

# The Commission Interprets Section 447.4095, Florida Statutes “Financial Urgency”

By Hearing Officer William D. Salmon

Section 447.4095, Florida Statutes (2011), states:

In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

In *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police Inc. (FOP) v. City of Miami*, Case No. CA-2010-119 (Fla. PERC March 27, 2012), the FOP alleged that the City violated Section 447.501(1)(a) and (c), Florida Statutes, by: (1) improperly invoking Section 447.4095, Florida Statutes (2011), because a financial urgency did not exist; (2) failing to follow the procedures in the financial urgency statute by unilaterally changing the terms and conditions of employment of bargaining unit employees before completing the impasse resolution procedure set forth in Section 447.403, Florida Statutes (2011), Resolution of Impasses; (3) improperly applying the financial urgency statute to the status quo period; and (4) engaging in bad faith or surface bargaining because it never intended to reach an agreement with the FOP during bargaining for a successor agreement.

*(Continued on page 10)*

---

*(Continued from page 1)*

Following an evidentiary hearing, the Commission-appointed hearing officer found that the City was experiencing financial urgency and concluded that the City did not violate Section 447.501(1)(a) and (c), Florida Statutes. The FOP filed exceptions to the recommended order; the City filed a response to the exceptions.

Prior to resolving the FOP's exceptions, the Commission majority described the purpose of Section 447.4095, Florida Statutes. The Commission stated that Section 447.4095, Florida Statutes, is a legislative exception to its body of law concerning unilateral change, i.e., an employer is prohibited from unilaterally changing a wage, hour, or term and condition of employment. The other three exceptions are: waiver,

exigent circumstances requiring immediate action, or legislative resolution of an impasse pursuant to Section 447.403, Florida Statutes.

The FOP alleged that the City improperly invoked the financial urgency statute because a financial urgency did not exist. To determine whether Section 447.4095, Florida Statutes, was invoked improperly required a finding of whether the City was experiencing a financial urgency. The Commission's first step was to define "financial urgency." After considering the parties' and the hearing officers' proposed definitions as well as the dictionary definitions of the words "financial" and "urgency," the Commission defined financial urgency as a financial condition demanding prompt and decisive action which requires the modification of an agreement; however, it is not necessarily a financial emergency or bankruptcy. After

*(Continued on page 11)*

(Continued from page 10)

defining financial urgency, the Commission agreed with the hearing officer that a determination of financial urgency requires a close examination of the employer's complete financial picture on a case-by-case basis.

The Commission's next step was to develop a standard to determine when an agreement could be modified. The FOP sought to apply the test applied by the Florida Supreme Court in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993): a governmental employer may not modify an agreement unless the employer first demonstrates that there exists "no other reasonable alternative means of preserving its contract with public workers, either in whole or in part." According to the FOP, financial urgency was improperly invoked because the City could raise taxes and increase revenue from other sources.

The hearing officer rejected the FOP's proposed standard. He noted that in *Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School Board of Manatee County*, 62 So. 3d 1176 (Fla. 1st DCA 2011), *aff'g in part and rev'g in part*, 35 FPER ¶ 46 (2009), the court specifically rejected the union's request to hold that the *Chiles* decision provided the test for financial urgency within the meaning of Section 447.4095, Florida Statutes. However, the hearing officer agreed with the FOP that the City had to demonstrate a compelling interest in reopening its contract and altering provisions which related to the employees' wages and pension benefits. As part of the compelling interest, the hearing officer found that the City did not raise taxes because it believed City residents could not afford additional taxes or fees. At the time it declared financial urgency, the City's overall unemployment rate was approximately 13% and in some areas the rate was 25% to 30%.

After considering the competing standards, the Commission developed the following standard stating, in pertinent part:

Resolving a financial urgency case requires a finding that the financial condition of the

employer constituted a compelling governmental interest, which required immediate modification of the parties' agreement. When invoking Section 447.4095, Florida Statutes, the employer is held to the standard of good faith as defined in Section 447.203(17), Florida Statutes. Good faith is a matter of intent; it is a state of mind which is usually determined by inference from a party's conduct. *See, e.g., City of Hialeah v. Hialeah Association of Fire Fighters Local 1102 of the International Association of Fire Fighters of Hialeah, Florida*, 38 FPER ¶ 111 (2011).

The Commission continued by stating that, in charging an employer with a violation of Section 447.501(1)(a) and (c), Florida Statutes, for declaring a financial urgency, evidence must be provided that the financial assessment at the time financial urgency was declared was incorrect and/or that the employer was not acting in good faith when it declared financial urgency. A successful unfair labor practice charge could result in a finding of an unlawful unilateral change or a failure or refusal to bargain in good faith with appropriate penalties, such as a requirement that the employer return to the status quo as it existed prior to the unlawful declaration of financial urgency, the posting of a cease and desist order (Notice to Employees), and an award of attorney's fees and costs. The Commission reasoned that this standard implemented the legislative policy enacted in Section 447.4095, Florida Statutes, and protected the parties' respective constitutional rights.

The Commission's next step was to determine if a financial urgency existed in the case at hand. The hearing officer found that the City's personnel costs consumed more than 80% of its operating budget. To effectuate a city-wide reduction in expenses, pursuant to Section 447.4095, Florida Statutes, the City implemented modifications to employee wages, health care, and pension benefits for FY 2010-2011. Had the City failed to act, its personnel costs would have exceeded all revenues by consuming a staggering 101% of the City's budget. In that instance, the City would have been in the untenable situation of being unable to pay for essential governmental purchases, such as improvements, electricity, and fuel for City vehicles. The City would not have been able to operate or

(Continued on page 12)

*(Continued from page 11)*

maintain its buildings, and its pension costs would have depleted approximately 25% of the City's budget. The City also considered additional layoffs in lieu of reductions in pension and personnel costs; however, this would have necessitated the layoff of 1,300 employees or one-third of the City's workforce. These layoffs would have depleted hundreds of police and fire positions, impacted essential services to the citizens, and potentially endangered the health and safety of City residents. The Commission agreed with the hearing officer that the City demonstrated a compelling governmental interest requiring immediate modifications to employee benefits for the next fiscal year: a financial urgency existed.

In its next allegation, the FOP alleged that if financial urgency exists, the public employer and the bargaining agent must negotiate how the urgency would impact the agreement. The FOP further argued that if no agreement was reached, the statutory impasse process set forth in Section 447.403, Florida Statutes, must be utilized prior to modifying the agreement. The hearing officer rejected this statutory interpretation.

Because of the statute's specific references to "impact" and "negotiate," the hearing officer applied the impact bargaining procedure used by the Commission in circumstances when a public employer seeks to impose a management right. The Commission's impact bargaining procedure is that a public employer need only provide notice and a reasonable opportunity to bargain before implementing its decision concerning a management right, but it is not required to submit an impasse in negotiations to the statutory resolution process prior to implementation.

The Commission stated that the employer's announcement of financial urgency provided notice to an employee organization of impending modifications to the parties' agreement. The fourteen day period reserved for negotiations provided a reasonable opportunity to bargain over the impact of those modifications. The employer's implementation of the changes provided the prompt and decisive action necessitated by financial

urgency. Any impasse in negotiations occurring after implementation would be resolved by the legislative impasse resolution procedure contained in Section 447.403, Florida Statutes.

Next, the FOP alleged that the City improperly applied the financial urgency statute to the status quo period. The status quo period refers to the hiatus period that occurs between collective bargaining agreements. That is, if the agreement expires and another has not been executed, the terms of the first contract survive the contract's expiration.

The FOP argued that Section 447.4095, Florida Statutes, may be invoked, by definition, only for the purpose of modifying the terms of a collective bargaining agreement, and is inapplicable to alter the status quo after a contract's expiration. It contended that the City improperly invoked Section 447.4095, Florida Statutes, to modify terms and conditions of employment for FY 2010-2011 because no agreement existed covering that period.

The hearing officer found that the FOP and the City were signatories to a three-year collective bargaining agreement. Negotiations for a successor agreement began on April 12, 2010, when the FOP presented its initial proposal to the City. On July 28, 2010, after five bargaining sessions, the City declared financial urgency. On September 30, 2010, the day the contract expired, the City's modifications to the agreement became effective, and on October 1, 2010, the parties' status quo period began. Based on the hearing officer's findings of fact, the Commission determined that the declaration of financial urgency did not occur during the status quo period.

The FOP alleged that the City engaged in bad faith or surface bargaining because it never intended to reach an agreement with the FOP during bargaining for a successor agreement. In support of this allegation, the FOP contended that the City failed to inform it that it would invoke Section 447.4095, Florida Statutes. Moreover, after the City declared financial urgency, it did not change its bargaining proposals and it was not until shortly before the City Commission vote that the City Manager visited the FOP's president and chief

*(Continued on page 13)*

(Continued from page 12)

negotiator at his home and presented to him, as a fait accompli, the modifications that the City Commission intended to impose including changes to pension benefits and wages that had never been presented at the bargaining table.

The hearing officer was not persuaded by this contention. According to the hearing officer, there is no requirement in Section 447.4095, Florida Statutes, that labor organizations receive prior notice that the employer intends to invoke the provision. The provision states that, "In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible." The FOP received written notice of the City's declaration of a financial urgency on July 28, 2010, and the parties met twice within the statutorily prescribed fourteen-day period. Furthermore, the City was not required to change its bargaining proposals after invoking Section 447.4095, Florida Statutes. The Commission agreed with the hearing officer's conclusion that the FOP failed to prove by a preponderance of the evidence that the City engaged in bad faith or surface bargaining in violation of Section 447.501(1)(a) and (c), Florida Statutes.

Commissioner John Delgado concurred in part and dissented in part with the majority. He agreed with the majority that any interpretation of Section 447.4095, Florida Statutes, must begin with the definition of financial urgency, but he disagreed, in part, with the majority's definition of financial urgency. Rather, he defined financial urgency as a financial condition that: (1) calls for immediate attention; (2) requires a close examination of the employer's complete financial picture on a case-by-case basis; (3) requires the modification of an agreement after a proceeding pursuant to the provisions of Section 447.403, Florida Statutes; and (4) is neither a financial emergency as described in Section 218.503, Florida Statutes, nor bankruptcy, as provided through Section 218.01, Florida Statutes. He agreed with the majority that the hearing officer's facts demonstrated that the City's financial condition called for immediate attention. However, he disagreed that the City's financial

conditions was such that it required modification of the existing collective bargaining agreement.

According to Commissioner Delgado, the City could implement a red-light camera program, change the pension funding method from "aggregate" to "entry age normal," freeze the cost of living adjustment, and raise the millage rate from 7.6 mils to the maximum allowable rate of 10 mils. Applying the Supreme Court's standard in *Chiles*, Commissioner Delgado concluded that the City had funds available from these other reasonable alternative sources and, therefore, improperly invoked Section 447.4095, Florida Statutes, and violated Section 447.501(1)(a) and (c), Florida Statutes.

Commissioner Delgado also disagreed with the majority that the hearing officer had properly applied Section 447.4095, Florida Statutes. In his opinion, the correct application requires that, after impasse is declared, the parties proceed pursuant to Section 447.403, Florida Statutes, through the special magistrate procedure and a hearing before the City's legislative body before contract modifications may be imposed. Thus, he concluded that the procedure utilized by the City violated Section 447.501(1)(a) and (c), Florida Statutes. Commissioner Delgado agreed with the majority that neither party was entitled to an award of attorney's fees and costs.

