

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

PALM BEACH COUNTY POLICE
BENEVOLENT ASSOCIATION, INC.,
CHARTERED BY THE FLORIDA POLICE
BENEVOLENT ASSOCIATION, INC.,

Charging Party,

Case No. CA-2020-044

v.

Order No.: 23U-072

Date Issued: May 23, 2023

SCHOOL BOARD OF PALM BEACH
COUNTY, FLORIDA,

Respondent.

_____ /

FINAL ORDER

On December 14, 2020, the Palm Beach County Police Benevolent Association, Inc., chartered by the Florida Police Benevolent Association, Inc. (PBA), filed an unfair labor practice (ULP) charge alleging that the School Board of Palm Beach County, Florida (Board) violated section 447.501(1)(a), (c), and (f), Florida Statutes (2022),¹ by circumventing the promotional process for Sergeants set forth in the parties' collective bargaining agreement (CBA), even after a grievance regarding the matter had been granted. The Commission's General Counsel found the charge to be sufficient, and a hearing officer was appointed.

On February 28, 2023, after a four-day evidentiary hearing, the hearing officer issued his recommended order², concluding that the Board violated section 447.501(1)(a) and (c), Florida Statutes. The hearing officer also concluded that the Board did not

¹ All statutory citations are to the 2022 edition of the Florida Statutes.

² References to the hearing officer's recommended order are designated as "HORO at" followed by the appropriate page number(s).

violate section 447.501(1)(f), Florida Statutes, and that both parties were entitled to partial awards of attorney's fees and costs. On March 15, the PBA filed exceptions to the recommended order. The Board did not file any exceptions of its own but filed a response to the PBA's exceptions on March 27.³ A transcript of the hearing was filed with the Commission.

First, we review the pertinent facts. Article 20.11 of the parties' CBA sets forth the applicable procedures and the required qualifications for an Officer who seeks to become a Sergeant. In 2016, the PBA filed a grievance claiming that the Board was permitting Officers to sit for the Sergeant's examination although they did not meet the requirements of the CBA. The grievance disposition confirmed the allegation and directed Police Chief Lawrence Leon "to follow the CBA on this issue on a go-forward basis."

In February 2020, the PBA filed a second grievance asserting that new Police Chief Frank Kitzerow was promoting individuals to Sergeant in a manner contrary to the terms of Article 20.11. The Board asserted that the individuals were merely temporarily assigned as Acting Sergeants. On March 13, the grievance was granted, noting that while the Chief has the authority to make special duty assignments to Sergeant, the Chief must comply with Article 20.11. The disposition directed the Chief to relieve the Officers of their Acting Sergeant assignments, cease providing them with supplemental pay, and follow the process set forth in Article 20.11 for all future Sergeant assignments.

³ On March 30, the PBA filed a reply to the Board's response to the exceptions. The PBA's reply is hereby stricken as unauthorized. Fla. Admin. Code R. 28-106.217; see, e.g., *Diaz v. DHSMV*, 13 FCSR ¶ 109, 1998 FL PERC LEXIS 506, at *2 n.1 (1998).

Shortly after the grievance was granted, it appeared that certain Acting Sergeants were still performing Sergeant duties. In August 2020, the PBA learned that the Board had continued to circumvent the CBA's promotional process for Sergeants through a series of subtle changes in operations that created a position ultimately known as Detective Supervisor, which had the same duties and supervisory responsibilities as Sergeants. Instead of relieving the Acting Sergeants of their duties and discontinuing their supplemental pay, the Board changed the title of several Acting Sergeants to Detective Supervisor and continued their supplemental pay. The Board also promoted new individuals, who did not meet the requirements of Article 20.11 and did not take the Sergeant's examination, from rank-and-file classifications to the Detective Supervisor position. Those officers who had previously taken the Sergeant's examination and were already Sergeants were not given the Detective Supervisor title change. Further, Chief Kitzerow stopped promoting anyone to the classification of Sergeant.

In response, the PBA filed this charge alleging violations of section 447.501(1)(a), (c), and (f), Florida Statutes, which provide:

(1) Public employers or their agents or representatives are prohibited from:

(a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part.

....

(c) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.

. . . .

(f) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent for the public employee or the employee involved.

Specifically, the PBA alleged that the Board violated these provisions by: (1) refusing to comply with the 2020 granted grievance and (2) creating and reclassifying individuals to the new Detective Supervisor classification with the same duties and responsibilities as Sergeants.

The PBA has filed three exceptions to the hearing officer's legal conclusions. In resolving these exceptions, we apply the following standard of review:

When a party excepts to a conclusion of law, the Commission has the principal responsibility of interpreting the statutory provisions consistent with the legislature's intent and objectives. We may substitute our conclusions of law for those of the hearing officer in those cases where we find our resolution of those issues is as reasonable or more reasonable than that of the hearing officer. In resolving exceptions to conclusions of law, we consider the statute at issue, policy considerations, and whether the hearing officer's analysis is consistent with pertinent judicial and Commission precedent.

Service Employees International Union (SEIU) Florida Public Services Union (FPSU), Change To Win (CTW) v. The District Board of Trustees of Valencia College, Florida, 47 FPER ¶ 327 (2021) (cleaned up).⁴

⁴ Internal citations, quotation marks, and brackets have been omitted from the quoted material to enhance readability; the quotation otherwise faithfully reproduces the quoted text.

In its first exception, the PBA asserts that after correctly finding that the Board intentionally disregarded the 2020 granted grievance, the hearing officer erred in not analyzing whether that action violated section 447.501(1)(a), (c), and/or (f), Florida Statutes. As to section 447.501(1)(a) and (c), the hearing officer considered the Board's creation of the new Detective Supervisor classification and found that it violated subsections (1)(a) and (c).⁵ However, he did not consider the Board's refusal to comply with the granted grievance because he concluded that the PBA did not pursue that grievance to arbitration as required by *Westfall v. Orange County Board of County Commissioners*, 8 FPER ¶ 13367 (1982). As to section 447.501(1)(f), the hearing officer considered both allegations but, again, found that because the PBA did not proceed to arbitration on the grievance, the PBA could not demonstrate, under *Westfall*, that the Board's actions prohibited the PBA from fully utilizing the contractual grievance procedure.

With this backdrop, we turn to the merits of the PBA's first exception. In essence, the PBA objects to the hearing officer's conclusion that the PBA was required to advance its 2020 grievance to arbitration – a conclusion that impacts several aspects of the hearing officer's legal analysis. We recognize that on a prior occasion, *Westfall* has been applied where an employee organization prevailed on a grievance and later alleged that the employer failed to comply with the grievance disposition. See *Federation of Public*

⁵ There were no exceptions filed as to that legal conclusion, with which we agree. Thus, it will not be discussed here.

Employees, a Division of the National Federation of Public and Private Employees v. The School Board of Broward County, Florida, 22 FPER ¶ 27002 (G.C. Summary Dismissal 1995) (dismissing alleged violation of section 447.501(1)(f), Florida Statutes, for failing to demonstrate that the employer prevented the union from advancing the grievance to arbitration under *Westfall*). However, in such a situation, the requirements of *Westfall* do not apply.

A charge asserting that an employer has failed to comply with the terms upon which a grievance has been resolved or settled asserts a contractual right derived from the provisions of the underlying CBA. See *United Faculty of Florida v. University of South Florida Board of Trustees*, 36 FPER ¶ 61 (2010); *Central Florida Police Benevolent Association, Inc. v. Orange County Board of County Commissioners*, 19 FPER ¶ 24214 (1993) (“Grievance procedures, which are embodied in [CBAs] pursuant to the requirements of section 447.401, Florida Statutes, are terms and conditions of employment.”). Contravention of this contractual right by an employer establishes an unlawful refusal to bargain in violation of section 447.501(1)(a) and (c). *United Faculty of Florida*, 36 FPER ¶ 61; *Sharp v. City of Melbourne*, 18 FPER ¶ 23092 (1992) (“Breaching the grievance settlement may be the basis for a unfair labor practice charge against the City analogous to a unilateral change in the terms of the underlying contract.”); see, e.g., *United Faculty of Florida*, 36 FPER ¶ 61 (finding that the employer failed to bargain in good faith by not complying with the grievance settlement it had previously executed).

Furthermore, a public employer does not discuss a grievance in good faith where the grievance is granted and resolved in favor of the certified bargaining agent and the employer later fails to abide by the resolution. For example, in *Orange County*, 19 FPER ¶ 24214, the Commission found that the public employer did not refuse to discuss the grievance in good faith pursuant to the terms of the CBA where it fully abided by the decision resolving the grievance. The Commission stated that although the union filed a ULP charge, it could have filed a new grievance asserting that the employer failed to abide by the disposition of the prior grievance. *Id.*; see also *City of Melbourne*, 18 FPER ¶ 23092 (explaining the options for alleging a repudiated grievance settlement as pursuing a ULP charge or filing a new grievance).

In this case, the PBA chose to file a ULP charge to address the Board's disregard of the granted grievance and its subsequent actions in contradiction of the granted grievance. Thus, the hearing officer should have analyzed whether the Board's noncompliance with the granted grievance violated section 447.501(1)(a) and (c) and whether the Board's disregard and circumvention of the granted grievance violated section 447.501(1)(f). Accordingly, the PBA's first exception is granted. Because the hearing officer made the factual findings necessary for us to properly conduct this legal analysis, a remand is unnecessary. We now analyze both legal issues in turn.

The 2020 grievance disposition directed the Board to relieve all Officers assigned as Acting Sergeant, cease providing them with supplemental pay, and follow the process set forth in Article 20.11 for promoting Sergeants. Instead of doing so, the Board

changed the titles of employees who were Acting Sergeants to the new title of Detective Supervisors, kept them as supervisors over Officers, and allowed them to retain the supplemental pay. Thus, the Board failed to comply with the directives of the granted grievance, thereby violating a contractual right derived from the provisions of the CBA. This continued unilateral alteration of the promotional requirements in the CBA constitutes a failure to bargain in good faith, in violation of section 447.501(1)(a) and (c), Florida Statutes. See *United Faculty of Florida*, 36 FPER ¶ 61.

We now consider whether the Board's conduct – both the refusal to comply with the grievance disposition and the creation of the Detective Supervisor classification – violated section 447.501(1)(f), Florida Statutes. That subsection prohibits a public employer from refusing to discuss grievances in good faith pursuant to the terms of the CBA. § 447.501(1)(f), Fla. Stat. In this case, the hearing officer's recommended order is replete with findings of fact and legal conclusions demonstrating that the Board acted in bad faith with regard to the 2020 granted grievance. The hearing officer found that the Board took steps to conceal its efforts to disregard the grievance disposition by making subtle changes and using misleading terminology in the creation of the Detective Supervisor classification, which was essentially a mere retitling of the Sergeant classification for those previously assigned as Acting Sergeants. HORO at 23, 33. The hearing officer further concluded that "the 2016 grievance, the 2020 grievance, and the Chief's actions subsequent to the 2020 grievance demonstrate that the Board has a pattern of trying to evade the requirements of Article 20.11." HORO at 30.

Lastly, the hearing officer found that the Board acted surreptitiously in implementing the change from Acting Sergeant to Detective Supervisor: for example, making a series of changes through a vaguely worded email and various ambiguous orders issued over several months that only gradually made the role of the new classification clear; renaming several former Acting Sergeants to either Detective, Detective Sergeant, or Detective Supervisor – all of which are essentially synonyms for the supervisory position of Sergeant; and promoting new individuals as Detective Supervisors without following the process outlined in Article 20.11. HORO at 31-32. We agree with the hearing officer that the Board acted in bad faith concerning the 2020 granted grievance and the creation of the Detective Supervisor classification by disregarding and circumventing the directives of the grievance. Thus, we find that the Board's conduct demonstrates a refusal to discuss the grievance in good faith, which is a violation of section 447.501(1)(f), Florida Statutes. See *Orange County*, 19 FPER ¶ 24214.

As its second exception, the PBA argues that the Board should not be awarded attorney's fees and costs with respect to the PBA's section 447.501(1)(f) claim. Based on our resolution of the first exception, we agree. As we have found the PBA's claim to be meritorious, it does not meet the "frivolous, unreasonable, or groundless" standard; therefore, the Board is not entitled to fees.⁶ The PBA's second exception is granted.

⁶ We recently announced a new standard for determining when to award attorney's fees and costs to a prevailing respondent. See *Singha v. Sheriff of Highlands*

Further, we conclude that the Board knew or should have known that its actions were improper, as previously discussed. See *United Faculty of Florida*, 36 FPER ¶ 61 (describing standard for awarding fees and costs to a successful charging party as whether the employer knew or should have known that its conduct was unlawful). Thus, we award attorney's fees and costs to the PBA, as the prevailing party on this portion of the charge as well.

The PBA's third exception essentially requests clarification of the portion of the hearing officer's recommended order directing the Board to "[r]estore the status quo Board rank structure that existed prior to March 20, 2020, with the exception of rescinding salary increases upon request of the PBA." We interpret this statement as requiring the Board to reclassify the Officers assigned as Detective Supervisors and cease paying them supplemental pay with the caveat that those Officers do not have to repay any amounts of supplemental pay previously earned.

However, because the creation of the Detective Supervisor classification was simply a continuation of the misconduct addressed by the 2020 granted grievance, we instead direct the Board to return to the status quo of the rank structure that existed prior to the assignment of several individuals to the Acting Sergeant classification. In other words, all Officers shall be removed from both the Detective Supervisor and the Acting

County, 49 FPER ¶ 243 (2023). Under the new standard, the Commission will follow the plain language of section 447.503(6)(c), Florida Statutes, instead of the former "frivolous, unreasonable, or groundless" standard. The new standard applies to ULP charges filed after the issuance of *Singha*. Therefore, the new standard does not apply in this case.

Sergeant classifications, if any remain; the Board shall cease paying these Officers supplemental pay, but none of the Officers are required to repay any amounts of supplemental pay earned prior to the issuance of this order; and the Board shall cease all efforts to circumvent the CBA's promotional process for Sergeants moving forward.

Upon review of the entire record, we conclude that the hearing officer's findings of fact are supported by competent, substantial evidence received in a proceeding which satisfied the essential requirements of law. *See Boyd v. Department of Revenue*, 682 So. 2d 1117 (Fla. 4th DCA 1996). Therefore, we adopt the hearing officer's findings of fact. Insofar as we have disagreed with some of the hearing officer's conclusions of law, we find that our resolution of those issues is as or more reasonable than that of the hearing officer. § 120.57(1)(/), Fla. Stat. Accordingly, the hearing officer's recommended order, as modified by this order, is incorporated herein.

Pursuant to section 447.503(6), Florida Statutes, the Board is ORDERED to:

- 1) Cease and desist from:
 - (a) Disregarding the terms of the 2020 granted grievance;
 - (b) Circumventing the promotional procedures and requirements for Sergeants set forth in the CBA between the Board and the PBA;
 - (c) In any like or related manner, failing to bargain collectively in good faith over wages, hours, and terms and conditions of employment;
 - (d) In any like or related manner, interfering with, restraining, or coercing bargaining unit members in the exercise of any rights guaranteed under Chapter 447, Part II, Florida Statutes; and

- (e) In any like or related manner, refusing to discuss grievances in good faith pursuant to the terms of the CBA.
- 2) Take the following affirmative action:
- (a) Restore to status quo the Board rank structure that existed prior to the assignment of certain individuals as Acting Sergeants, with no further supplemental pay but without requiring reimbursement of any previously earned supplemental pay.
 - (b) Henceforth, comply with the promotional process for Sergeants set forth in the CBA;
 - (c) Pay the PBA its reasonable attorney's fees and litigation costs for the successful prosecution of the charge as to violations of section 447.501(1)(a), (c) and (f), Florida Statutes; and
 - (d) Post immediately in the manner in which the Board customarily communicates with its employees, the attached Notice to Employees.⁷

The PBA is directed to file its attorney's fees and costs proposal within thirty days from the date of this order. The Clerk of the Commission is directed to open an attorney's fees case and schedule a hearing.

⁷ The Board can satisfy this requirement by e-mailing the Notice to Employees to bargaining unit members or by posting the Notice to Employees on its website. See *School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancement in modern technology).

This order may be appealed to the appropriate district court of appeal.⁸ A notice of appeal must be received by the Commission and the district court of appeal within **thirty days** from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in sections 120.68 and 447.504, Florida Statutes (2022), and the Florida Rules of Appellate Procedure.

It is so ordered.

RUBOTTOM, Chair, AARON and SASSO, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on May 23, 2023.

BY: Barry Adam
Clerk



/ia

COPIES FURNISHED:

For Charging Party

Lawrence K. Fagan, Esquire
Katie Lynne Mendoza, Esquire

For Respondent

Andrew Brett Carrabis, Esquire
Jean Marie Middleton, Esquire
Mary Quesada
Veronica Velez

⁸ The portion of the final order addressing entitlement to attorney's fees is nonfinal and, therefore, not appealable until the amount is determined. See *McGee v. McGee*, 264 So. 3d 1087, 1089 (Fla. 1st DCA 2019).

NOTICE TO EMPLOYEES



Case No. CA-2020-044

POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION
AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW, AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT disregard the terms of the 2020 granted grievance.

WE WILL NOT circumvent the promotional procedures and requirements for Sergeants set forth in the collective bargaining agreement (CBA) between the Board and the PBA.

WE WILL NOT, in any like or related manner, fail to bargain collectively in good faith over wages, hours, and terms and conditions of employment.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit members in the exercise of any rights guaranteed under Chapter 447, Part II, Florida Statutes.

WE WILL NOT, in any like or related manner, refuse to discuss grievances in good faith pursuant to the terms of the CBA.

WE WILL restore to status quo the Board rank structure that existed prior to the assignment of certain individuals as Acting Sergeants, with no further supplemental pay but without requiring reimbursement of any previously earned supplemental pay.

WE WILL, henceforth, comply with the promotional process for Sergeants set forth in the CBA.

WE WILL pay the PBA its reasonable attorney's fees and litigation costs for the successful prosecution of the charge as to violations of section 447.501(1)(a), (c) and (f), Florida Statutes.

[POSTING PARTY]

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for **60** consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)