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March 17, 2015

James K Scholl,
City Manager
City of Key West
3132 Flagler Avenue
Key West, FL 33040

Re: Opinion regarding labor law issues associated with the pension benefit changes to the City's Police/Fire Pension Plan proposed by the Police/Fire Pension Board

Dear Jim,

After the City received a draft pension ordinance from the Fire/Police Pension Board attorney, in which the Pension Board recommended making changes to the City's Police/Fire pension plan by increasing a supplemental payment benefit and creating a new ad hoc 13th check benefit, at your direction I was asked whether those pension benefit changes are subject to bargaining.

I advised that it is well established in Florida that pension/retirement benefits are a "mandatory subject" of bargaining in the public sector. See e.g., Tallahassee v PERC, 410 So.2d 487 (Fla. 1981); Scott v Williams, 107 So.3d 379 (Fla. 2013); New Port Richey v Hillsborough County PBA, 505 So.2d 1096 (Fla. 2d DCA 1987).

Because pension benefits are a "mandatory subject" of bargaining, I advised that any such proposed changes should be the subject of collective bargaining with the PBA union and the IAFF union, so that ratified agreements can be obtained before the proposed pension benefit changes are implemented.

I also expressed concern about the City taking unilateral action to pass the proposed pension ordinance without having first bargained and reached agreement with the PBA and IAFF unions to make any changes to the City's pension/retirement benefits for those bargaining unit employees. My concerns are based on the following brief synopsis of Florida collective bargaining law discussing public employers making "unilateral" changes to benefits that are considered "mandatory subjects" of bargaining:

> Florida courts have determined that the right to collectively bargain requires a broad scope of negotiations. See City of Tallahassee v. PERC, 393 So. 2d 1147 (Fla. 1st DCA 1981), aff'd, 410 So. 2d 487 (Fla. 1982); United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees, 7 FPER ¶ 12300 (1981), aff'd, 425 So. 2d 133, 139 (Fla. 1st DCA 1982), aff'd in relevant part,

475 So. 2d 1221 (Fla. 1985); Duval Teachers United v. Duval County School Board, 3 FPER 96 (1977), aff'd, 353 So. 2d 1244 (Fla. 1st DCA 1978). Wages, hours and terms and conditions of employment are considered mandatory subjects of bargaining. See City of Winter Springs v. Winter Springs Professional Firefighters, 885 So. 2d 494 (Fla. 1st DCA 2004), rev. den., 911 So. 2d 793 (Fla. 2005). When an employee organization is certified as the exclusive bargaining agent for employees, a public employer is no longer free to make unilateral changes in bargainable issues. See Florida State Lodge, FOP v. City of Lauderhill, 4 FPER ¶ 4209 (1978).

A public employer is prohibited from unilaterally altering wages, hours, and terms and conditions of employment of employees represented by a union, except where there is a clear and unmistakable waiver by the certified bargaining agent; exigent circumstances requiring immediate action exist; legislative action is taken pursuant to the statutory impasse procedures; or where a financial urgency exists. See Government Supervisors Association of Florida/Office and Professional Employees International Union, Local 100 v. Broward County Board of County Commissioners, 37 FPER ¶ 76 (2011), citing Florida School for the Deaf and the Blind Teachers United v. Florida School for the Deaf and the Blind, 11 FPER ¶ 16080 (1985), aff'd, 483 So. 2d 58 (Fla. 1st DCA 1986); § 447.4095, Fla. Stat.; see also Florida Police Benevolent Association, Inc. v. Sheriff of Orange County, 36 FPER ¶ 348 (2010) at 711, and cases cited therein, aff'd, 67 So. 3d 400 (Fla. 1st DCA 2011) (determining that the objective expectation of employees in the continuance of existing terms and conditions of employment is the most important factor in determining the status quo).

Orange County Classroom teachers Assoc., Inc. vs. School District of Orange County, 40 FPER 323 (2014).

As to the question of whether there has been a "waiver" of bargaining rights, there are PERC cases addressing the question of waiver of a union's right to bargain over a mandatory subject of bargaining that show a public employer can establish an affirmative defense to Unfair Labor Practice charges for having taken a unilateral action to change a term and condition of employment by showing that the union has agreed to language – which is typically found in the language of a labor agreement that has been previously ratified by the union members -- that provided a "clear and unmistakable" waiver of the union's right to bargain over changes that the public employer made to what would otherwise be a mandatory subject of bargaining.

For example, in Palm Beach County PBA v. Sheriff of Palm Beach County, 38 FPER 171 (2011), the PERC hearing officer's analysis on the question of waiver under PERC law was noted as follows:

> I turn now to the waiver at issue. Where, as here, a party is claimed to have waived his rights under a collective bargaining agreement, the Commission requires that the waiver be clear and unmistakable. In Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 12 FPER ¶ 17029 (1985), rev'd on other grounds, 609 So. 2d 31 (Fla. 3d DCA 1985), the Commission reiterated the " clear and unmistakable" test to be applied in determining whether a party, in that case a union, has effectively waived certain bargaining rights:
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> A "clear and unmistakable" contractual waiver of bargaining rights is demonstrated by language which unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. Local 2226, IAFF v. City of St. Petersburg Beach, 10 FPER ¶ 15211 (1984). A waiver of this type must be stated with such precision that simply by reading the pertinent contract provision employees will be reasonably alerted that the employer has the power to change certain terms and conditions of employment unilaterally. Florida Public Employees Council 79, AFSCME v. State of Florida, 10 FPER ¶ 15208 at 417 (1984), aff ' d mem., 472 So. 2d 1184 (Fla. 1st DCA 1985).

Palm Beach County PBA v. Sheriff of Palm Beach County, 38 FPER 171 (2011).

As we discussed, I do not read the language in Article 11, Section E of the PBA Contract to be a clear and unmistakable/unambiguous waiver of the PBA members' rights to bargain over pension benefit changes. In addition, there is no language in the IAFF Contract (Article 27 Pension and Retirement Plan) suggesting that the Fire Union members have waived their right to bargain over pension benefits. There is, however, a "side letter" attached to the current IAFF Contract, in which the Fire Union noted that while it would cooperate with the City in a proposed "efficiency study" of the pension plan, that letter also expressly noted that: "neither the city nor the union waives any of its bargaining rights or any other legal rights conferred by [the] Florida Constitution or Florida Statutes."

Even if the Police and Fire union representatives have since provided what they may argue to be a "clear and unmistakable" waiver of their respective rights to bargain over these pension benefit changes, which have been proposed only by the Pension Board (but not the City as I understand the facts) that does not mean the City has any legal obligation to move forward with making unilateral changes to pension plan benefits at this time.

In the alternative, to avoid any uncertainty that would be created by making a unilateral change and the uncertainty as to whether a waiver may later be found by PERC to be "clear and unmistakable" if needed to defend having made any unilateral changes to benefits, like any other benefit changes that have been proposed and/or may be considered, I suggested that the City should first obtain or determine the actual additional costs to the City of the proposed pension benefit changes (which I understand has been requested), and then those additional costs should be considered in the context of the additional costs of other benefit changes that are currently being negotiated. The City would then be in a better position to determine whether it prefers approaching the PBA and IAFF to discuss making those proposed pension benefit changes suggested by the pension board now or to include those proposed changes as part of the regular

collective bargaining process -- which are on-going with the PBA union and will start soon with the IAFF union.

In this regard, it also should be noted that in the current collective bargaining negotiations with the PBA, that union has made proposals to make two (2) pension benefit changes, which means the City is already discussing other pension benefit changes with that union. Additionally, I understand that the PBA union attorney also sent an email advising that while the PBA does not believe either a waiver or ratification vote is needed at this time, he also advised that the PBA is willing to further discuss the issues associated with the Pension Board's proposed pension ordinance change during the next negotiation meeting.

Sincerely,

Paul T. Ryder, Jr.

Cc: Shawn D. Smith, City Attorney
Ronald Ramsingh, Assistant City Attorney