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June 4, 2018

CERTIFIED MAIL/RETURN RECEIPT

Dr. Wazir Ishmael, City Manager
Office of the City Manager
City of Hollywood
2600 Hollywood Blvd.
Hollywood, Florida 33022-9045

Douglas Gonzales
Office of the City Attorney
City of Hollywood
2600 Hollywood Blvd.
Hollywood, Florida 33022-9045

Re: City of Hollywood Police Officer's Pension Fund
Our File No: 160007

Dear Dr. Ishmael and Mr. Gonzales:

In light of the Hearing Officer's Recommended Order ("HORO") in PERC Case CA-2012-016, our office has been asked by the Board of Trustees of the City of Hollywood Police Officer's Pension Fund to determine how to proceed with making the members of the Plan whole considering both the decision of the Florida Supreme Court in *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017), along with the PERC Recommended Order. It is expected that the Board of Trustees will act on the advice set forth in this letter once the Final Order is entered by PERC in the pending unfair labor practice charge case.

It is our opinion that the HORO failed to address the following discrete categories of protected plan members: (1) bargaining unit members who had retired prior to the effective date of the purported contract waiver in 2013; (2) those police officers eligible to retire as of the effective date of the 2013 waiver; and (3) sworn police employees who were not members of the bargaining unit due to promotion to managerial positions after the commission of the unfair labor

practice but prior to the 2013 collective bargaining agreement. It is our view that failing to exclude those classes of plan participants from the effect of the 2013 contract waiver contravenes the holdings in *O'Connell v. State, Dept. of Admin.*, 557 So. 2d 609 (Fla. 3d DCA 1990) and *Bean v. State, Div. of Ret.* 732 So. 2d 391 (Fla. 1st DCA 1999). Those decisions make it clear that individuals eligible to retire must be treated as if they are retired and therefore exempt from the impact of subsequent legislative changes.

The HORO treated all sworn police officer employees equally, notwithstanding that many of the members were eligible for normal retirement, or not members of the bargaining unit. The Second District in *Bean* and the Third District in *O'Connell* both held that once a member of a public employee retirement system reaches normal retirement eligibility, the member has a vested right to the benefits in place at the time of normal retirement, notwithstanding the fact that the employee remains in service. *O'Connell,* 557 So. 2d at 610-11; *Bean*, 732 So. 2d at 392.

The members of the bargaining unit did not ratify the collective bargaining agreement containing waiver language until July 29, 2013. HORO, p.8, ¶ 18. Thus, any reductions in retirement benefits as a result of the unconstitutional declaration of financial urgency had no effect on any police pension plan member who had retired prior to July 16, 2013; any member who had reached normal retirement eligibility before legislative ratification; and any member who was not part of the bargaining unit and therefore not covered by any contractual provision.

The effect of the *Headley* decision was to render the 2011 ordinance adopted as a consequence of the application of the Financial Urgency statute, void *ab initio.* In order for the City to re-establish the 2010 ordinance invalidated by *Headley*, it would have been necessary for the City to re-enact the ordinance as a part of the 2013 contract language and the provisions of Section 447.309(3), Fla. Stat. The PERC Hearing Officer failed to address this issue.

It is our view that enforcing a purported waiver based upon the employer's constitutionally infirm actions violates public policy and emboldens the employer to find ways to repeat its illegal behavior. In *Headley*, the Supreme Court of Florida affirmed the decision of the Fourth District finding that Hollywood committed an unfair labor practice in the manner in which it employed the financial urgency statute. In dismissing the City of Hollywood's petition for review of the Fourth District's finding that the City acted contrary to the *Chiles* standard, the Supreme Court applied the *Headley* holding to Hollywood.

The Supreme Court's *Headley* decision found the procedure employed by Miami and Hollywood to be unconstitutional. This should come as no surprise, both in light of the language in Chiles and well-established jurisprudence on constitutional violations by government. Since the 1920's, an unbroken line of cases has held that an unconstitutional act is void *ab initio*. See, e.g., *State ex rel. Davis v. City of Stuart*, 120 So. 335 (Fla. 1929), *State ex rel. Nuveen v. Green*, 102 So. 739 (Fla. 1924); *North Florida Women's Health and Counseling Services, Inc. v. State of Florida,* 866 So. 2d 612 (Fla. 2003); *Bell v. State,* 585 So. 2d 1125 (Fla. 2d DCA 1991). It is our view that a contractual waiver, even if valid, cannot have a retroactive effect.

There is no question that the City unilaterally altered the retirement ordinance prior to the completion of impasse resolution proceedings in Section 447.403, Florida Statutes. Whether the waiver in 2013 was valid or not is a matter to be determined by PERC and the courts. What is clear, however, is that a waiver cannot be applied retroactively to divest employees of settled rights to retirement. Accordingly, any changes to pension benefits should be applied prospectively as to all members in accordance with the Florida Supreme Court decision in *Scott v. Williams*, 107 So. 3d 379 (2013).

In light of our evaluation of these issues, our office will be recommending the following action to the Board at their meeting scheduled for June 29, 2018, pending the PERC Final Order:

1. Return to status *quo ante* for all members who retired or were eligible to retire prior to July 29, 2013. Additionally, all members who were not part of the bargaining unit due to their managerial status prior to the waiver effective date will be returned to status *quo ante*. The waiver would have no effect on their pension benefits, which would be calculated as if the 2011 financial urgency ordinance never existed. *See*, *City of Orlando v. PERC*, 435 So. 2d 275 (Fla. 5th DCA 1983) which held that rights of employees who are not in a bargaining unit are not subject to collective bargaining, adopting the decision of the United States Supreme Court in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In the *PPG* decision, the Court held that retired employees are not covered by the collective bargaining process.

2. Return to status *quo ante* for all Plan members through the effective waiver date of July 29, 2013, then apply the CBA pension benefit provisions for these members on a prospective basis. These members would in effect vest in the pre-financial urgency benefits until the effective date of the waiver, and then have their benefits calculated in a pro rata fashion based upon both the pre and post waiver benefit structure in accordance with decision of the Florida Supreme Court in *Scott v. Williams,* 107 So. 3d 379 (Fla. 2013). The revisions to the Plan which resulted from the 2013 and 2015 collective bargaining agreements, together with the pre-2011 plan provisions through the date of the waiver will form the benefit structure for active employees who do not fall into any of the categories in paragraph 1 above. The hybrid calculations will need to be performed by the Plan actuary. (It should be noted that an argument could be made that until the City re-enacts the 2011 ordinance, only the newly enacted provisions would apply along with the pre-2011 plan provisions. It is our view, however, that this is a matter between the City and the PBA).

We have preliminarily identified the actual benefits that could be impacted, in whole or in part, by Board action to include: (1) changes to the normal retirement age and benefits, (2) change in the definition of earnings, (3) reversion back to a DROP plan instead of the PRB, (4) the COLA, (5) eligibility for the supplemental pension benefit, and (6) revised employee contributions.

Prior to the Board meeting, we believe it would be in the interest of all affected parties to discuss this matter further, to see if there is mutual agreement on any of these issues. The Board would welcome the opportunity to meet with you to discuss these issues, including the implementation of the mediation process in Chapter 164, Florida Statutes, prior to making a final decision on how to proceed.

Please contact either of the undersigned if you would like to discuss further.

Very truly yours,

ROBERT D. KLAUSNER

STUART A. KAUFMAN

RDK/SAK/yv

cc: David Williams, Administrator
David Strauss, Chairman