.57(1)(l), Fla. Stat. (2018). We also agree with the hearing officer's analysis of the dispositive legal issues and her conclusions of law. As for the hearing officer's

recommendation, we would draw the distinction that we conclude that the City engaged in an ULP in violation of section 447.501(1)(a) and (c), Florida Statutes, and therefore we are not dismissing the charge. Rather, we conclude that there is no need to order a remedy for this violation because the PBA waived any and all remedies that could arise out of the resolution of this case. With this clarification, the hearing officer's recommended order is incorporated within this order except for the recommendation that the charge be dismissed.

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within **thirty** days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in sections 120.68 and 447.504, Florida Statutes, and the Florida Rules of Appellate Procedure.

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 August 14, 2018.

BY: Rebecca Deal
Deputy Clerk

/bjk

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