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 RESPONSE TO THE
COMMISSION'S ORDER OF NOVEMBER 16, 2017

The Charging Party, the BROWARD COUNTY POLICE BENEVOLENT ASSOCIATION, INC. ("PBA"), and hereby responds to the Public Employee Relations Commission's Order of November 16, 2017, and states that the purported waiver asserted by the City of Hollywood ("City") is ineffective, both procedurally and as a matter of law. In support, the PBA states:

1. The PBA and the City were signatories to a collective bargaining agreement for the period of October 1, 2009, through September 30, 2012.[1]

2. In May 2010, the City advised the PBA that it was facing revenue shortfalls for FY 2010-11, and asked the PBA to help the City find cost savings. The PBA voluntarily reopened negotiations on the collective bargaining agreement, and on August 30, 2010, the parties reached an agreement, which was set forth in a memorandum of understanding ("MOU").

3. On September 7, 2010, eight days after the parties reached an agreement but before the parties executed the MOU, the City declared financial urgency pursuant to Sec.

[1] The facts articulated in are taken from the findings of fact in the hearing officer's recommended order in Case No. CA-2011-098 and the affidavit submitted by the PBA in its charge against employer.

447.4095, Fla. Stat. On October 4, 2010, the PBA informed the City that its membership had ratified the MOU. As a result of the agreement on the MOU, the September 7th declaration of financial urgency did not proceed through impasse and no modifications to the collective bargaining agreement were imposed.

4. On May 4, 2011, the City informed the PBA that there was an additional revenue shortfall for FY 2010-11, and a projected shortfall of $25 million for FY 2011-12. Again, the City asked the PBA to voluntarily reopen negotiations, but the PBA declined.

5. On May 18, 2011, the City again declared a financial urgency for FY 2011-12.

6. A short series of bargaining sessions followed, and on June 13, 2011, the Hollywood City Commission voted to impose wage reductions, eliminate merit pay raises and authorize lay-offs. In subsequent negotiations, the City agreed to rescind the layoffs, and increase the imposed wage reductions.

7. On September 21, 2011, the City held a special referendum election on whether the City should implement imposed changes to the pension ordinance, which passed.

8. On September 21, 2011, the Hollywood City Commission adopted the results of the referendum election and simultaneously adopted legislation imposing reductions in wages, hours and other terms of employment. Specifically, the legislation froze the then-current pension plan and created a new plan, deleting all language from the then-current collective bargaining agreement that was inconsistent with the new legislation. The imposed changes were effective October 1, 2011.

9. 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.

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

11. 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 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.

12. 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.

13. 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).

14. 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.

15. 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.

[2] *Hollywood Firefighters, Local 1375 IAFF, Inc. v. City of Hollywood.*

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.

16. 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).

17. While the City's Response to Order to Show Cause is framed as a response, it is actually a motion to dismiss. For the reasons set forth below, the City's request to dismiss this case without an evidentiary hearing is properly denied. Now that the parties agree the stay should be lifted, the Commission should order this case to proceed to an evidentiary hearing and final order.

ARGUMENT

I. The City Response is Procedurally Deficient

The City's request to dismiss this case based upon the purported waivers is not authorized by Florida Statute or PERC's rules of procedure under the Florida Administrative Code. Section 447.503, Fla. Stat., describes the procedure to remedy unfair labor practices filed pursuant to Sec. 447.501. The language states in part:

> [V]iolations of the provisions of s. 447.501 shall be remedied by the commission in accordance with the following procedures and in accordance with chapter 120; however, to the extent that chapter 120 is inconsistent with the provisions of this section, the procedures contained in this section shall govern...

The procedure for administrative hearings under Chapter 120, Fla. Stat., is found at Ch. 28-106, F.A.C., Decisions Affecting Substantial Interests. Under Chapter 28-106, the only means to dismiss an administrative petition is found at Rule 28-106.204(2), F.A.C., Motions, which states:

> Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after assignment of the presiding officer, unless the motion is based upon a lack of jurisdiction or incurable errors in the petition.

Rule 28-106.204(2), F.A.C. clearly conflicts with Section 447.503, which provides that the PERC General Counsel has the statutory duty to determine whether a charge is sufficient or subject to dismissal. Florida Statute 447.503 does not provide a party with the ability to move to dismiss a case, only to answer the charge if the General Counsel finds sufficiency. See, e.g., Order Denying Motion for Summary Judgment, *Cape Coral Fraternal Order of Police Lodge Number Thirty-Three v. City of Cape Coral*, CA-2011-001, 2011 WL 2275523 (PERC Gen'l Counsel March 29, 2011) (denying summary disposition, as it is authorized only in cases where the Division of Administrative Hearings has final order authority). Additionally, Chapter 60CC of the Florida Administrative Code memorializes procedure for public employee labor activities regulated by PERC, and specifically describes the procedure for resolving unfair labor practice proceedings at Ch. 60CC-5. Under that rule, in accordance with Florida statute, the General Counsel is charged with determining questions of sufficiency. No procedure exists in Chapter 60CC for a party to move to dismiss a charge against employer, as would occur in an adversarial proceeding governed by the Florida Rules of Civil Procedure.

Furthermore, a claim of waiver is an affirmative defense, which under Florida law is not properly considered on a motion to dismiss. See Fla. R. Civ. P. 1.110(d), Affirmative Defenses. 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 in its Response to Order to Show Cause it 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, and while a defendant may have affirmative defenses that will absolve him or her of all liability at trial, these may not be considered by the court when ruling on a motion to dismiss. *See Pizzi v. Central Bank and Trust Company*, 250 So.2d 895 (Fla. 1971).

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. 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." The Commission would commit reversible error if it were to decide this issue without a full evidentiary hearing.

Section 447.503(2)(b) grants the Commission the discretion to allow a respondent to amend their answer at any time during a unfair labor practice proceeding. Under the rules, the proper procedure to be employed here is to allow the City to amend its answer, asserting the affirmative defense of waiver, and proceed to hearing.

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 mention 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."

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).

The fact of the matter is that whatever the City intended the language at Article 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.

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 procedure is wrong and their policy is wrong. The PBA respectfully requests the Commission not reward the City for their constitutional violations by dismissing this case, and allow it to proceed through the process provided for in Sec. 447.503, Fla. Stat.[3]

WHEREFORE the PBA respectfully requests the Commission order the following:

1. Lift the Stay.
2. Deny the Respondent's Motion to Dismiss/Response to Stay.
3. Give the Respondent ten (10) days to file an amended answer and the Charging Party five (5) days to file any response or motion.
4. Request the parties provide three (3) agreed on dates to hold an evidentiary hearing on the matter.

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[3] The Commission should be aware that a challenge to the facial constitutionality of Section 447.4095, Fla. Stat. is currently pending in the Supreme Court of Florida. The Supreme Court accepted jurisdiction on the merits. The Court dispensed with oral argument and directed briefing to be completed by December 4, 2017. *Fraternal Order of Police v. City of Miami*, 2017 WL 4280607 (Fla. 9/26/2017).

CERTIFICATE OF SERVICE

I hereby certify that this document was filed with PERC and a true and correct copy furnished to counsels for the Respondent, Paul T. Ryder, Jr., Esq. @ 1580 Sawgrass Corporate Parkway, Suite 130 Sunrise, Florida 33323 and J. Robert McCormack Esq. @ 100 N. Tampa Street, Suite 3600 Tampa, Florida 33602 via U.S. Mail this 27th day of November 2017.

By_____
Michael Braverman, Esq.
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