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 PARTIES PROPOSED HEARING OFFICER'S RECOMMENDED ORDER

The Charging Party, the BROWARD COUNTY POLICE BENEVOLENT ASSOCIATION, INC. ("PBA"), by and through its undersigned counsel and pursuant to the applicable provisions of the Florida Administrative Code and hereby files this CHARGING PARTIES PROPOSED HEARING OFFICER'S RECOMMENDED ORDER Containing Findings of Facts, Argument, Citation of Authority and Conclusions of Law and in furtherance thereof , the PBA states:

FINDINGS OF FACT/STIPULATIONS[1]

1. On March 12, 2012, the PBA filed the instant charge against employer, which the PERC General Counsel found sufficient and the City filed its Answer.

2. The parties agreed to stay the instant charge while the litigation in CA-2011-101[2] was pending.

3. On March 27, 2012, the Commission decided *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc. v. City of Miami*, Case No. CA-2010-119, wherein it held the

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[1] The stipulations agreed to by the parties and set forth above are taken from Joint Exhibit 1.
[2] *Hollywood Firefighters, Local 1375 IAFF, Inc. v. City of Hollywood.*

City of Miami's invocation of Section 447.4095 to impose mid-duration changes to a collective bargaining agreement period, without going through the statutory impasse process, did not violate Chapter 447.

4. The Miami City Commission had engaged in the identical behavior as the Hollywood City Commission in invoking Sec. 447.4095 to declare a financial urgency, and impose wage and benefit reductions mid-agreement, without proceeding through the statutory process described in Sec. 447.403, Fla. Stat.

5. On July 19, 2013, the First District Court of Appeal affirmed the Commission's decision in *Headley*. *Headley v. City of Miami*, 118 So. 3d 885 (Fla. 1st DCA 2013).

6. On January 8, 2014, the Fourth District Court of Appeal reversed the Commission's decision in CA-2011-101, in *Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood*, 133 So.3d 1042 (Fla. 4th DCA 2014). In that case, the Commission dismissed an unfair labor practice charge filed by IAFF Local 1375 based on the facts described above. The Fourth DCA held that the Commission's interpretation of Sec. 447.4095 was erroneous, disagreed with the First District's affirmance in *Headley*, and certified conflict to the Florida Supreme Court.

7. On March 2, 2017, the Florida Supreme Court issued its opinion in *Headley v. City of Miami*, 215 So.3d 1 (Fla. 2017), wherein it recognized that the invocation of Sec. 447.4095, in the manner applied by Miami, denied fundamental rights under the Florida Constitution, namely the right to collectively bargain and the right to contract.

8. The *Headley* Court further held: 1) that the standard it articulated in *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993) was the correct constitutional standard to apply to a declaration of financial urgency under Sec. 447.4095, and 2) the imposition of changes to a collective bargaining agreement mid-duration, without proceeding through the statutory impasse

process in Sec. 447.403, violated Chapter 447, thus affirming the Fourth District, quashing the First District decision and the decision of the Commission. A decision which is quashed is a nullity. *Smith v. Avino*, 572 So. 2d 1 (Fla. 3d DCA 1990), relying on *Holland v. Webster*, 43 Fla. 85, 29 So. 625 (1901).

9. The City of Hollywood does not dispute that it declared financial urgency for fiscal year 2011-2012 or modified the parties' CBA prior to completing the impasse procedure in section 447.403, Florida Statutes (see answer paragraph 4 and 9 and stipulation number 11, J. Ex.1).

10. The City is a public employer pursuant to §447.203(2), Fla. Stat.

11. The PBA is an employee organization pursuant to §447.203(11), Fla. Stat., and the certified bargaining agent for a Bargaining Unit, which includes all police officers, sergeants, and lieutenants employed by the City.

12. During the time period at issue, the parties were signators to a Collective Bargaining Agreement 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. Also, see Charging Party's Exhibit 1-3.

13 In May, 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 CBA, and on August 30, 2010, the parties reached an agreement, which was set forth in a Memorandum of Understanding (MOU).

14. On September 7, 2010, before the parties executed the MOU, the City declared financial urgency pursuant to §447.4095, Fla. Stat.

15. On October 4, 2010, the PBA informed the City that its membership had ratified the MOU.

16. On May 4, 2011, the City informed the PBA that there was an additional revenue shortfall for the fiscal year 2010 - 2011, and a projected shortfall of $25 million for the fiscal year 2011 - 2012.

17. The City asked the PBA to voluntarily reopen negotiations, but the PBA declined.

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

19. 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. In subsequent negotiations, the City agreed to rescind the layoffs and increase the imposed wage reductions.

20. On September 21, 2011, the City held a special referendum election on whether the City should implement imposed changes to the pension ordinance; specifically, the changes froze the then - current pension plan and created a new plan and deleted all language from the then - current Collective Bargaining Agreement that was inconsistent with the new plan. The referendum passed, and in light thereof, the City imposed the changes, effective October 1, 2011.

21. These changes were implemented via Ordinance 2011 - 118 and a May 20, 2011 letter prior to the completion of the impasse resolution proceeding, as set forth in §447.403, Fla. Stat.

22. In December of 2012, the PBA and City were in negotiations and the City agreed to take steps towards restoring certain pay and pension benefits. TR, p. 15; Respondent's Ex. 3).

23. The City began proposing a waiver of possible damages as early as December 11, 2012. (Respondent's Ex. 3).

24. The City's philosophy in moving forward in the latter part of 2012 was to work with the unions and return as much as possible. (TR, p. 16).

25. The City relied on the illegally removed pay and benefits as consideration for the waivers provided in Article 37.9. (TR, p. 18).

26. The parties ratified the 2012 - 2014 Agreement, which contained the following language.

Article 37 - Pension and Pension Plans contains the following language:

> 37.9: The Union agrees for itself and for all Bargaining Unit members to waive, renounce, and forego any and all remedies and payments whatsoever related to the modification 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 aware by any tribunal or through settlement or any matter related to such changes, including the pending unfair labor practice charges that are on appeal in Case No. 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.

27. The City of Hollywood passed an ordinance that adopted the new pension changes, that was passed as a result of the ratification. (TR, p. 19).

28. The changes that took effect based on the passage of Ordinance 2011-118. (TR, p. 19).

29. The 2014 - 2017 contract contained the same language in the Pension Article 37.9. (TR, p. 20; PBA Ex. 3).

30. The parties are currently engaged in negotiation and there has been no successor agreement entered into after the September 20, 2017 Collective Bargaining Agreement. (TR, p. 20; PBA Ex. 3).

31. The 2017 Collective Bargaining Agreement ended September 30, 2017. There is no record of the PBA agreeing to the waiver in the minutes of the April 10, 2013 collective bargaining session. (P. 6 of 10, Respondent's Ex. 6).

32. Other than the notations made in the minutes contained in Charging Party Exhibit 6 or Exhibit 6, Exhibit 9, and Exhibit 13, there are no other written or recorded records of the actual discussions regarding the waiver. (TR, p. 26; Charging Party's Ex. 6, 9, and 13). Article 38 - Complete Agreement and Waiver of Bargaining contains the following language:

> 38.1: It is agreed and understood that this Agreement constitutes the complete understanding between the parties, terminating all prior agreements, and concluding all collective bargaining during its terms, except as otherwise specifically provided in the Agreement. The Union specifically waives the right to bargain during the term of the Agreement, with respect to any subject or matte referred to or covered in this Agreement, or to any subject or matter not specifically referred to or covered even though it may have been in the knowledge or contemplation of the parties at the time this Agreement was negotiated.
>
> 38.2: It is understood and agreed that if any part of this Agreement is in conflict with the mandatory federal or state laws or mandatory provisions of the City Charter, such parts shall be renegotiated, and the appropriate mandatory provisions shall prevail.
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> 38.3: Should any part of this Agreement or any portion therein contained be rendered or declared illegal, legally invalid, or unenforceable by a court of competent jurisdiction, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions thereof. In the event of such occurrence, the parties agree to meet as soon as practical to negotiate substitute provisions of this Agreement. (Charging Party's Ex. 1, 2, and 3).

33. The Collective Bargaining Agreements for the term 2012 - 2014 and 2014 - 2017 contain a case number for the unfair labor practice of 2012 - 216. (TR, p. 31, PBA Ex. 2 and 3).

34. The case number in this unfair labor practice is 2012 - 016.

35. Jeffrey Marano is the President of the Broward County PBA and was the chief negotiator for the 2009 - 2012, 2012 - 2014, and 2014 - 2017 Collective Bargaining Agreements. (TR, p. 36).

36. The unilaterally imposed reductions had immediate and very substantial changes on the Bargaining Unit members. It forced foreclosures of houses, short sales, divorces, all around economic impact to the membership was immediate. The membership had no attempt to plan, refinance, borrow money, or adjust their budget; it just happened overnight. (TR, p. 37).

37. The changes which were unilaterally imposed by the City had a significant impact on the ability to staff positions with the police department and the ability for police personnel within the Bargaining Unit to safely operate. (TR, p. 37).

38. Marano explained that the membership felt they had no choice, that they had a gun to their head, either you take this or leave it, that's it. (TR, p. 38).

39. Marano brought back the 2014 - 2017 contract for negotiations because he felt that there was no other option. People were leaving and going to other departments, going to the Broward Sheriff's Office, going to Margate, going to PBSO (Palm Beach Sheriff's Office). (TR, p. 39).

40. The PBA and City have agreed to withdraw their claims for attorney's fees. Either party will be requesting fees or costs. (TR, p. 40).

ISSUE

What is the remedy to be awarded to the PBA?

ARGUMENT

I. The City has committed an unfair labor practice and the and the language contained in Article 37.6 only relates to or possibly impacts the remedy.

It is clear from the record that the PBA is the prevailing party and as such is entitled to the remedy requested in the original charge of unfair labor practice filed in 2012. The PBA and the members of the bargaining unit are entitled to have the illegally removed pay and benefits restored. The Commission has routinely restored the status que as a remedy in unilateral change cases. The City claims that the language contained in Article 37.6 should bar the PBA being awarded any remedy in the case. The language in article 37 could be construed as a waiver. A claim of waiver is an affirmative defense. An affirmative defense is one that admits the cause of action asserted by the preceding pleading, but avoids liability, wholly or partly, by allegations of excuse, justification or other matter negating liability. *Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc.*, 538 So. 2d 1382 (5th DCA 1989). The City is essentially arguing is excused from being subject to the unfair labor practice charge, not that it has no liability due to some intervening event over the years. The City is thus asserting an affirmative defense to the charge

As an affirmative defense, the City bears the burden of establishing a factual basis for proving waiver. "Whether waiver has occurred is generally a question of fact, reviewed for competent, substantial evidence." *Hale v. Dept. of Revenue*, 973 So.2d 518, 523 (Fla. 1st DCA 2007); *accord Clearwater Fire Dept. v. Lewis, et al.*, 404 So.2d 1156 (Fla. 2d DCA 1981). "To successfully assert waiver as an affirmative defense, the City must prove by a preponderance of the evidence that the waiver was clear and unmistakable. To show that a contractual waiver is clear and unmistakable, the language must be stated with such precision that simply by reading the

pertinent contract provision employees will be reasonably alerted that the employer has the power to change certain terms and conditions of employment unilaterally." *Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police, v. City of Jacksonville*, 44 FPER ¶ 129 (2017) (internal citations omitted).

The purported waiver the City is relying upon appears to waive only damages during the time of the collective bargaining agreement, not the underlying charge. The waiver has been renewed during two separate collective bargaining agreements. The waiver has expired (September 30, 2017) at the end of the term of the last collective bargaining agreement. Had the PBA wanted to cease moving forward with the charge, it simply would have entered a voluntary dismissal. Apparently, the City must have understood this as the parties placed the language in two successive agreements. Since the City views the language in a different light from the PBA, there is a material dispute of facts and the language is not "clear and unmistakable."

II. The purported waiver found at Article 37.6 of the collective bargaining agreement is ineffective, as it is void by operation of Article 38.

The language upon which the City relies is found at Article 37.6 of the Collective Bargaining Agreement 10/01/14 – 09/30/17 Between the Broward County PBA and the City of Hollywood. The language states:

> The Union agrees for itself and for all bargaining unit employees to waive, renounce, and forgo 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 in 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.

However, the City fails to consider the language found at Article 38: Complete Agreement and Waiver of Bargaining, which states:

38.2: It is understood and agreed that if any part of this Agreement is in conflict with mandatory Federal or State Laws, or mandatory Federal or State Laws, or mandatory provisions of the City Charter, such parts shall be renegotiated and the appropriate mandatory provisions shall prevail.

38.3: Should any part of this Agreement or any portion therein contained be rendered or declared illegal, legally invalid, or unenforceable, by a Court of competent jurisdiction, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions thereof. In the event of such occurrence, the parties agree to meet as soon as practical to negotiate substitute provisions of this Agreement.

The language in Article 37.6 purports to waive remedies resulting from the reversal of the imposed changes made pursuant to the City's multiple declarations of financial urgency. However, each time the City invoked Sec. 447.4095, it failed to proceed through the impasse resolution process outlined in 447.403, thus the actions it took conflicted with and violated mandatory Florida law.

The Supreme Court in *Headley* 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." *Headley*, 215 So.3d 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 Miami without proceeding through the Sec. 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, 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).

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).*

The purported waiver found at Article 37.6 is contrary to Florida law and is illegal from inception. Based upon the language in Article 38 of the collective bargaining agreements, the City should meet with the PBA "as soon as practical to negotiate substitute provisions of [the] Agreement."

The parties contemplated portions of the Collective Bargaining Agreement potentially being ruled illegal or unenforceable. The provisions of Article 38 make it clear that the parties

foresaw the need to be able to remove portions of the Collective Bargaining Agreement that are found to be illegal or unenforceable and not have that result in the entire agreement being ruled void. The facts of this case are undisputed. The City committed an unfair labor practice when it passed legislation through the form of an ordinance and conducted a referendum election that removed collective bargaining benefits, wages, and pension benefits without exhausting the impasse procedure contained in Chapter 447.

The City's actions are distinguishable from a normal unfair labor practice Involving a unilateral change. This case involves the City violating the fundamental constitutional rights of the members of the bargaining unit. The City's actions were illegal. The City did not have a legal right or title to the money and benefits it illegally took. The City coerced the Bargaining Unit into accepting the language in Article 37.

There was no consideration for the waiver language. The City illegal took the pay and benefits of the employees. The City never should have reduced the pay and benefits and could not use the return of those same items as consideration for the waiver. Mr. Ryder testified that the City agreed to restore part of the illegally removed pay and benefits in consideration of the waiver but that is no consideration on the part of the City. The city cannot illegally take the pay and benefits and then claim a detriment by returning a portion of those same benefits. The City has not supplied any consideration for the waiver and it should be ruled unenforceable.

The Hearing Officer should rule that the waiver is illegal or unenforceable and that it will be voided as part of Article 38. The parties should be required to return to the table and continue to negotiate over the return of the benefits illegally removed by the City. This remedy should be after the return to the status quo. At that point, the City and PBA, according to Article 38, would

return to the bargaining table and the City's concerns over the financial impact of the return to the status quo can be addressed during those negotiation sessions.

In addition, Article 38.1 makes it clear that during the term of each Collective Bargaining Agreement, all prior agreements and understandings between the parties are terminated unless they have been specifically provided for in this Agreement. (Emphasis added; Article 38.1).

This point cannot be understated. It is clear that the City realized that the waiver provision of this case that makes up the City's affirmative defense needed to be restated each time the parties returned to the bargaining table. PERC addressed the scope of waivers in the case of *Citrus, Cannery, Food Processing and Allied Workers vs. City of Sarasota,* 29 FPER 87 (2003), holding that prior waiver does not waive future bargaining rights. In that case, PERC made it clear that employees and employers are limited in the effect of waivers and waivers cannot exceed certain parameters.

In the case of *Palm Beach Junior College Board of Trustees vs. United Faculty of Palm Beach Junior College,* 475 So.2d 1221 (Fla. 1985), the Court held it was unlawful to impose a waiver of union's rights to bargain over the impact of management decisions.

In the case of *Palm Beach Junior College Board of Trustees vs. United Faculty of Palm Beach Junior College,* 468 So.2d 1089 (Fla. 4th DCA 1985), the Court held it was unlawful to impose a waiver of the union's right to arbitrate grievances after the exploration of a Collective Bargaining Agreement.

Furthermore, in the case of *City of Clearwater vs. John J. Lewis, III,* 404 So.2d 1156 (Fla. 2nd DCA 1981), the Court also recognized that the establishing of a standard for a waiver of a right was also infused with policy considerations.

These decisions all stand for the proposition that any waiver entered in to by the PBA or the membership has a limited duration. This fact, again, cannot be understated. The Collective Bargaining Agreement term of the last contract was 2014 - 2017. The parties have not reached a successor agreement. Given that fact, the waiver that was contained in the 2012 - 2014 contract has expired. The waiver that was contained in the 2014 - 2017 contract has expired. Given that fact and the inability to waive prospective rights of the PBA and Bargaining Unit Members, lead to the conclusion that the waiver contained in Article 37 should be void and should not prohibit the PBA from seeking the return to the status quo as a remedy in the unfair labor practice.

It goes without saying the City has obviously admitted to the illegal conduct and that unfair labor practice was committed. Given the Hedley decision and the actions of the City, the Court's failure to apply the standard in the Childs matter demands that the actions of the City be overturned, and the status quo be restored.

As stated above, what distinguishes this case from other unilateral action cases and violations of Chapter 447 is the fundamental right that was abridged when the City chose to impose changes prior to the completion of the impasse procedure and the constitutional rights of the employees that were violated cannot be waived.

Starting October 1, 2017, there was no waiver and the PBA had the ability to continue the litigation and seek damages for the illegal action taken by the City. It is clear from the parties' past actions that the City could have offered the PBA in collective bargaining some type of resolution that would have prevented the PBA from going forward with the unfair labor practice charge. It was that fact that supports the Hearing Officer's determination that any effect of the language of Article 37 ended with the expiration of the 2014 - 2017 contract.

There is no other logical explanation as to why the parties reiterated the waiver in the 2012 - 2014 and then, again, in the 2014 - 2017 Collective Bargaining Agreement. The parties recognize that even with the language that was contained and agreed to, ratified and approved by both parties in the 2012 - 2014 contract, that clearly rights were continuing to vest, and monies were continuing to accrue. The Bargaining Unit members continued to be Injured the reduction in pension benefits and pay. The effect of those changes continued to compound over years and this continued impact necessitated the parties to revisit this issue each year until the case was either voluntarily withdrawn, dismissed, or a final order had been issued. None of those conclusions have occurred and the parties are continuing to negotiate over the return of benefits that were illegally removed from the Bargaining Unit members.

III. The purported waiver found at Article 37.6 of the collective bargaining agreement is ineffective, as the basis for the waiver is void *ab initio* because it abridges fundamental rights to collectively bargain and contract.

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 Sec. 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 Section 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 (*Id.* at 6), 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. 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 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 Section 447.4095 allows unilateral modification of a collective bargaining agreement only after the parties have completed the impasse resolution process of Section 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 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 a 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).

IV. Case number CA-2012-016 is Not listed in either the 2012-2014 or the 2014 – 2017 collective bargaining agreements.

A review Article 37 of both relevant collective bargaining agreements (PBA Ex. 2 & 3) reveals that this case (CA-2012-016) is not listed in the language of 37.9 (2012-2014) or 37.6 (2014-2017). Both contracts list a case CA-2012-216. The PBA & City of Hollywood are not parties to any case listed as CA-2012-216. A bargaining unit member could have been mistaken about the scope of the language contained in article 37 and would not have been placed on notice of the effect of the ratification of the contract containing case number CA-2012-216. The language in article 37.9 or 37.6 does not include the case CA-2012-016. No member, who reviewed the content of the proposed contract knowingly voted to waive any part of case CA-2012-016. Given this major error at best the scope of the language is unclear and therefore void.

The fact of the matter is that whatever the City intended the language at Article 37.9 or 37.6 to be, it could not deprive individual union members of their fundamental rights under the Florida Constitution. Nor, given the unsettled state of the law at the time, could there be a knowing waiver of rights yet to be determined.

CONCLUSION

City leaders ran roughshod over the fundamental rights of its employees through the financial urgency process, enticed the employees to agree to language vitiating their coercion in exchange for a return of some of the value taken from them and now ask the Commission to validate their disregard for the Constitution by dismissing the employees' charge against employer. The City's actions are illegal and wrong and their policy is wrong. The PBA respectfully requests the Commission not reward the City for their constitutional violations by allowing the City to evade a proper remedy in a case that clearly shows the City's actions were illegal.

The language contained in Article 37.9 and 37.6 (waiver) that is at the center of the case is not supported by good and valuable consideration and must be voided.

For the reasons set forth herein and based on the testimony, exhibits, and the totality of the record the PBA respectfully that the following conclusions of laws of law be accepted by the Commission.

CONCLUSIONS OF LAW

1. The City of Hollywood is a public employer pursuant to Section 447.203(2), Florida Statutes.
2. The Broward County Police Benevolent Association (PBA) is an employee organization pursuant to Section 447.203(11) Fla. Stat., and the certified agent for the Bargaining Unit, which includes all police officers, police sergeants, and police lieutenants employed by the City.
3. The City unilaterally implemented changes prior to the completion of the resolution of the impasse proceeding, as set forth in §447.403, Fla. Stat., and committed an unfair labor

practice by failing to complete the impasse resolution proceeding prior to implementing any change.

4. The language contained in Article 37.6 is void.
5. The language contained in Article 38.2 requires Article 37.6 to be the subject of further negotiations.
6. The City is ordered to restore the status quo that was in place as of September 30, 2011 and make all PBA bargaining unit members whole for any losses suffered because of the City's illegal conduct. [3]
7. Neither party has requested or made a claim for attorney's fees or costs and none should be ordered.

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 20th Day of April 2018.

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[3] This make whole remedy would take into consideration any moneys or benefits that have been restored by the City since the illegal reduction took place.