LEGISTAR NO. 110383

MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229
Box 46

CITY ATTORNEY

TO: Mayor and City Commissioners

DATE: October 6, 2011

FROM: Marion J. Radson
City Attorney

SUBJECT: Communications Workers of America, et al. v. City of Gainesville, PERC Case Nos. CA-2009-002, CA-2009-003, CA-2009-004, and CA-2009-005: Appeal to Florida Supreme Court and PERC Order on Remand.

Recommendation: The City Commission (1) hear a presentation; (2) authorize management to implement the Public Employees Relations Commission's Order on Remand; (3) authorize the City Attorney to seek amicable resolution to all pending issues in the litigation; and (4) authorize management to seek legislative amendments to restore the rights of public employers in the collective bargaining process.

In response to increasing medical costs and premiums, in 1992, the City changed its payment of retirees' health insurance premiums from 100% of single coverage for the retirees to 80% of single coverage, in line with what it was paying for active employees. These changes were not bargained. The retirees filed a class action lawsuit to stop the City from doing so, arguing that they had been told the City would pay 100% of the premium for their lifetime. After years of litigation, the Court declined to certify a class of retirees, and later held that the Plaintiff retirees had abandoned their claims and dismissed the case.

While the lawsuit was ongoing, the City commissioned an actuarial study to determine the long term cost of the City's contribution of 80% of retirees and current employees' premiums. The study estimated that the City's cost to provide this benefit from 1994 forward was 76 million dollars. As a result of this study, in 1995, the City Commission adopted an ordinance changing how it would contribute to current and future retirees health insurance benefits. The ordinance provided that the City would contribute a percentage of retirees' health insurance costs that was variable based on years of service, age at retirement, and hire date. The result of these changes reduced the City's liability to 18 million dollars. The ordinance further provided that "the percentage or amount of which payment for either retirees or dependent coverage has varied over the years and may continue to do so in the future . . ." The then-IAFF Union President demanded to bargain over the changes; however, the City declined to bargain

the changes independent of the normal bargaining process. IAFF took no action in response to the City's stance and the ordinance was never challenged.

In 1999, the City adopted another ordinance which effectively lowered the benefit for those employees who entered into the DROP. Again, these changes were not bargained and the ordinance was never challenged.

In 2006, the City adopted another ordinance that converted the existing retiree health insurance program into a trust. The purpose of the trust was to provide benefits to the retirees while at the same time protect the assets of the trust from the creditors of the City. The 2006 ordinance provided that "the percentage or amount of which payment for either retirees or dependent coverage has varied over the years and may continue to do so in the future . . ." Again, these changes were not bargained and the ordinance was never challenged.

By 2008, the City concluded that the percentage method of contributing to the retiree health insurance plan had become financially unsustainable for the taxpayers and rate payers. The City desired to maintain the ability to contribute some level of premium subsidy for current and future employees, but could not do so under the 1995 formula and the escalating rise in health insurance premiums. Premiums that in 1994 were $103 for single coverage and $355 for family coverage, in 2008 had risen to $300 for single coverage and $837 for family coverage, thus raising the City's liability to 49 million dollars. Consequently, in 2008, the City adopted a plan where the City would contribute a specified dollar amount based on years of service and age rather than a percentage of the premium, thus reducing the liability to 41 million dollars.

Since at least the mid 1990's, the City has repeatedly notified its employees that the City reserves the right to unilaterally change its payments to retiree health benefits and that it might agree in the future to contribute "none, some, or all of the costs of retiree and/or dependent coverage." The City was conscientious about providing these notifications due in part to the lawsuit in 1992 wherein retirees maintained that they had been told they would get these benefits for life. So, in 2008 when the City unilaterally changed the benefits for retirees and refused to bargain the changes for current employees until the collective bargaining agreements opened, it was acting in accord with its prior actions.

Shortly after the 2008 changes, four of the City's bargaining units (the "Unions") filed unfair labor practice charges with the Public Employees Relations Commission (PERC) for refusing to bargain. On March 2, 2010, PERC concluded that the City did not commit an unfair labor practice. In particular, PERC held that the City's retiree health insurance program had not become part of the status quo of employee benefits subject to collective bargaining before amendment. The longstanding test for determining whether a "past practice" is so established that it has become the status quo for employee benefits is whether the practice: (1) was unequivocal; (2) existed substantially unvaried for a significant period of time prior to change; and (3) could reasonably have been expected by the employees to have continued unchanged. The test is disjunctive; that is, each facet contains separate requirement. PERC concluded that the City's retiree health insurance benefits were not unequivocal and it was not objectively reasonable for City employees to believe that the benefits would remain unchanged; therefore the program was not a past practice subject to bargaining before change. This was because the

language in the City's clearly ordinances warned employees that the benefit could change if the City Commission deemed it necessary and the City repeatedly warned its employees that the premium costs were subject to unilateral change.

The Unions appealed PERC's order to the First District Court of Appeal. Due to the importance of the issue on appeal, an amicus brief was filed on behalf of the City by the Florida League of Cities. On May 9, 2011, the First District Court panel by a vote of 2-1 overturned PERC, seeming to hold that the mere passage of time is sufficient to transform a unilaterally granted benefit into a past practice. In doing so, the panel ignored the expertise of the agency charged with interpreting law relating to collective bargaining and ignored long established precedent. The ruling greatly affects the ability of public employers to manage employees within the financial circumstances they face and potentially creates a host of past practices which were never intended to be conferred. The panel noted that time as little as two years can establish a past practice. In order to have avoided the result reached by the panel, the City would have to regularly change the unilaterally conferred benefit, for no reason except to prevent the creation of a past practice, which the City said over and over again it was not creating.

In response to the First District Court's decision, the Cities of Cocoa, St. Petersburg, Kissimmee, West Palm Beach, and Jacksonville, the Counties of Alachua and St. Johns, and the Florida League of Cities joined the City of Gainesville in asking the panel to rehear the case, either as the panel or en banc, or to certify the issue to the Florida Supreme Court as a question of great public importance. The appellate court declined to take such action.

On July 21, 2011, because of the significance of the First District Court's decision and its impact on the city and other public employers, the City Commission authorized the City Attorney request the Florida Supreme Court to review the First District Court of Appeal's decision. Once again, the City was supported in its appeal by the Florida League of Cities, the Cities of Cocoa, Kissimmee, and St. Petersburg, and the Counties of Alachua and St. Johns.

On September 27, 2011, the Florida Supreme Court, who is vested with narrow authority to review decisions from the district courts of appeal under the Florida Constitution, declined the City's request to accept discretionary jurisdiction in this case. Accordingly, the decision of the First District Court is final and binding on the City.

In accordance with the First District Court's decision, PERC issued an Order on Court Remand ordering the City, among other things, to rescind its changes to the formula by which the City's contribution to the future retirement health insurance premiums of employees represented by the Unions is calculated and pay to employees represented by the Unions and who have retired since implementation of the changes to the formula the amount of premium they would have not paid but for the City's changes in that formula. It is management's and the City Attorney's recommendation that the City implement PERC's Order on Remand. In rescinding the formula change for the affected retirees, many retirees will now owe the retiree health insurance trust fund premium payments because the City's cost savings in the 2008 formula change were set to occur in later years. The 2008 formula change was actually beneficial to most retirees in the early years after implementation. Therefore, it is recommended that these premium payments also be recovered to fully implement the 2008 formula rescission

and make the trust whole. In addition, since PERC's Order on Court Remand has been appealed by both the Unions and the City, and due to the finality of the First District Court's decision, it is recommended that the City Attorney to seek amicable resolution to all pending issues in the litigation. Lastly, because of the significance of the First District Court's decision and its impact on the City and other public employers, it is recommended that the City Commission authorize management to seek legislative amendments to restore the rights of public employers in the collective bargaining process.

Prepared by:

Stephanie M. Marchman
Assistant City Attorney II

Prepared, Submitted and
Approved by:

Marion J. Radson
City Attorney