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 CORRECTED EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER AND SUPPORTING MEMORANDUM OF LAW

The Charging Party, United Faculty of Florida (UFF), files the following exceptions and supporting memorandum of law to the Hearing Officer's Recommended Order issued on June 16, 2008:

1. The Charging Party excepts to the Hearing Officer's legal analysis, conclusions of law and recommendation regarding whether the partial waiver of the right to collectively bargain over wages contained in Article 23.9(a) of the collective bargaining agreement survives the expiration of the agreement as the *status quo*. For the reasons set forth in the accompanying memorandum of law, the Hearing Officer's analysis and conclusion that Respondent did not commit an unfair labor practice as alleged in the charge is erroneous.

2. The Charging Party excepts to the Hearing Officer's conclusion and recommendation that the Charging Party's assertion of the unfair labor practice charge in this case was groundless. Her conclusion that the case law pertinent to this issue was settled *against*

the position of the Charging Party is not supported by competent substantial evidence and is clearly erroneous. Consequently, her recommendation should be rejected by the Commission.

MEMORANDUM OF LAW

The issue in this case is whether a provision partially waiving the constitutional and statutory right to collectively bargain over wages of bargaining unit members survives the expiration of a collective bargaining agreement as part of the *status quo*. UFF asserts that the Commission resolved this issue definitively in *Duval Teachers United v. Duval County School Board*, 7 FPER ¶ 12056 at 131 (1980), by 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 [*i.e.* a mandatory subject of bargaining].

(Emphasis added). Because the Commission has repeatedly held that a provision waiving some or all of the right to collectively bargain is *not* a mandatory subject of bargaining, it does not survive the expiration of the agreement as part of the *status quo*. Although the Hearing Officer determined that the provision at issue in this case, Article 23.9(a), is a partial waiver of the right to bargain over wages of bargaining unit employees, she nevertheless found that this provision did survive the expiration *because it was contained within a provision that is a mandatory subject of bargaining.* UFF hopes that, 28 years after *Duval County School Board*, the Commission finds the italicized portion of the last sentence nonsensical and repugnant to the *status quo* doctrine itself. How can the *placement* of a waiver provision in the agreement rationally have any impact whatsoever on whether it is a mandatory subject of bargaining and, therefore, survives the expiration? What policy supports such a conclusion? What case clearly states such a proposition?

Unfortunately, the Hearing Officer did not answer any of these critical questions. Rather, she simply applied *Volusia County Firefighters Association, Local 3574 v. Volusia County*, 22 FPER ¶ 27066 (1996), and *International Association of Firefighters, Local 2266 v. City of St. Petersburg Beach*, 13 FPER ¶ 18116 (1987), without even mentioning *Duval County School Board* or the countervailing policy issues raised by UFF in its brief. UFF concedes that *City of St. Petersburg Beach* can be read as inconsistent with the general rule set forth in *Duval County School Board*, but it reasonably cannot be interpreted, as did the Hearing Officer, to state the entirely new and unequivocal rule attributed to it in *Volusia County*: *all* waivers *automatically* survive the expiration as part of the *status quo*. It plainly contains no such pronouncement. Moreover, such an interpretation means that, directly contrary to *Duval County School Board*, particular contract *clauses* that *are not* mandatory subjects of bargaining *always* survive as part of the *status quo*.

The Commission should do what the Hearing Officer declined to do: reconcile these conflicting interpretations of the applicable law on the basis of reason, logic, and sound labor policy. To that end, UFF submits the following arguments demonstrating that (1) the Commission effectively adopted the National Labor Relations Board (NLRB) rule that waivers of the right to bargain do not survive the expiration unless clearly and unmistakably so stated when it adopted the NLRB's *status quo* doctrine in *Pinellas County PBA v. City of St. Petersburg*, 3 FPER 207 (1977), and the test for survivability in *Duval County School Board*, (2) the *Duval County School Board* case continues to represent the correct policy applicable to the survivability issue, (3) the *City of St. Petersburg Beach* case was wrongly decided or, at the very least, should be limited to its facts, (4) the statement of the law on the survivability issue in

Volusia County is *obiter dictum* and represents neither the appropriate statement of the law nor an accurate representation of the holding in *City of St. Petersburg Beach* , (5) the *Volusia County* case involved an entirely different *status quo* issue than this case (where a successor union was certified after the expiration of an agreement negotiated by its predecessor) and is therefore inapposite, and (6) there is no basis whatsoever for concluding that UFF's position in this case is groundless warranting an award of attorney's fees against it.

I.

The Commission Long Ago Adopted, and Should Continue to Follow, the NLRB Rule Regarding the Survivability of Provisions as Part of the *Status quo*

UFF respectfully submits that recent suggestions in this case and others that the Commission has not adopted or followed the practice of the NLRB with respect to the survivability of provisions after the expiration of a collective bargaining agreement (CBA) are simply wrong. As the following discussion demonstrates, the Commission specifically adopted the NLRB's *status quo* doctrine in *Pinellas County PBA v. City of St. Petersburg*, 3 FPER 207 (1977), in 1977, and applied that doctrine three years later in *Duval Teachers United v. Duval County School Board*, 7 FPER ¶ 12056 (1980), when deciding whether certain provisions of a CBA granting exclusive access by the certified union to bargaining unit employees at work survived the expiration of the CBA as part of the *status quo*. These cases formed the basis for subsequent decisions regarding the *status quo* in numerous unfair labor practice cases, none of which have ever purported to overrule either case.

In *Pinellas County PBA v. City of St. Petersburg*, 3 FPER 207 (1977), the Commission was required to decide whether the City's unilateral alteration during negotiations with three

certified unions for successor CBA's of numerous provisions of the expired CBA's constituted unfair labor practices. In concluding that the City did violate Section 447.501(1)(a) and (c), *Florida Statutes* (1975), the Commission carefully considered and specifically adopted the NLRB *status quo* doctrine as applicable to Florida's public sector statutory scheme. Noting that that scheme requires the employer to refrain from taking unilateral action to change existing terms and conditions of employment even longer than private employers under the National Labor Relations Act (NLRA) due to the statutory impasse resolution procedure, the Commission stated:

> The Commission finds that upon the expiration of an agreement and until the legislative body take[s] action pursuant to Section 447.403(2)(c)4. or a new agreement is ratified, the public employer has a duty to maintain the *status quo* with regard to the expired agreement.

3 FPER at 208. In reaching this conclusion, the Commission quoted with approval the following from *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970):

> The spirit of the National Labor Relations Act and the more persuasive authority stand for the proposition that, even after expiration of a collective bargaining contract, an employer is under an obligation to bargain with the Union before he may permissibly make any unilateral change in those terms and conditions of employment comprising . . . bargaining subjects within the meaning of § 8(d) of the Act.

3 FPER at 208. After quoting Section 447.309(1), *Florida Statutes* (1975), which is the Florida analogue to Section 8(d) of the NLRA, the Commission stated:

> After an employee organization has been certified by the Commission, a public employer is no longer free to make unilateral determinations with respect to items which are considered "wages, hours, and terms and conditions of employment." Items which fall within the above categories are proper subjects of collective bargaining.

3 FPER at 208. Thus, the Commission's *status quo* doctrine is therefore the same as the NLRB's *status quo* doctrine as it relates to the survivability issue.

The Commission again applied the NLRB *status quo* doctrine as adapted to the Florida public sector bargaining law in *Duval Teachers United v. Duval County School Board*, 7 FPER ¶ 12056 (1980), in determining that a provision granting the incumbent union *exclusive* access to communicate with bargaining unit employees at work did not survive the expiration of the CBA because it was a benefit flowing directly to the benefit of the certified union, not individual unit employees, and was, therefore, not a wage, hour or term and condition of employment of such employees. This provision did not survive the expiration because it did not establish a mandatory subject of bargaining, not because of where it appeared in the CBA.

A waiver provision negotiated by an employer is the analogue of an exclusive access or similar provision negotiated by a union for its own, rather than the bargaining unit's, benefit. Such a provision simply does not establish a term or condition of employment of bargaining unit employees. On the contrary, it relieves the employer of the statutory obligation to do so only through collective bargaining, restoring some of the discretion to unilaterally determine certain terms and conditions of employment through direct negotiations with individual employees that it lost upon certification of the union. Therefore such a provision has correctly been determined to be a permissive subject of bargaining that cannot be insisted upon to impasse in negotiations. *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). The same policy considerations require that such a provision not survive the expiration of the agreement as part of

the *status quo*. Moreover, there is no basis for treating provisions benefitting just the union differently for purposes of survivability than provisions benefitting just the employer.

The NLRB characterized the survivability of a provision granting an employer discretion to unilaterally establish or change mandatory subjects of bargaining as follows:

> 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), enfd. 1441 LRRM 2208 (3rd Cir. 1994) and 140 LRRM 2248 (3rd Cir. 1992); *Kendall College of Art*, 288 NLRB 1205 (1212) (1988).

Beverly Health and Rehabilitation Services, 1997 NLRB LEXIS 952 (N.L.R.B. Nov. 26, 1997). (Emphasis added). In fact, the NLRB explicitly rejected the legal theory relied upon by the Hearing Officer in this case in *Beverly Health and Rehabilitation Services, Inc.,* 335 NLRB 635, 636-37 (2001):

> Our dissenting colleague's unsupported assertions that the Respondent's unilateral changes were permissible "business decisions" even if the management-rights clause did not survive, and that the General Counsel had the burden of showing that these changes were a "radical departure" from the preexpiration terms of employment, are entirely contrary to this established authority. He contends, in effect, that even if a management-rights clause expires with the contract, this waiver of a union's right to bargain has nonetheless established a *status quo* in the terms of employment which continues beyond contract expiration. This cannot be correct, for the essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls. If our colleague were correct, such a fluid *status quo* would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired. In that event, the expiration of the management-rights clause would be meaningless wherever the employer

> had taken advantage of the waiver to make changes. Contrary to our dissenting colleague, we decline to depart from well-established precedent to adopt a policy that makes little sense and discourages, rather than promotes, collective bargaining.

(Footnotes omitted). The same analysis applies in this case.

The Commission recently applied *Duval County School Board* in *United Faculty of Florida v. Board of Trustees of the Florida Agricultural and Mechanical University*, 32 FPER 34 (2006), in determining whether a provision granting released time for employees working on behalf of the certified bargaining agent survive the expiration as the *status quo*. It cannot therefore be argued that the cases relied upon by the Hearing Officer overruled that case or its rationale. Because there is no principled basis to treat provisions benefitting unions differently than similar provisions benefitting employers or to base survivability on the location of the provision within a CBA, the Hearing Officer's conclusion that Article 23.9(a) survived the expiration of the CBA is erroneous and must be rejected.

II.
The *St. Petersburg Beach* Case Was Wrongly Decided and the *Volusia County Case* is Inapposite

UFF submits that *International Association of Firefighters, Local 2266 v. City of St. Petersburg Beach*, 13 FPER ¶ 18116 (1986), was simply wrongly decided. A review of Hearing Officer Meck's Recommended Order establishes that he was imminently correct in deciding that the portion of the annual physical examination provision granting employer discretion at issue did not satisfy the stringent clear and unmistakable waiver test for purpose of authorizing drug testing, and, even if it had, it did not survive the expiration of the CBA. This Commission should carefully review the decision and either overrule it or limit it to its specific facts. There is no rational basis for treating waiver language differently because it is included with an article

that also establish mandatory subjects of bargaining or placed in a separate article. With all due respect to the distinguished former Commissioners who decided that case, that decision simply cannot be reconciled with the law previously discussed or justified on any sound labor policy. It simply proves again the adage that "hard cases make bad law."

In any event, the case clearly does not stand for the broad proposition cited by the Hearing Officer. Nowhere does the Commission purport to overrule *Duval County School Board* or otherwise alter the long-standing legal principles on which that case is based, nor could it reasonably be read as doing so. Rather, at most, that case stands for the proposition that under those facts, the inclusion of language in a provision relating to a mandatory subject of bargaining that preserves some discretion to management, which language cannot be separated from the rest of the provision, does not prevent the entire provision from being a mandatory subject of bargaining that survives the expiration of the agreement. Nothing in this decision even remotely suggests that the Commission was doing anything other than deciding the case on the particular facts presented. It should also be noted that, in reaching this decision, the Commission failed to cite a single case and failed to give any convincing explanation why it is "not reasonable to excise Section B while giving continuing effect to Sections A and C."

Likewise, the *Volusia County* case is inapposite because it involved materially different facts than the instant case and, in fact, did not involve the precise issue presented in this case. The *Volusia County* case is an order affirming a summary dismissal of the General Counsel. A review of the General Counsel's summary dismissal, 22 FPER ¶ 27009 (1995), reveals that the case involved the *status quo* where a collective bargaining agreement agreed to by a predecessor certified bargaining unit agent expires and a new certified bargaining agent is subsequently

certified. In that situation, the *status quo* is based upon the terms and conditions of employment existing at the time of certification of the new agent, and 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 ¶ 33, 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). It is not a matter of whether the provisions of the expired agreement, whether mandatory or permissive, continue in effect. They obviously do not. Rather, the issue in the *Volusia County* case was what were the terms and conditions of employment existing at the time of certification of the new agent.

Although it is not at all clear, the successor union apparently took the position that the terms of the expired collective bargaining agreement established the *status quo*. General Counsel Meck made that assumption in making his determination that the charge was nevertheless not sufficient. He did not determine as a matter of law that the waiver survived the expiration in the sense involved in this case. Consequently, this case presents an entirely different issue than the instant case, and has nothing to do with whether a waiver provision survives the expiration of the collective bargaining agreement while negotiations with incumbent union continue.

Because the summary dismissal did not in fact involve the issue of survivability of a waiver provision while a successor agreement is being negotiated with the union that granted the waiver, the order affirming that dismissal cannot be authority for the broad proposition cited

therein, "A contractual waiver establishes the *status quo* even when the contract has expired." At best, this statement is dictum, and the way this case is being used for support of that proposition in this case proves the merit of the rule that such statements are not binding or even persuasive precedent. It is clear that neither the General Counsel's summary dismissal order or the Commission's order affirming that dismissal squarely presented or resolved in a clear adversarial context the broad proposition for which it is now being cited.

In fact, following the Hearing Officer's 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 above, private employees regulated by the 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

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 County School Board* 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 County School Board* 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 County SchoolBoard* 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. 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 County School Board* 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.

III.

The Hearing Officer Erred in Awarding Attorney's Fees and Costs to Respondent

Based on the detailed analysis above, it is clear that the charge in this case was not in any way groundless. Even if the Commission rejects UFF's exceptions, it simply cannot be concluded that reasonable persons could not disagree about the issues presented. Therefore, the Hearing Officer's recommendation should be rejected.

IV.

Conclusion

For the reasons set forth above, the Commission should grant the UFF's exceptions and find that Respondent committed the unfair labor practice alleged in the charge.

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 2nd day of July, 2008, to: Carolyn A. Egan, Esquire, Florida State University, Post Office Box 3061400, Tallahassee, Florida 32306-1400.

____
Thomas W. Brooks