STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

FLORIDA STATE FIRE SERVICE ASSOCIATION, IAFF, LOCAL S-20, Charging Party, v. STATE OF FLORIDA, Respondent.	:	Case No. CA-2011-109 HEARING OFFICER'S RECOMMENDED ORDER

Richard P. Siwica and Tobe Lev, Orlando, attorneys for charging party.

Michael Mattimore and Jason E. Vail, Tallahassee, attorneys for respondent.

CHATHAM, Hearing Officer.

On August 22, 2011, the Florida State Fire Service Association, IAFF, Local S-20 (Association) filed an unfair labor practice charge against the State of Florida (State) alleging that it violated Section 447.501(1)(a) and (c), Florida Statutes (2012),[1] by the manner in which it resolved an impasse in bargaining over contract re-opener articles covering dues check-off, health and welfare and retirement pensions. The General Counsel found the charge sufficient to proceed to a hearing, but noted that the Public Employees Relations Commission (Commission) had issued a decision affecting the allegation regarding dues deductions. Edison Community College v. Edison Community College Faculty Federation, 4 FPER ¶ 4269 (1978). He instructed the hearing officer to address that issue.

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[1]The 2011 and 2012 editions of the statutes are similar for the two unfair labor practice provisions relevant to this case; therefore, the latter edition will be cited in this order unless otherwise indicated.

The Commission appointed Sharon Cromar as hearing officer and she scheduled an evidentiary hearing for October 13, 2011. However, the hearing was continued several times at the request of the parties and then cancelled after the parties requested to file a stipulated record. The parties then requested and were granted several extensions of time to file the stipulations. Eventually, they requested that the hearing be rescheduled. Hearing Officer Cromar rescheduled the hearing for April 10, 2012; that hearing was cancelled at the request of the parties and the hearing was rescheduled for June 5. The hearing was again continued until July 12 at the joint request of the parties.

On July 10, the Commission re-assigned this case to the undersigned and I granted a joint motion, filed on July 11, to cancel the hearing and accept a stipulated record, which was also filed on July 11. I directed the parties to file their legal arguments by August 8, but subsequently granted them an extension of time until August 22 within which to file their briefs. Neither party filed a timely brief. On August 27 and 28, the parties filed their briefs; there appearing to be no prejudice to either party, both briefs have been carefully considered in writing this order.

ISSUES

The issues to be resolved in this case are whether the State violated Section 447.501(1)(a) or (c) after the Legislature resolved re-opener contract articles that had been bargained to impasse, and whether either party should be awarded monetary or other remedies.

FINDINGS OF FACT

Based upon the stipulated facts,[2] I make the following findings:

1. The Association is the duly certified collective bargaining representative of the employees in the unit defined by the Commission. Certification 1360. The parties agree to the hearing officer and the Commission taking administrative notice of the Commission's orders relating to Certification 1360.

2. The Governor of the State of Florida is the public employer and chief executive officer for the employees in Certification 1360. § 447.203(9), Fla. Stat.

3. The legislative body for the purpose of resolving an impasse between the Association and the Governor is the Florida Legislature. § 447.203(10), Fla. Stat. The Legislature utilizes a Joint Select Committee (Committee) on collective bargaining to hear testimony relevant to the resolution of impasse issues comprised of members of the Florida Senate and House of Representatives.

4. The Association and the State have been parties to three collective bargaining agreements (CBA): the first agreement had a duration of July 1, 2003, to June 30, 2006; the second, July 1, 2006, to June 30, 2009. See Composite Exhibit 1.

5. The State and the Association are currently parties to a CBA (current contract or the 2009-2012 collective bargaining agreement) that has a term of July 1, 2009, through June 30, 2012. See Exhibit 1.

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[2]I have adopted the entire stipulated record.

6. The CBA between the parties contained language allowing for a certain number of contract articles to be reopened in the last two years of each three year agreement. The current contract contains the following language at Article 32(1)(e):

> (c) The State and the Association agree that in addition to Article 25, Wages, changes in any three (3) articles within this agreement that the Association or the State desire to reopen shall be subject to negotiations during the second year of this Agreement for Fiscal Year 2011-2012.

7. The language of the 2009-2012 CBA between the parties for Article 25 for 2009-2010 states, in pertinent part:

> Section 1 - Pay provisions
>
> (A) Pay shall be in accordance with the Fiscal Year 2009-2010 General Appropriations Act as executed into law providing no competitive wage increase or change to the current pay grades or pay bands.
>
> (B) Increases to base rate of pay and salary additives shall be in accordance with state law and the General Appropriations Act.

This language for Article 25 was the result of a resolution of an impasse between the State and the Association by the 2009 Florida Legislature. In the following 2010-2011 year, the provisions of Article 25 remained the same, again as a result of the resolution of an impasse, the only change being the fiscal year reference to the General Appropriations Act (i.e., "Fiscal Year 2010-2011").

8. The language of the 2009-2012 CBA for Article 13, Health and Welfare, states in pertinent part:

> Section 1 - Insurance Benefits
>
> The State agrees to administer the State Employees Group Health Self-insurance Plan in accordance with the current General Appropriations Act for the applicable year and, if provided, the Summary Statement of Intent, as well as any statutory provision affecting the plan or its operations.

This language was agreed to by the parties in their 2009 negotiations for the 2009-2012 agreement and was continued for the 2010-2011 year.

9. On September 20, 2010, the State through a letter authored by Patty Roberts, Human Resources Consultant, Department of Management Services (DMS), to Rodney Durbin, President of the Association, requested the submission of any proposals for reopener negotiations for 2011-2012. See Exhibit 2. Roberts is an employee of DMS and facilitates the scheduling and communications between DMS and bargaining unit representatives. Michael Mattimore is the chief negotiator for the public employer, the Governor of the State of Florida, through DMS. Durbin was the chief negotiator for the Association for the relevant time period of this unfair labor practice charge.

10. On September 20, 2010, Durbin responded to the request with an electronic mail message stating, "I'll let you know by next Monday." See Exhibit 3.

11. On October 4, 2010, Durbin wrote again by electronic mail stating, "We need a little more time." See Exhibit 4).

12. Roberts responded by electronic mail stating on October 4, 2010:

> Rodney,
> Not a problem - whenever you have them ready."

See Exhibit 5.

13. The Association did not submit any contract proposals until January 31, 2011, by electronic mail message from Durbin to Roberts (copied to the Association's bargaining team) stating:

> Hey Patty,
>
> Attached is the Association proposal for Article 25.
>
> Rodney

See Exhibit 6.

14. The Association's proposal for Article 25 transmitted on January 31, 2011, by the Association's bargaining team reflected the following language:

> Article 25
>
> Wages
>
> Section 1 - General Wage Increase for Fiscal Year 2011-2012
> Based on funding in the Fiscal Year 2011-2012 General Appropriations Act all employees in the unit shall receive a general wage increase in the amount specified by the Legislature.
>
> Section 2 - Special Pay Issues
>
> Effective July, 2011, unit members of Association shall receive a competitive pay adjustment of $1500 to each employee's June 30, 2011 base rate of pay.

See Exhibit 6.

15. On February 4, 2011, Roberts transmitted a letter from the State's Chief Labor Negotiator to Durbin. See Exhibit 7. The letter expressed the State's consideration of the Association's written proposal on Article 25 - Wages and the State's opening

of Articles 3, 13, and 16. The State's chief labor negotiator pledged to "continue to negotiate and to seek resolution of any unresolved issues."

16. The State received confirmation of receipt of the February 4, 2011, letter on February 4, 2011. See Exhibit 8.

17. On February 7, 2011, the Governor of the State of Florida submitted his legislative budget request. See Exhibit 9. By operation of law, all unresolved issues between the State and the certified bargaining units are at impasse as of this submission. §§ 447.403(5)(a) and 216.163(6), Fla. Stat. For negotiations between the State and the Association, as of February 7, 2011, Articles 3, 13, 16, and 25 were at impasse and subject to resolution by the 2011 Florida Legislature.

18. On February 11, 2011, the State transmitted to the Association the written contract proposals, at impasse, for Articles 3, 13, 16 and 25. See Exhibit 10.

19. Also on February 11, 2011, the State's chief negotiator notified the Speaker of the House, President of the Senate, the Chair of the Commission and all of the bargaining agents, including the Association, of the impasse that occurred on February 7, 2011. See Exhibit 11.

20. On February 14, 2011, the Legislature notified the parties of the public hearing before the Committee on collective bargaining to be conducted on February 21, 2011. See Exhibit 12.

21. On February 17, 2011 the State's chief labor negotiator submitted copies of proposals and materials, as requested, to the Legislature with regard to the impasse with the Association. See Exhibit 13. These materials were not transmitted to the Association.

22. On February 17, 2011, Richard Siwica, counsel for the Association, transmitted an electronic mail message to Roberts with a document describing the position of the Association on the disputed impasse issues. See Exhibit 14. The State also forwarded the Association's document to the Legislature. See Exhibits 15 and 16. On the same day, February 17, 2011, Siwica transmitted a copy of the Association's position on the disputed impasse issues to the Legislature.

23. The February 17, 2011, communication by the Association to Roberts states that "By separate e-mail we will be forwarding you PDF's of the parties' proposals, as well as supporting documentation." The State was not provided by separate e-mail any proposal by the Association for Articles 3, 13, or 16. However, the communication by the Association did attach a document entitled "Association's Proposal" which stated that the Association "propose[d] to maintain the status quo" with respect to Articles 3 (Dues Checkoff), 13 (Health and Welfare), and 16 (Retirement). The Association's wage proposal had previously been supplied by the Association to the State. See Exhibits 15, 16, and 16A.

24. The Committee on collective bargaining conducted a legislative body hearing within the meaning of Section 447.403(4) on February 21, 2011. See Exhibit 17.

25. A true and accurate recording of the entire proceeding is attached as Exhibit 18.

26. Pursuant to Section 447.403(5), Florida Statutes, the Florida Legislature took "action" and resolved the impasse for Articles 3 (Dues Checkoff), 13 (Health and Welfare), 16 (Retirement), and 25 (Wages) through Senate Bill 2094 and the General Appropriations Act. See Exhibits 19 and 20. Each article was resolved (within the meaning of Section 447.403(5)) pursuant to the State's last offer from February 10, 2011, as presented by the State's chief labor negotiator in the February 17, 2012, materials (Exhibit 13) and at the February 21, 2011, hearing. See Exhibits 10, 13, and 18-20.

27. As a result of the resolution of the impasse on Article 3 (Dues Checkoff) by the 2011 Legislature, the language at Article 3 was vacated. Notwithstanding the Legislature's resolution to remove Article 3 in its entirety, there has been no change in any respect to the collection, processing, or any other aspect of dues deduction by the State.

28. As a result of the resolution of the impasse on Article 13 by the 2011 Legislature, the contract administration of health insurance for 2011-2012 remained unchanged from 2010-2011.

29. As a result of the resolution of the impasse on Article 16 and the enactment of newly-enacted legislation defining the benefits of the Florida Retirement System, the bargaining unit members were obligated to contribute three percent of their total

compensation to the Florida Retirement System (FRS) Pension Fund, whereas previously bargaining unit members had participated in FRS at no cost to the employee. FRS contributions from bargaining unit members began on July 1, 2011. See § 120.71, Fla. Stat.; Senate Bill 2100.

30. As a result of the resolution of the impasse on Article 25 by the 2011 Legislature, the wages for 2011-2012 remained unchanged from 2010-2011.

31. The same impasse resolution process and the same or similar contract language was presented to all other State bargaining units without objection including the American Federation of State, County and Municipal Employees (AFSCME) (Administrative and Clerical Unit, Operational Services Unit, Human Services Unit, and Professional Unit); Federation of Physicians and Dentists (SES Physicians Unit, SES Supervisory Non-Professional Unit, State Employees Attorneys Guild); Florida Nurses Association (Professional Health Care Unit); and the Police Benevolent Association (Law Enforcement Unit, Florida Highway Patrol Unit, Security Services Unit, Special Agents Unit). See Exhibits 13 and 18-20.

32. On June 17, 2011, on behalf of the State, Roberts transmitted to Durbin by electronic mail a letter, a copy of the CBA as modified by the resolution of the impasse by the 2011 Legislature, reopener revisions in strike-through/underline format, and a spreadsheet summary of the 2011 legislative impasse resolution. The e-mail stated in part:

> We will make the ratification process a top priority, and we look forward to your response."

The accompanying letter stated that it was the State's expectation that the ratification vote would be completed by August 19, 2011. See Exhibit 21.

33. On August 22, 2011, Durbin called Roberts and advised that he was unable to sign Article 16 as resolved at impasse because the Association is "a party to the 3% contribution lawsuit." He also advised that he was unsure as to whether he would sign the other articles at impasse (Articles 3, 13, and 25). Durbin also stated that he understood that the Articles at impasse that were legislatively resolved would be imposed if not approved and signed by the union. See Exhibit 22.

34. The CBA for 2011-2012 with reopener revisions pursuant to the 2011 impasse resolution is attached as Exhibit 23.

35. The reopener revisions resolved pursuant to the 2011 impasse resolution have not been submitted to a ratification vote by the Association. Likewise, the collective bargaining agreement from 2011-2012 with the reopener revisions resolved pursuant to the 2011 impasse resolution has not been submitted to a ratification vote by the Association. The Association, with the consent of the State, withdraws its allegation pertaining to Article 13 (Health and Welfare). The Association, consistent with its pre-hearing statement dated December 30, 2011, with the consent of the State, withdraws its allegations pertaining to Article 3 (Dues Deduction) set forth in paragraphs 2, 3, 4, 4A, 5, and 6A of the Charge as they relate to Article 3 (Dues Checkoff).

ANALYSIS

The Association's unfair labor practice charge was narrowed by the withdrawal of that portion alleging a dues check-off violation in its pre-hearing statement and the parties' agreement in the stipulations to withdraw the health and welfare article allegations. The sole remaining issue to be decided is the alleged improper imposition of a waiver of bargaining over pension provisions during the collective bargaining impasse process.

The Association argues that it is only charging the Governor, as chief executive, with violating the law governing impasse resolution, rather than the Florida Legislature (brief at 7). It seeks as a remedy a Commission order directing the Governor to: (1) cease enforcing the contested collective bargaining contract Article 16, imposed by the Florida Legislature at the conclusion of the impasse resolution process and (2) request the Legislature to reimburse employees who were required to assume a portion of the pension costs after the impasse decision. It also seeks an order directing the Governor to post a notice to employees explaining the violation of the bargaining law, and an award of its attorney's fees and litigation costs.

The last contract provided in Article 16: "All bargaining unit members shall continue to participate in the Florida Retirement System (FRS) at no cost to the employee." The substitute article that was proposed by the Governor to the Legislature states: "The State agrees to administer the Florida Retirement System (FRS) in accordance with any statutory provision or Act affecting the plan or its operation."

The gist of the Association's argument is that the substitute article imposes a waiver on it of any right to future bargaining over the terms of employee pensions. The Legislature may not remove the subject of pensions from collective bargaining by state employees. City of Tallahassee v. PERC, 410 So. 2d 487 (Fla. 1981). Pension benefits are a mandatory subject of bargaining, and the State may not impose through the impasse resolution process a waiver of future bargaining over a mandatory subject. E.g., Winter Park Professional Fire Fighters, Local 1598 v. City of Winter Park, 35 FPER ¶ 43 (2009). Moreover, the Commission judges the practical effect of the wording of the imposed article and is not limited to reviewing whether the article contains an express waiver. City of Winter Park, ibid. Thus, this case turns on whether the language of substitute Article 16 contains a waiver of future bargaining over pensions.

The Association argues that by substituting the above-quoted language, the employer has created a status quo that allows the Legislature to change the pension plan without any bargaining with the employees. This changes the bargaining dynamic from changes made after the employees have had an opportunity to go through the bargaining process, and impasse resolution if necessary, to changes made before any bargaining begins. In addition, contract bargaining is generally "zipped" in the absence of a reopener provision for the article in question, prohibiting bargaining over the article until the expiration of the contract. E.g., Sinderman v. AFSCME, Local 121, 16 FPER ¶ 21302 (1990) (explaining the clause). There are no such limitations on statutory changes, which may be made during any session. Accordingly, while the language of

the substitute article is silent on waiver, its practical effect appears to be a waiver of bargaining until after the statutory changes are already the status quo.

In a related case, a circuit court judge opined that the 3% pension contribution law adopted by the Legislature operated by "effectively removing the subject of retirement from the collective bargaining process and rendering negotiations after the fact futile." Williams, et al. v. Rick Scott, et al., Case No. 2011 CA 1584 (Cir. Ct. 2d Jud. Cir., March 6, 2012), appeal pending, Fla. S. Ct. Case No. SC12-520. The circuit judge further concluded that the 3% pension law abridged the employees' constitutional right to collective bargaining over their pension benefits. While the Commission is not bound by the circuit court decision, it should issue a decision in this case that is consistent with the circuit court decision in the related case if possible within its authority to make statutory interpretations of the bargaining laws. I have done so with this recommended order.

REMEDIES

The usual remedy for the illegal imposition of a waiver of future bargaining is to return to the status quo before impasse was declared. Winter Park Professional Fire Fighters, Local 1598 v. City of Winter Park, 35 FPER ¶ 43 (2009) (citing Palm Beach Junior College v. United Faculty of Palm Beach Junior College, 475 So. 2d 1221 (Fla. 1985).

However, this is not a usual case. Here, the Association asks that the Commission order the Governor to cease enforcing substitute Article 16, to post a notice to employees, to pay its attorney's fees and costs, and to order the Governor to request

the Legislature to reimburse all state employees for past pension contributions. The request recognizes that the Governor is taking 3% of covered salaries as pension contributions pursuant to legislation, not a contract provision. However, it argues that the original Article 16 would have prevented the application of the new law to employees covered by the contract. It further argues that since the substitute article was improperly imposed, the status quo requires the maintenance of the original article.

The Association correctly accepts the lack of authority for the Commission to order the Florida Legislature to appropriate funds. Police Benevolent Association, Inc. v. State of Florida, 818 So. 2d 584 (Fla. 1st DCA 2000). The Legislature's action in substituting Article 16 and simultaneously passing legislation to require a 3% pension contribution effectively underfunded the prior Article 16 "no cost" provision. The Commission has no authority to require the Governor to ask the Legislature to undo its previous funding decisions. Therefore, this part of the requested remedy is not appropriate.

In addition, the Commission cannot order the Governor to cease enforcing the law requiring a 3% employee pension contribution. Among other things, any such order would necessarily intrude on the constitutional right of the Legislature to approve the state budget. Thus, this portion of the requested remedy is inappropriate. The appropriate forum for the requested remedy is the Florida Supreme Court.

A notice to employees describing the bargaining violation would be especially difficult to draft. Accordingly, I recommend that the Commission not require this notice posting. On the other hand, the Governor knew or should have known that it was violating its bargaining obligation by asking the Legislature to impose a substitute contract article that effectively waived the Association's right to bargain over pension changes in the future. For this reason, it should compensate the Association for its necessary attorney's fees and litigation costs solely related to this one portion of its original charge on which it prevailed. If the Supreme Court affirms the circuit court decision, the remedy provided by the court will apply here.

AFFIRMATIVE DEFENSES

The State alleged that the charge was untimely. § 447.503(6), Fla. Stat. (requiring an unfair labor practice charge to be filed within six months). The parties were at impasse on February 7. The Governor presented substitute Article 16 to the Joint Select Committee on Collective Bargaining on February 21, 2011. The charge was not filed until August 22, 2011, six months and a day later. However, the last day of the six month limitations period was a Sunday. Also, the parties agreed that the entire Florida Legislature is the legislative body for impasse resolution purposes. It did not vote until May 26. There was no final action on substitute Article 16 until the Legislature voted. Alternatively, the charge was timely even if the violation occurred on February 21 when the Governor presented substitute Article 16. Thus, the State did not prove this affirmative defense.

The State also argues that the Association waived its right to file its unfair labor practice charge in the 2009-2011 contract. Article 33 of the existing contract contains a provision that limits the contract if the Legislature enacts a conflicting law. However, the savings clause does not insulate the State from liability for imposing a waiver of future bargaining. The State did not prove this affirmative defense.

The State requested an award of attorney's fees and costs, but did not prevail on the only issue litigated. There is no evidence or argument establishing that it is entitled to an award based on the other portions of the charge that were withdrawn.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case. § 447.503, Fla. Stat.

2. The State violated Section 447.501(1)(a) and (c), Florida Statutes, by obtaining through impasse resolution a waiver of future bargaining over pensions (Article 16) at the conclusion of re-opener bargaining.

3. The State should compensate the Association for its necessary attorney's fees and litigation costs for that portion of its original charge on which it prevailed. The other portions of the charge should be dismissed as withdrawn. No further remedies are appropriate.

RECOMMENDATION

I recommend that the Commission adopt this recommended order. 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). The Commission may not change the findings of fact in this order without first reviewing an official transcript of the hearing. Any party who desires the Commission to review the transcript must file one with the Commission by the date exceptions are due. 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 30th day of August, 2012.

JERRY W. CHATHAM
Hearing Officer

JWC/bjk

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