

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA,

Charging Party,

v.

Case No. CA-2008-025

**FLORIDA STATE UNIVERSITY
BOARD OF TRUSTEES,**

Respondent.

_____ /

CHARGING PARTY'S MEMORANDUM OF LAW
IN SUPPORT OF UNFAIR LABOR PRACTICE CHARGE

The Charging Party, United Faculty of Florida (UFF), submits the following memorandum of law in support of the unfair labor practice charge in this case. The charge alleges that Respondent violated Sections 447.501(1)(a) and (c), *Florida Statutes* (2007), by unilaterally making discretionary salary increases to bargaining unit employees pursuant to Article 23.9(a) of the collective bargaining agreement after its expiration. This allegation is based on the fact that Article 23.9(a) is a partial waiver of the statutory right of the UFF to collectively bargain over such wage increases, and is therefore a permissive subject of bargaining that does not survive the expiration of the agreement as part of the *status quo*.

The material facts relating to this issue are undisputed. Respondent has stipulated that it has continued to make discretionary salary increases pursuant to Article 23.9(a) unilaterally after expiration of the agreement through the present. The area of disagreement is whether this provision survived the expiration of the agreement as part of the *status quo*. This presents solely

a question of law to which the bulk of this memorandum is directed. The remaining issues raised by Respondent will be addressed in Argument II.

I.

Article 23.9(a) is a Partial Waiver of the Statutory Right of the UFF to Collectively Bargain Over Wages, and is Therefore a Permissive Subject of Bargaining That Does Not Survive the Expiration of the Agreement as Part of the *Status Quo*

The survivability of a provision waiving a portion of the right to collectively bargain over wages of employees represented by a certified bargaining agent as part of the *status quo* after expiration of a collective bargaining agreement is controlled by *Duval Teachers United v. Duval County School Board*, 7 FPER ¶ 12056 at 131 (1980), in which the Commission directly addressed this issue, stating:

[T]he threshold test for determining survivability of a particular contract clause is: Is the provision a wage, hour, or term or condition of employment.

The Commission was referring to those matters that are made mandatory or required subjects of bargaining by Section 447.309(1), *Florida Statutes* (2007), which requires the public employer and the certified bargaining agent to “bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit.”

A provision constituting a partial waiver of the statutory right to bargain is a non-mandatory or permissive subject of bargaining. *United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees*, 7 FPER ¶ 12300 (1981), *aff'd in pertinent part, Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 475 So. 2d 1221 (Fla. 1985). In *United Faculty of Florida v. Florida Board of Regents*, 20

FPER ¶ 25034 at 71-72 (1993), the Commission found the following provision to constitute a partial waiver of the right to bargain, and, therefore, a permissive subject of bargaining:

Nothing contained herein shall prevent the Board from providing salary increases beyond the increases specified above.

Later, in *United Faculty of Florida v. Florida Board of Education*, 28 FPER ¶ 33232 (2002), the Commission adopted the Hearing Officer's conclusion that essentially the same provision was a permissive subject of bargaining that could not be insisted upon to impasse:

Nothing contained herein shall prevent the Board from providing bonuses and other increases beyond those specified above.

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.

This provision is substantially similar to the provisions previously determined by the Commission to be partial waivers of the right to bargain over wages. It cedes to the employer complete discretion to determine who receives an administrative salary increase and in what amount, up to the specified dollar limits. UFF clearly and unmistakably waived its right to bargain over these salary increases to this extent during the term of the agreement. Article 23.9(a) is, therefore, a partial waiver of the right to bargain over wages and a permissive subject of bargaining. Consequently, under the plain and unambiguous language of the *Duval Teachers*

United case above, Article 23.9(a) is not a wage, hour or term and condition of employment and did not survive the expiration of the agreement on June 30, 2007, as part of the *status quo*.

Respondent asserts that Article 23.9(a) is not a waiver provision because the UFF has limited the range of employer discretion as compared to the similar provisions in prior cases. But the fact that Respondent has less than complete discretion is plainly irrelevant. The cases cited above have implicitly rejected this argument because they, too, involved only *partial* waivers of the right to bargain. Article 23.9(a) is unquestionably such a waiver.

Respondent's citation of *Florida Nurses Association v. State of Florida, Department of Management Services*, 20 FPER ¶ 25102 (1994), in support of its assertion that Article 23.9(a) is not a waiver is inapposite. The Commission determined in that case that certain state rule changes regarding criteria and eligibility for salary additives and certain changes in employees' pay were not clear and unmistakable waivers of the right to bargain the amount of those additives or changes in pay in the future, so these rules involved mandatory subjects of bargaining that could be taken to impasse. Consequently, that case has no applicability to the facts of this case where the employer has been ceded such discretion.

Respondent also relies upon *United Faculty of Florida v. University of Central Florida Board of Trustees*, 30 FPER 229 (2004), in support of its claim that Article 23.9(a) survived the expiration of the agreement, asserting that it is clear that the Commission would have held that the waiver provision in that case survived the expiration if the University of Central Florida Board of Trustees had been held to be the successor employer. This assertion is, however, pure speculation. The Commission simply did not decide the survivability issue in that case. Rather,

the case turned on an entirely different issue, lack of successorship, so it has no precedential value whatsoever in this case.

Respondent's reliance on *Florida Public Council 79 v. State of Florida*, 31 FPER 139 (2005), is also misplaced. As to the survivability issue, that case relies upon *Volusia County Firefighters Association, Local 3574 v. Volusia County*, 22 FPER ¶ 27066 (1996), for the broad proposition that all waiver provisions (in that case a zipper clause) automatically survive expiration. However, as demonstrated in UFF's response to the Hearing Officer's order denying Respondent's motion to dismiss on pages 4-7 and incorporated herein, neither that case nor *International Association of Fire Fighters, Local 2266 v. City of St. Petersburg Beach*, 13 FPER ¶ 18116 (1987), which it cites, stands for this broad proposition. Rather, *Volusia County* involved an entirely different circumstance: determination of the *status quo*, not during the hiatus between agreements involving the parties to the expired agreement, but where a successor union was negotiating a new agreement after its predecessor had disclaimed interest and allowed the prior agreement to expire before the successor was certified. In that situation, the old agreement is relevant to the *status quo* only insofar as the employer has voluntarily chosen to continue to abide by its terms. *Professional Association of City Employees, Inc. v. City of Jacksonville*, 28 FPER P33, 225 (2002) ("Once a new union displaces an incumbent union, the collective bargaining agreement between the incumbent union and the employer ceases to exist, absent an agreement to accept the terms of the agreement by the successor employee organization and the employer."); *see also Teamsters Local Union 385 v. Orange County*, 25 FPER 30072 (1999). Likewise, the *City of St. Petersburg Beach* case did not directly address the survivability issue and certainly did not purport to overrule the *Duval Teachers United* case.

The *Florida Public Council 79* case is similarly erroneous when it cites *Hillsborough County P.B.A. v. City of Inverness*, 9 FPER ¶ 14208 (1983), for the proposition that all of the provisions of an agreement survive its expiration as the *status quo*. That case did not even involve an expired agreement. On the contrary, it involved an agreement that had been automatically extended for an additional year according to its terms because the union had failed to timely notify the employer of its intent to renegotiate the agreement. It has nothing to do with the issue in this case.

Florida Public Council 79 is also incorrect in asserting that a zipper clause can be used to prevent a union from requiring negotiations over mandatory subjects after expiration of the agreement that it zipped up. As stated by the Florida Supreme Court in the *Palm Beach Junior College* case,

[t]he clear purpose of zipper clauses is to permit both parties to agree to maintain the status quo **during the term of the agreement**, to prevent either party from **seeking to reopen negotiations**.

475 So. 2d at 1226. (Emphasis supplied). Such a clause, by definition, expires with the agreement, its purpose having been rendered moot because either party is then free to demand resumption of negotiations. The Court explicitly approved this type of waiver, but only when limited to the term of the agreement:

We conclude that a union may contractually waive its statutorily guaranteed right to collective bargaining to the extent that it waives the right to demand bargaining to alter the status quo **during the term of the contract**.

Id. (Emphasis supplied). The Court's approval of only a limited waiver, coupled with its skepticism about the constitutionality of broader waivers stated in footnote 7 on page 1227,

brings the viability of the Commission's carelessly overbroad statements about survivability of waiver provisions in the above cases into substantial doubt. This faulty analysis should not be perpetuated.

In fact, such analysis raises serious constitutional questions. The right to collectively bargain in Florida is guaranteed by Article I, Section 6, of the Florida Constitution. This provision guarantees public employees the same rights to collectively bargain as private employees, with the exception of the right to strike. *City of Tallahassee v. PERC*, 410 So. 2d 487 (Fla. 1981). The Commission has repeatedly stated with judicial approval that it must take the constitutional basis for the right to collectively bargain into account when interpreting Chapter 447, Part II, *Florida Statutes*. See, e.g., *In Re Lake Worth Utilities Authority*, 9 FPER 14178 (1983) ("We have an obligation to construe Chapter 447, Part II, consistent with the State Constitution.").

As established in UFF's response to the Hearing Officer's order denying Respondent's motion to dismiss on page 3, private employees regulated by the National Labor Relations Board (NLRB) who choose union representation are not bound, after expiration of the agreement, by any waiver of the right to bargain over mandatory subjects to which their union may have agreed unless the waiver provision clearly and unmistakably so states. The rationale for this rule is stated by the NLRB in *Beverly Health and Rehabilitation Services*, 1997 NLRB LEXIS 952 (N.L.R.B. Nov. 26, 1997):

A management rights clause, while a contractually negotiated item, is not a term or condition of employment in the same sense as the traditional terms and conditions of employment such as wages or health benefits. To the extent that a management rights clause authorizes unilateral action to change matters that are mandatory

subjects of bargaining, it entails a union's waiver of its statutory right to bargain over those matters. *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Waiver of such a right must be strictly construed; and the Board consistently has held that a waiver of bargaining rights under a management rights clause does not survive the expiration of a contract. *Buckcreek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enf. 1441 LRRM 2208 (3rd Cir. 1994) and 140 LRRM 2248 (3rd Cir. 1992); *Kendall College of Art*, 288 NLRB 1205 (1212) (1988).

Under *City of Tallahassee*, therefore, public employees in Florida have the same rights unless there is a compelling state interest justifying a different result. The *Duval Teachers United* case represents a definitive adoption of the private sector rule by the Commission that has never been explicitly overruled. The subsequent cases relied upon by Respondent, discussed above, simply do not directly confront the precise issue presented in this case and identify no rational basis, much less a compelling state interest, for departing from the *Duval Teachers United* rule. Consequently, these cases must be rejected as valid authority to the extent that they purport to suggest a contrary conclusion.

It should also be noted that Respondent has failed to present any basis for departing from the *Duval Teachers United* rule other than citation to the subsequent cases already shown to be based on faulty analysis. The reason is that Respondent and other public employers gain a significant new weapon (the ability to continue to exercise unilateral discretion during the hiatus that they never bargained for and would otherwise not have) at no cost. Such a result giving employers an incentive to string out negotiations where the union seeks to end the waiver is the polar opposite of the intent of the Commission and the Florida Supreme Court in the *Palm Beach Junior College* case.

The result in that case was premised upon the conclusion that preventing employers from conditioning agreement to mandatory subjects on granting waivers of the statutory right to collectively bargain was a necessary component of the statutory scheme to compensate in some measure for the absence of the right to strike. 7 FPER ¶ 12300 at 594-95. Limiting such waivers clearly and unmistakably agreed to by unions to the duration of the agreement only was a necessary corollary to the holding of this case, as is made clear by the quotations from the Supreme Court's opinion set forth above. To conclude otherwise is to reject this fundamental principle of promoting the statutory purposes of harmonious labor relations and the avoidance of illegal strikes by recognizing these counter-balancing factors.

In sum, the test stated in *Duval Teachers United* for determining whether a provision survives the expiration of the agreement as part of the *status quo* represents the correct balance between the constitutional collective bargaining rights of public employees and the legitimate interests of management. This test has never been overruled in a case that squarely presented the survivability issue in a truly adversarial context. The Hearing Officer should therefore conclude that Respondent violated Sections 447.501(1)(a) and (c), *Florida Statutes*, (2007), by continuing to unilaterally grant wage increases to bargaining unit employees pursuant to Article 23.9(a) after the expiration of that provision on June 30, 2007.

II.

Respondent's Affirmative Defenses are Without Merit

Respondent has raised several alleged affirmative defenses, none of which have merit.

The first affirmative defense is a general denial that Respondent violated Section 447.501(1), *Florida Statutes*, in any way. This defense is without merit for the reasons set forth

above in Argument I.

Defenses two through five and seven and nine all involve Respondent's claim that UFF is bound by the "Continuation Memorandum." These defenses were either explicitly or implicitly rejected by the Hearing Officer when she denied Respondent's motion to dismiss predicated on this memorandum. This ruling was correct and there is no basis for reconsidering this issue. Respondent's theories of past practice and estoppel are without any legal basis. Whether UFF submitted prior MOAs for ratification or not is irrelevant to whether the Continuation Memorandum is valid. As set forth in UFF's response to the motion to dismiss, Commission decisions on this issue make it clear that failure to ratify an MOA that alters a material term of a collective bargaining agreement (in this case the duration article at the very least) renders the MOA invalid and unenforceable as a matter of law, even against a party that failed to ratify its own agreement. UFF also notes that Respondent lacks clean hands on this issue because it, too, failed to have the Continuation Memorandum ratified. It therefore has no standing to complain about UFF's failure to do so.

Defense number six alleges that some or all of the actions claimed to constitute unfair labor practices are barred by the applicable statute of limitations. However, the stipulated facts establish that Dr. Jack Fiorito did not receive notice of Respondent's post-expiration Article 23.9(a) discretionary raises until he returned from Europe on September 17, 2007. Therefore, this charge, filed on March 11, 2008, is timely. In addition, the charge contains evidence of such raises being given after the initial notification and Respondent has stipulated that it has continued to make discretionary administrative raises during the hiatus. Consequently, this charge is timely for all such unilateral raises, which practice constitutes a continuing violation.

The remaining defenses relate to claims of entitlement to an award of attorney's fees, which are clearly without merit because this charge is in no way frivolous or groundless.

III.

Conclusion

For the reasons set forth above, the Hearing Officer should find that Respondent violated Sections 447.501(1)(a) and (c), *Florida Statutes* (2007), and order the traditional make-whole remedy applicable to unilateral change cases, including affording the UFF the option of deciding whether to require Respondent to rescind the unlawful salary increases. *See United Faculty of Florida*, 30 FPER 229 at 518. In addition, UFF should be awarded its reasonable attorney's fees and costs because Respondent either knew or should have known that its actions in this case were unlawful under the *Duval Teachers United* case and the prior cases involving provisions similar to Article 23.9(a).

Respectfully submitted,

MEYER AND BROOKS, P.A.
2544 Blairstone Pines Drive
Post Office Box 1547
Tallahassee, Florida 32302
(850) 878-5212
(850) 656-6750 - Facsimile

By: _____

THOMAS W. BROOKS
Florida Bar No: 0191034

ATTORNEY FOR CHARGING PARTY

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail on this 29th day of May, 2008, to: Carolyn A. Egan, Esquire, Florida State University, Post Office Box 3061400, Tallahassee, Florida 32306-1400.

Thomas W. Brooks