

STATE OF FLORIDA  
PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA, :

Charging Party, :

v. :

FLORIDA STATE UNIVERSITY  
BOARD OF TRUSTEES, :

Respondent. :

Case No. CA-2008-025

HEARING OFFICER'S  
RECOMMENDED ORDER

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Thomas W. Brooks, Tallahassee, attorney for charging party.

Carolyn A. Egan, Tallahassee, attorney for respondent.

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ZAHNER, Hearing Officer.

On March 11, 2008, the United Faculty of Florida (UFF) filed an unfair labor practice charge alleging that the Florida State University Board of Trustees (FSU) violated Section 447.501(1)(a) and (c), Florida Statutes (2007),<sup>1</sup> by continuing to grant administrative discretionary salary increases after the collective bargaining agreement (CBA) between the parties expired on June 30, 2007. On March 14, the General Counsel issued a notice of sufficiency. The undersigned was appointed as hearing officer, and a hearing was scheduled.

On April 3, FSU filed a motion to dismiss the charge, and on April 29 it filed its answer denying that it committed an unfair labor practice. FSU asserted in both pleadings that the unratified memorandum of agreement (Continuation Memorandum) signed by the parties' negotiating representatives on July 12, 2007, extended the CBA for

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<sup>1</sup>All statutory references are to the 2007 edition of the Florida Statutes.

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one year. Thus, FSU argued that it was permitted to continue granting administrative discretionary salary increases pursuant to Article 23.9(a). FSU also claimed in its answer that the charge was untimely filed.

On May 5, I denied the motion to dismiss because the Continuation Memorandum upon which FSU relied was not ratified. See Carroll v. City of Tampa, 18 FPER ¶ 23164 (1992); Florida Public Employees Council 79, AFSCME, AFL-CIO v. The Honorable Jeb Bush, 28 FPER ¶ 33134 (G.C. Summary Dismissal 2002). I also stated that it appeared that the status quo included the waiver contained in Article 23.9(a). See Volusia County Firefighters Association, Local 3574 v. Volusia County, 22 FPER ¶ 27066 (1996); International Association of Fire Fighters, Local 2266 v. City of St. Petersburg Beach, 13 FPER ¶ 18166 (1987). On May 7, both parties responded to my order reasserting their respective positions.

On May 8, the UFF filed an unopposed motion to continue the hearing because there were no disputed issues of material fact and requesting that the parties be given an opportunity to file stipulations and legal arguments. The motion was granted.<sup>2</sup>

The parties filed stipulations, the UFF filed exhibits A through E, and FSU filed exhibits F through I. Because the parties' exhibits were referenced in the stipulations, they are accepted as stipulated exhibits. The record was closed on May 30. Both parties also filed written memoranda of law, and these were considered.

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<sup>2</sup>Because this case is decided based upon a stipulated record, FSU's motion in limine to exclude parol evidence is denied as moot.

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### ISSUES

1. Whether the charge was timely filed?
2. Whether FSU violated Section 447.501(1)(a) and (c), Florida Statutes?
3. Whether either party should be awarded its attorney's fees and costs?

### STIPULATIONS

1. Since October 24, 2003, UFF has been, and continues to date to be, the exclusive bargaining agent for the General Faculty's bargaining unit of The Florida State University under Certification Order Number 1438.

2. The UFF and FSU were parties to the 2004-2007 CBA, which contains an expiration date of June 30, 2007.

3. Article 23.9 of the 2004-2007 CBA, which is found at Charging Party's Exhibit A, permitted Administrative Discretionary Increases (ADIs) to in-unit faculty members upon "verified written counter-offers, increased duties and responsibilities, special achievements, endowed/named chairs and similar situations."

4. The UFF and FSU's bargaining teams commenced negotiations aimed toward obtaining a successor CBA in or about October 2006.

5. The parties' negotiations resulted in eleven tentatively agreed articles by June 28, 2007, leaving only Article 23, Salaries, incomplete.

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6. The parties' negotiations had failed to result in a successor CBA by the June 30, 2007, expiration date, because the salaries article had not yet been agreed.

7. The UFF's bargaining team members present at the subsequent July 12, 2007, bargaining session were Dr. Jack Fiorito, Dr. Robin Goodman, and Dr. Diana Rice.<sup>3</sup>

8. Because the UFF's Chief Negotiator Ted Baker was absent from the July 12 bargaining session, Dr. Fiorito acted as Chief Negotiator for the July 12 session.

9. FSU's bargaining team members present at the July 12 bargaining session were Susannah Miller, Dr. Anne Rowe, Dr. Joseph McElrath, Drew Meehan, and Christopher Pitts.

10. At the July 12 bargaining session, the "Continuation Memorandum," which is found at Charging Party's Exhibit B, was executed by the UFF's Chapter President Jack Fiorito and by FSU's Chief Negotiator Susannah Miller.

11. During bargaining sessions, minutes are contemporaneously kept and are simultaneously projected onto a large screen in the bargaining room.

12. The scribe's minutes of the July 12 bargaining session are located at Respondent's Exhibit F. The minutes constitute a summary, but not a verbatim account, of the parties' negotiations.

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<sup>3</sup>The footnote to this stipulation is omitted because it is argument.

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13. The UFF did not submit the Continuation Memorandum to the members of the bargaining unit for a ratification vote, nor did FSU submit it to the Board of Trustees for ratification.

14. At the July 19, 2007, bargaining session, the UFF's bargaining team sought assurance that FSU's bargaining team understood that the status quo doctrine did not include ADIs pursuant to Article 23.9. Ms. Miller indicated to the UFF that it was FSU's understanding that the status quo doctrine did in fact extend to ADIs, and that the Continuation Memorandum included Article 23.9.

15. On July 25, 2007, Dr. Fiorito authored and subsequently transmitted the letter found at Charging Party's Exhibit C.

16. On or about September 7, Ms. Miller authored and subsequently transmitted the letter found at Charging Party's Exhibit D.

17. Included with Ms. Miller's September 7 correspondence was the report of recently granted ADIs, in accordance with the reporting requirement of Article 23.9(b).

18. Dr. Fiorito stated in his affidavit submitted with the UFF's unfair labor practice charge that he received Ms. Miller's letter on or about September 8, 2007.

19. Dr. Fiorito has since checked his records and has determined that he was out of the country from September 2 through September 17, 2007. Dr. Fiorito states that he did not receive the September 7, 2007, letter until after he returned to Tallahassee

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on September 17, 2007. FSU cannot stipulate to when Dr. Fiorito received the September 7, 2007,<sup>4</sup> letter, but it has no evidence to present to contradict Dr. Fiorito's statement.

20. FSU has continued to award ADIs during the academic year 2007-2008 on its assertion that same is permitted by contract.

21. The UFF filed its unfair labor practice charge on March 11, 2008.

22. On March 13, 2008, approval was sought by Department Chair Dr. Ralph Berry for an ADI, based on exceptional achievement, for the UFF's bargaining team member Dr. Goodman.

23. The request for Dr. Goodman's ADI was approved by Dean Joseph Travis and Provost Larry Abele on March 14, 2008.

24. Prior to 2007, the UFF had honored memoranda of agreement without submitting them to a ratification vote.

25. In Fall 2007, the UFF asserted for the first time to FSU's bargaining team that memoranda agreements must be ratified to be binding.

26. The UFF and FSU have, during the status quo period, continued to meet in consultation, pursuant to Article 2.

27. The UFF and FSU have, during the status quo period, continued to permit access to documents, pursuant to Article 7.

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<sup>4</sup>In the stipulations, this date is stated as September 17, 2007. I assume that was an error and that the correct date of the letter was September 7, 2007.

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28. FSU has not denied any requests by the UFF for released time, pursuant to Article 3.

29. FSU has continued to provide, and the UFF has accepted, data and reports required by the 2004-2007 CBA, including those required by Article 23.

30. FSU has continued to administer, without objection from UFF, Article 23.6 pertaining to awards.

31. By entering into these stipulations, the UFF does not concede that the stipulations contained in paragraphs 7-16 and 22-30 above are necessary for or relevant to the resolution of the remaining issues in this case.

32. By entering into these stipulations, FSU does not concede that parol evidence is admissible.

### ANALYSIS

The first issue to consider is whether the charge was timely filed. Section 447.503(6), Florida Statutes, provides that an unfair labor practice charge is untimely if it is based on events which occurred more than six months prior to the filing of the charge, unless the filing was delayed by service in the armed forces. See Local 1464, ATU v. City of Tampa, 17 FPER ¶ 22012 (1990) (holding that the six-month period is initiated when a charging party knew or should have known of the complained of actions).

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Dr. Fiorito stated in his affidavit attached to the charge that he received Miller's letter containing the report of the recently granted ADIs on September 8, 2007. Subsequently, Dr. Fiorito reviewed his records and discovered that he was out of the country from September 2 through September 17 and that he did not receive the letter until after he returned to Tallahassee on September 17. Although FSU did not stipulate when Dr. Fiorito received the letter, it does not dispute that he was out of the country until September 17 and did not receive the letter until he returned. Thus, prior to September 17, the UFF did not know that FSU granted ADIs. As the charge was filed on March 11, 2008, I conclude that it was timely filed.

FSU next asserts that the Continuation Memorandum authorized it to grant ADIs after the CBA expired. It is undisputed that the CBA expired on June 30, 2007, that the Continuation Memorandum was executed on July 12, and that the Continuation Memorandum was not ratified by either party. FSU argues that it was unnecessary to ratify the Continuation Memorandum because it did not change any material provision of the agreement. I reject this argument because the Continuation Memorandum changed the expiration date of the CBA, which is a material provision of the agreement. Thus, the unratified Continuation Memorandum is not effective to extend the contract. See § 447.309, Fla. Stat.; see also Carroll v. City of Tampa, 18 FPER ¶ 23164 (1992); Florida Public Employees Council 79, AFSCME, AFL-CIO v. The Honorable Jeb Bush, 28 FPER ¶ 33134 (G.C. Summary Dismissal 2002).

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Notwithstanding that the Continuation Memorandum was not ratified, FSU argues that the UFF is estopped from arguing that the Continuation Memorandum is not valid because the UFF failed to submit the Continuation Memorandum for a ratification vote and because it failed to timely repudiate the benefits it received and continues to receive by FSU's implementation of the Continuation Memorandum. FSU has not asserted any basis for obtaining equitable relief. City of Cape Coral v. Cape Coral Professional Fire Fighters, Local 2424, IAFF, AFL-CIO, 5 FPER ¶ 10343 (1979). However, FSU recognized in its answer that its legal remedy would be to file an unfair labor practice charge against the UFF for its failure to present the Continuation Memorandum for a ratification vote. In addition, the facts demonstrate that the UFF immediately informed FSU after it determined that there was a misunderstanding of the effect of the Continuation Memorandum. Moreover, FSU is not bound by the unratified Continuation Memorandum to continue to give the UFF contractual benefits that are not part of the status quo.

The UFF asserts that FSU violated Section 447.501(1)(a) and (c), Florida Statutes, by granting discretionary salary increases to bargaining unit members pursuant to Article 23.9(a) of the CBA after the CBA expired on June 30, 2007. A public employer is required to bargain over wages, hours, and terms and conditions of employment. § 447.309(1), Fla. Stat. Absent a clear and unmistakable waiver by the certified bargaining agent, exigent circumstances requiring immediate action, or legislative body

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action after impasse, a public employer violates Section 447.501(1)(a) and (c), Florida Statutes, if it unilaterally alters the status quo of the terms and conditions of employment of public employees without negotiating with the certified bargaining agent. See Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985), aff'd, 483 So. 2d 58 (Fla. 1st DCA 1986); Florida Public Employees Council 79, AFSCME v. State of Florida, 10 FPER ¶ 15208 (1985), aff'd, 472 So. 2d 1184 (Fla. 1st DCA 1985). Moreover, it is settled law that an employer has a duty to maintain the status quo with regard to wages, hours, and terms and conditions of employment during the period between the expiration date of a CBA and the effective date of a replacement agreement. See Manatee Education Association v. Manatee County School Board, 7 FPER ¶ 12017 at 32 (1980).

FSU relied on Article 23.9(a) of the expired contract to provide the ADIs. The UFF contends that Article 23.9(a) is a partial waiver of the UFF's statutory right to bargain over wage increases. It also claims that the Commission has adopted National Labor Relations Board (NLRB) precedent holding that waivers are negotiated provisions giving the employer the power to act unilaterally and as such they are permissive subjects of bargaining that do not become part of the status quo surviving the expiration of the contract. See Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985); Duval Teachers United v. Duval County School Board, 7 FPER ¶ 12056 (1980).

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Article 23.9(a), Administrative Discretionary Raises, provides:

The University shall provide salary increases beyond the increases specified above for verified written counter-offers, increased duties and responsibilities, special achievements, endowed/named chairs and similar situations. Any court-ordered or court-approved salary increase or any salary increase to settle a legitimate broad-based employment dispute shall not be subject to the terms and limitations of this language. The total amount of salary increase provided under this section in a fiscal year shall not exceed 0.25% of the total salary rate of faculty members who are in an employment relationship with the University on the first day of May immediately preceding the beginning of the fiscal year.

Ch. Party Ex. A. By its terms, this provision constitutes a waiver of the UFF's right to bargain over wages. Although there are limits placed on FSU's ability to offer wage increases, within those limits FSU has the unilateral right to set wages. Thus, I reject FSU's assertion that the provision does not constitute a waiver.

In my May 5 order denying FSU's motion to dismiss, I stated that a waiver embodied in a contract provision survives the expiration of the contract and establishes the status quo based upon the Commission's decisions in Volusia County Firefighters Association, Local 3574 v. Volusia County, 22 FPER ¶ 27066 (1996) and International Association of Fire Fighters, Local 2266 v. City of St. Petersburg Beach, 13 FPER ¶ 18116 (1987). The UFF argues that the facts in Volusia County and St. Petersburg Beach are distinguishable from those in this case.

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The UFF asserts that the Volusia County case differs from the instant case because it involved a successor certified bargaining agent's agreement to accept the terms of the CBA negotiated by the prior bargaining agent. However, the UFF has not explained why this fact should alter the method used to determine the status quo.

The UFF also claims that St. Petersburg Beach does not control. It asserts that the waiver in that case could not be severed from the remaining portions of a contract provision which was a mandatory subject of bargaining. The Commission determined that the provision should be read as a whole and concluded that because the provision involved a mandatory subject of bargaining the entire provision survived the expiration of the bargaining agreement. The UFF asserts that the decision should be limited to the circumstances where the waiver allegedly cannot be separated from the remaining language in a provision constituting a mandatory subject of bargaining. Moreover, the UFF argues that the Commission has not had the opportunity to determine whether a waiver like the one at issue here, which can be separated from the remaining portion of the mandatory subject of bargaining, should survive the expiration of the contract and form the status quo.

Contrary to the UFF, I interpret Volusia County and St. Petersburg Beach to hold that a waiver included in a mandatory subject of bargaining survives the expiration of the contract and forms the status quo. I do not believe that the factual differences between the instant case and Volusia County and St. Petersburg Beach warrant a different result.

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Moreover, I disagree with the UFF that the waiver language in St. Petersburg Beach could not have been severed from the remainder of the contract provision. Thus, Article 23.9(a) remains in effect and forms the status quo. Therefore, FSU did not commit an unfair labor practice by granting ADIs after the expiration of the CBA.

The next issue is whether either party is entitled to an award of its reasonable attorney's fees and costs pursuant to Section 447.503(6)(c), Florida Statutes. The UFF is not entitled to an award of attorney's fees and costs because it is not the prevailing party. § 447.503(6)(c), Fla. Stat. The Commission's standard for awarding attorney's fees to a prevailing respondent is set forth in Pittman v. Southeast Volusia Hospital District, 8 FPER ¶ 13419 (1982), aff'd, 436 So. 2d 294 (Fla. 1st DCA 1983). That standard is whether the case presented by the charging party is frivolous, unreasonable or groundless. Because the case law is settled that a waiver included in a mandatory subject of bargaining survives the expiration of the contract and forms the status quo, the charge was groundless. Therefore, I recommend that the Commission award FSU its attorney's fees and costs.

#### CONCLUSIONS OF LAW

Based on the record as a whole, I make the following conclusions of law:

1. The Public Employees Relations Commission has jurisdiction of this case pursuant to Chapter 447, Florida Statutes.

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2. FSU is a public employer within the meaning of Section 447.203(2), Florida Statutes.
3. The UFF is an employee organization within the meaning of Section 447.203(11), Florida Statutes.
4. The UFF's charge was timely filed.
5. FSU did not violate Section 447.501(1)(a) and (c), Florida Statutes, by continuing to grant administrative discretionary increases after the expiration of the CBA.
6. FSU should be awarded its attorney's fees and costs of litigation.

#### RECOMMENDATION

I recommend that the Commission adopt the foregoing recommended order and dismiss the UFF's unfair labor practice charge.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within **fifteen** days from the date of this order. See Fla. Admin. Code Rule 28-106.217(1). An extension of time for filing exceptions will not be granted unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 28-106.216 and SERVED on all parties this 16<sup>th</sup> day of June, 2008.

  
SHARON A. ZAHNER, Hearing Officer

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