IN THE CIRCUIT COUR TOF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COURNTY, FLORIDA

**CITY OF MIAMI,** CASE No: **17-29242-CA-30**

Plaintiffs,

v.

**MIAMI FIREFIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST AND BOARD OF TRUSTEES OF THE MIAMI FIREFIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST,**

Defendants.

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**ORDER DENYING MOTION FOR EMERGENCY INJUNCTIVE RELIEF & ABATING CASE PURSUANT TO CHAPTER 164**

THIS CAUSE came before the Court on the City of Miami's Emergency Motion for Temporary Injunctive Relief. Defendants, the Board of Trustees of the City of Miami Firefighters' and Police Officers' Retirement Trust ("Pension Board"), and the City of Miami Firefighters' and Police Officers' Retirement Trust ("Pension Trust") (collectively the "Pension Defendants"), opposed the City's Motion and filed a Motion to Abate pursuant to Florida's Governmental Conflict Resolution Act. An evidentiary hearing was held on December 29, 2017 and proposed orders were submitted in lieu of closing arguments. Based on a review of the record, including affidavits and stipulated exhibits, and for the reasons set forth below, the Court denies the Plaintiffs Motion for Injunctive Relief and grants the Defendants' Motion to Abate.

## I. INTRODUCTION

On December 22, 2017, Plaintiff, the City of Miami (herein after The City) filed its Petition seeking a temporary injunction and permanent injunctive relief to prevent the implementation of the March 27, 2017 decision of the Supreme Court of Florida in ***Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police v. City of Miami*, 215 So. 3d 1 (Fla. 2017)** which found

that the City of Miami had violated the individual and organizational rights of the Fraternal Order of Police (FOP) and its members by imposing substantial reductions of wages and pension benefits in 2010. The Court found that the City also committed an unfair labor practice under **§447.501(1), *Fla. Stat.*** The Court remanded the case back for entry of orders consistent with the opinion.

The First District returned the case to the Florida Public Employees Relations Commission (PERC), the legislatively created agency for resolution of claims under the ***Florida Public Employee Labor Relations Act, Chapter 447, Part II, Fla. Stat.*** PERC directed that the parties be restored to the *status quo ante* (the wage and benefit levels as they existed prior to September 2010). Agreeing with the recommendation of its hearing officer, on October 18, 2017, PERC ordered that the City's 2010 unilateral pension changes be rescinded and that all affected employees be granted back wages.

According to the PERC, "[t]he appropriate remedy in this case requires the City to rescind the changes in wages and benefits that we legislatively imposed on September 30, 2010, re-instate the status quo ante as of September 29, 2010, and make the employees whole." City's Exhibit "2" at p. 14.

Because a determination of back wages involves an individual assessment and proof, PERC set an administrative hearing to determine the amount of back-pay due. No administrative proceeding was required to restore the status quo ante pertaining to the rescission of the 2010 pension ordinance. The PERC Order merely provides for the opening of a "back-pay case," which is currently set for February 26, 2018.

On September 27, 2017, even prior to the PERC order, the Board of Trustees of the City of Miami Fire and Police Retirement System (FIPO) wrote to the City Manager outlining the potential long terms actuarial cost associated with the Supreme Court decision and invited the City

to engage in discussion with the Board on the issues. FIPO Exhibit "1". According to Board Chairperson, Retired Police Lieutenant Ornel Cotera's testimony, the City never responded.

On November 2, 2017, the FIPO Board voted unanimously to recalculate the benefit levels and actuarial liabilities of the System as if the 2010 ordinance had not been adopted. FIPO Minutes, Exhibit "1" to FIPO Opposition Memo. FIPO Administrator Dania Orta testified that an advance copy of the FIPO agenda was provided to the City. The Board deferred any action on back wages and the long terms actuarial impact of the *Headley* decision.

FIPO posted notice of its action on its website immediately thereafter.[1] FIPO specifically declined to take any action with regard to the effect of back-pay on past or future pension benefits until the PERC back-pay proceeding is concluded. The minutes of the November 2 meeting reflect the FIPO Board's unanimous[2] vote to administer the System "as if Ordinance 13202 had never been adopted."

The FIPO Plan Administrator, Dania Orta, and its Chairman, Ornel Cotera, both testified that the FIPO Board is not making any back-pay determinations or otherwise attempting to calculate damages at issue before PERC. Rather, the FIPO Board is acting pursuant to its express delegated authority, as a fiduciary, to restore pension benefits to the level articulated in the last valid ordinance (the "prior formula"), before benefits were reduced by the City's 2010 amendments. In other words, the FIPO Board understands that it is lawfully proceeding to pay

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1 The Director of the City's Office of Management and Budget, Christopher Rose, testified that he ordinarily attended monthly meetings of the FIPO Board. While he may not have attended the November 2, 2017, his assistant, Adine Cordero, would have attended the meeting. Ordinarily, Ms. Cordero reports back to Mr. Rose regarding FIPO Board meetings that she attends on his behalf. Hearing transcript at pages. 139-140.

2 Of the nine trustees on the FIPO Board, one is appointed by the City Manager and another four are "independent" trustees appointed by the City Commission. *See* § 40-193(a) of the City Code establishing the composition of the FIPO Board of Trustees.

pension benefits pursuant to the Pension Plan that it is charged with administering, as it existed prior to October 1, 2010.

In directing its staff, FIPO took specific note that its actions would not take into account the effect of any back-pay proceedings. FIPO correctly observed that since the back-pay had not been determined, but the order of rescission had, its corrective measures would go solely reinstating the 2010 pension formula. FIPO repeated this instruction at its meeting of December 15, 2017, reiterating that no calculations relating to the impact of back wages on pension payments were to be made until the PERC proceeding on back-pay was completed. *See* Orta affidavit at ¶9-¶10.

Ms. Orta further testified that the following payments will begin on January 15, 2018 based on the prior formula: i) monthly payment of approximately $66,000.00[3] of adjusted pension benefits for members who retired on or after October 1, 2010 and ii) a retroactive one-time payment of $3.3M in retroactive pension benefits. By commencing payment in January, FIPO will save interest on the $66,000 per month adjusted retiree benefits, rather than waiting until the future resolution of the separate and distinct PERC back-pay hearing. Transcript at p. 63.

## II. FIPO BOARD'S INDEPENDENT AUTHORITY AND FIDUCIARY DUTIES

The Board's decision to begin implementing the prior formula was based on the Supreme Court's decision in *Headley*, the PERC Order dated October 18, and the PERC hearing officer's recommendations,[4] which was incorporated into the PERC Order. City's Exhibit "2" at p. 14. The

[3] FIPO's monthly retiree payroll is approximately $12.5M. Accordingly, the $66,000 monthly increase in retiree pension payments represents approximately one half of one percent (0.5%) of FIPO's monthly retiree payroll.

[4] Exceptions filed by the City were rejected by the hearing officer and by PERC.

City argues that FIPO lacks legal authority to begin implementing the prior benefit formula as it existed in 2010.

The broad powers and fiduciary duties of the FIPO Board are set forth: (i) in the Pension Plan, which is codified in ***Chapter 40 of the City Code, (ii)*** in ***Chapters 175 and 185, Fla. Stat.,*** which govern municipal pension plans for public safety officers, and (iii) in ***Chapter 112, Part VII, Fla. Stat.***, which generally governs all municipal retirement systems.

The Pension Plan, which was enacted by the Miami City Commission, grants the FIPO Board the following independent powers and duties:

> ***Sec. 40-192.*** - Retirement system established; purpose; name; date operative.
> A retirement system is hereby established and placed under the administration and management of a board of trustees for the purpose of providing retirement benefits pursuant to the provisions of this division.
>
> ***Sec. 40-193.*** - Board of trustees.
>
> (c) *Fiduciary responsibility.* Members of the board of trustees shall be the named fiduciaries of the retirement system. As named fiduciaries, the trustees shall discharge their duties and responsibilities solely in the interest of members and beneficiaries of the retirement system:
> (1) For the exclusive purpose of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the retirement system;
> (2) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and
> (3) In accordance with ordinances and other applicable law, documents and other instruments governing the retirement system. (Emphasis added)
>
> ***Sec. 40-194.*** - Administration of retirement system.
> (a) *Plan administrator.* The board shall serve as plan administrator of the retirement system.
> (1) The general administrative duties of the board shall be:
> g. To establish and maintain such other functions as are necessary to administer, manage and operate the retirement system, or as otherwise required by law.
>
> (b) *Pension administrator; board physician; advisors.*

(3) The board shall have authority to retain its own legal counsel, accountants, actuaries, and other professional advisors to assist the board in the performance of its administrative duties. The board may act without independent investigation upon the professional advice of advisors so retained.

The FIPO Board is also governed by ***Chapters 175 and 185, Fla. Stat.,*** the state-wide municipal firefighter and police retirement laws, respectively, which grant the Board the following independent powers and duties:

***185.06*** General powers and duties of board of trustees[5].
(1) The board of trustees, subject to the fiduciary standards in ss. 112.656, 112.661, and 518.11 and the Code of Ethics in ss. 112.311-112.3187, may:

(d) Finally decide all claims to relief under the board's rules and regulations and pursuant to the provisions of this act. (Emphasis added)

(4) The sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement trust fund and for making effective the provisions of this chapter are vested in the board of trustees; however, nothing herein shall empower a board of trustees to amend the provisions of a retirement plan without the approval of the municipality. The board of trustees shall keep in convenient form such data as shall be necessary for an actuarial valuation of the retirement trust fund and for checking the actual experience of the fund. (Emphasis added).

Similarly, ***Chapter 112, Fla. Stat.,*** charges all governmental pension boards with the following authority and fiduciary duties:

***112.656*** Fiduciary duties; certain officials included as fiduciaries.
(1) A fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.

(2) Each retirement system or plan shall have one or more named fiduciaries with authority to control and manage the administration and operation of the retirement system or plan. However, the plan administrator, and any officer, trustee, and custodian, and any counsel, accountant, and actuary of the retirement system or plan who is employed on a full-time basis, shall be included as fiduciaries of such system or plan.

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[5] The operative provisions of ***Chapter 175 Fla. Stat.,*** are identical to those cited above from Chapter 185.

The Court finds that these overlapping sources of authority provide the Board with the sole and exclusive authority to administer the Plan in the interest of the participants and beneficiaries. The City asserted the position that the Board had amended the City Code. The Court disagrees and declines to interfere with the Board's unanimous decision as Plan fiduciaries to begin paying "reinstated" plan benefits in compliance with decisions by the Supreme Court in *Headley* and by PERC.

## III. THE FLORIDA INTERGOVERNMENTAL CONFLICT RESOLUTION ACT

The Florida Intergovernmental Conflict Resolution Act (the "Act") is codified in ***Chapter 164, Fla. Stat.*** The purpose and intent of the Act is to provide "an equitable, expeditious, effective, and inexpensive method for resolution of conflicts between and among local and regional governmental entities." ***§164.102., Fla. Stat.*** The first section of the Act describes that "[it] is the intent of the Legislature that conflicts between governmental entities be resolved *to the greatest extent possible* without litigation." *Id.* (Emphasis added).

The Act mandates that governmental entities formally engage in specified conflict resolution procedures *prior* to filing suit. When one governmental entity files suit against another, "the suit *shall* be abated, by order of court, until the procedural options of this act have been exhausted." (Emphasis added). ***§ 164.1041(1), Fla. Stat.***

Only when the governing body finds that an "immediate danger to the health, safety, or welfare of the public requires immediate action" or that "significant legal rights will be compromised" may the requirements of the Act be circumvented. This determination is required to be made by a three-fourths super majority vote.[6] ***§ 164.1041(1), Fla. Stat.*** Additionally, the Act

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[6] Similar super-majority voting requirements have been routinely upheld by the courts over the years in other contexts. ***Hope v. City of Gainesville*, 355 So. 2d 1172 (Fla. 1977).** While municipalities have undisputed authority to operate under the Municipal Home Rule Powers Act,

imposes a "good faith" requirement and explicit penalty for bad faith failure to comply with the Act. ***§ 164.1058, Fla. Stat.***

According to Ms. Orta and Chairman Cotera, the FIPO Board directed the preparation of a letter to the City after the potential actuarial impact of the *Headley* and PERC decisions would have on the pension plan. That letter, FIPO Exhibit "1", specifically invited the City to engage in a meaningful dialogue to address this potential financial impact. The City did not respond to the letter[7] or the invitation for discussions. No communications from the City were received by the Board until the filing of this action. Ms. Orta reviewed City Commission records and found no evidence that the City authorized suit, nor has she been so advised. The City's petition fails to allege that it authorized the filing of suit or complied with the pre-suit conflict resolution procedures required by ***Chapter 164 Fla. Stat.*** At the hearing, the City failed to present any evidence that the City Commission voted to authorize suit or attempted to comply with the Act.

Under the terms of Article 21 of the Miami City Charter, the City Attorney shall prosecute suits on behalf of the City as the City Commission shall direct by ordinance or resolution. There is no record evidence that any direction has been given to the City Attorney by the City Commission.

Had the City complied with its obligation under the Act it would have realized that judicial and taxpayer resources might be conserved in this matter. Indeed, the City's failure to comply with

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local resolutions are subordinate to Chapter 164's conciliation requirements. ***Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993)** (local ordinances are "inferior to laws of the state and must not conflict with any controlling provision of a statute").

[7] Chairman Cotera was questioned about a letter sent to the FOP's counsel after the November 2, 2017 meeting. While Chairman Cotera was aware of the letter, the FIPO Board was not the addressee. Neither the City's letter to the FOP nor the FOP's response was admitted into evidence. See discussion in section VIII, infra.

the Act has potentially led to the exact harm that the Legislature attempted to avoid by enacting the Act's mandatory conflict resolution procedures.

## IV. ABATEMENT IS MANDATORY IN THIS MATTER

The City of Miami does not dispute that the Board is an independent governmental entity authorized to sue and be sued by ***§112.66(6), Fla. Stat.*** *See* City Petition at ¶2; *see also* ***§40-195(a)(5), Miami City Code; §175.061, Fla. Stat., §185.06, Fla. Stat.***

As an independent governmental body created by special act of the Florida Legislature, FIPO is a "local government entity" as defined in ***Section 164.1031(1), Fla. Stat.***

The City of Miami incorrectly suggests that the Act has not been triggered because the FIPO Board did not formally initiate the conflict resolution proceedings under the Act by sending notification to the City. By letter dated September 27, 2017, from Chairman Cotera to City Manager Alfonso, the FIPO Board expressed a willingness to meet with the City to discuss "the restoration of the status quo ante." The Board's letter concludes by indicating that "[w]e look forward to your response and to setting a firm date for an open, public discussion of these critical issues." The Court notes that the resolution of a governmental body to set in place the pre-suit conciliation process does not require any particular form. The testimony of both Ms. Orta and Chairman Cotera establish that September 27th letter expressly invited a conciliation process, and the court so finds.

Even without regard to the Court's finding that the Board initiated formal conflict resolution procedures with its September 27 letter; it was the City of Miami who filed suit on December 22, 2017, and ***§ 164.1041, Fla. Sta.,*** states that: "If a governmental entity files suit against another governmental entity, court proceedings on the suit *shall be abated*, by order of the court, until the procedural options of this act have been exhausted." (Emphasis added).

The very next sentence of the Act provides that "[t]he governing body of a governmental entity initiating conflict resolution procedures pursuant to this act shall, *by motion*, request the court to issue an order abating the case pursuant to this section." (Emphasis added).

The City confuses the *pre-suit* initiation requirements of the Act by a plaintiff with the *post-suit* initiation of the Act by a defendant. If a plaintiff has not initiated the Act before filing suit, the defendant invokes the Act by filing a motion to abate. *See* ***§164.1041(1) Fla. Stat.*** The third sentence in ***§ 164.1041(1) Fla. Stat.,*** reinforces the point. All parties are encouraged to use the Act at any time, but are required to use the Act prior to commencement of litigation. "All governmental entities are encouraged to use the procedures of this act to resolve conflicts that may occur at any time between governmental entities, but *shall use these procedures before court proceedings*, consistent with the provisions of this section." (Emphasis added).

Any other reading of the Act would be impossible to reconcile with ***§ 164.1041(1) Fla. Stat.,*** (requiring that "court proceedings shall be abated" when a request is made "by motion" to issue an order abating the case). The formal initiation procedure set forth in ***§ 164.1052(1) Fla. Stat.,*** only applies when a *plaintiff* decides to initiate the Act "prior to initiating court proceedings." *See* ***§164.1052(1) Fla. Stat.*** Any other interpretation would be absurd because only a plaintiff can vote to initiate conflict resolution procedures "*prior to* initiating court proceedings or prosecuting action." *See* ***§164.1052(1) Fla. Stat.***

Thus, the City incorrectly interprets the Act which requires abatement in this case. Both ***§§ 164.1052(1) and 164.1041(1) Fla. Stat.,*** require application of the Act prior to initiating a lawsuit against another governmental entity. *See* ***§164.1052(1) Fla. Stat.,*** (requiring conflict resolution "prior to initiating court proceedings") and §***164.1041(1) Fla. Stat.,*** (requiring conflict resolution "before court proceedings"). The Court finds that a three-fourths super majority vote of the City

is required to support a finding that "immediate danger to the health, safety, or welfare of the public requires immediate action" or that "significant legal rights will be compromised." Absent such a legislative determination, abatement is required by Sections 164.1041(1) and 164.1052(1).

Notwithstanding the fact that three-fourths of the City Commission did not vote to authorize suit, ***§164.1041(2) Fla. Stat.,*** specifies that the Court has the final word on whether an effort to circumvent the Act is justified, even where there is a three-fourths vote.

***§164.1041(2), Fla. Stat.***, provides:

> [T]he court, upon motion, may review the justification for failure to comply with the provisions of this act and make a determination as to whether the provisions of this act should be complied with prior to court action and that following the provisions of this act will not result in the compromise of significant legal rights, the court shall abate the suit until the provisions of this act are complied with.

Accordingly, the Court finds that abatement is required in this matter. The Legislature has required that the pre-suit conciliation procedures set forth in Chapter 164 be utilized before any additional taxpayer expense is incurred in this matter. *See* ***City of Miami v. Village of Key Biscayne,*** **197 So. 3d 580 (Fla. 3d DCA 2016)** (mandamus to require intervention not approved when case abated pursuant to Chapter 164, Fla. Stat).

## V. STANDARD FOR INJUNCTIVE RELIEF

Notwithstanding the conclusion that abatement is required in this case, the Court will address the merits of the City's motion for temporary injunction. For the reasons which follow, the Court finds that the City has failed to establish the required criteria for a temporary injunction and the City's motion is denied. The Court will address the standard and each of the requisite elements.

"A temporary injunction is an extraordinary and drastic remedy which should be used sparingly." ***Allied Universal Corp. v. Given*****, 223 So. 3d 1040, 1043 (Fla. 3d DCA 2017).** The

party seeking an injunction bears the burden of proof and must satisfy each requisite element with competent, substantial evidence. ***Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997)*; *Concerned Citizens for Judicial Fairness, Inc. v. Yacucci*, 162 So. 3d 68, 72 (Fla. 4th DCA 2014).** In order to obtain a temporary injunction, the petitioner must establish a four part test: a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest. ***Gainesville Woman Care, LLC v. State*, 210 So. 2d 1243 (Fla. 2017).**

## VI. REQUESTED RELIEF

The City is asking this Court to use its equitable powers to override the decision of the FIPO Board of Trustees to distribute reinstated pension benefits from the FIPO Trust. The City's request implicates strictly monetary relief. Interfering with the Board's decision to pay pension benefits under the prior formula would allow the City to delay relief to retirees, following an undisputed determination by the Florida Supreme Court that the City's actions in 2010 were unconstitutional.[8]

In reliance on the *Headley* decision, PERC has concluded that the appropriate remedy in this case requires the City to "rescind the changes in wages and benefits that were legislatively imposed." Importantly, the City's complaints arise out of the City's own failure to repeal the 2010

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[8] The Board suggests that the City comes into a court of equity with "unclean hands," which is a bar to the equitable remedy of injunctive relief. ***Bradley v. Health Coalition, Inc.*, 687 So. 2d 329 (Fla. 3d DCA 1997)*; *Pilafian v. Cherry*, 355 So. 2d 847 (Fla. 3d DCA 1978).** The Board also suggests that the City's own actions belie any emergency where the City was advised of the Board's intentions in its September 27th letter; the City has known about the Board's decision to restore pension benefits since the November 2, 2017, publically noticed Board meeting; the City took no opportunity to request the Board defer its actions at the December 15th public meeting; but the City waited until the December 22nd to file its emergency petition.

ordinance. Repeal of the unconstitutional 2010 ordinance and reinstatement of the prior formula does not depend on the pending back pay determination before PERC.

## VII. IRREPARABLE HARM

"There is no irreparable harm for the purpose of a temporary injunction where the harm can be adequately compensated for by a monetary award." **City of Miami Springs v. Steffen, 423 So. 2d 930, 931 (Fla. 3d DCA 1982); Stand Up for Animals, Inc. v. Monroe County, 69 So. 3d 1011 (Fla. 3d DCA 2011).** Even where the party seeking an injunction alleges that the opposing party may dissipate assets, a judgment for money damages is adequate and injunctive relief is improper, notwithstanding the possibility that a money judgment will be uncollectible. ***Id.* at 1013.**

The City argues that its monetary harm would be irreparable because FIPO will be unable to reimburse the trust. Nevertheless, even if some (or all) of the 2010 ordinance was later revived, Chairman Cotera testified that retiree overpayments could be recouped pursuant to Section 40-208 of the Plan. According to Chairman Cotera, if the Board is paying a monthly benefit, it can adjust future monthly income as necessary to offset any errors. Chairman Cotera testified that the payments were small in relation the future benefits to be received by the 131 affected retirees. While the City may disagree with the Chairman's interpretation of Section 40-208 of the Plan, this proceeding is not the proper venue to litigate administrative questions that are properly addressed by the FIPO Board.

The Court finds on the basis of the unrebutted testimony of Ms. Orta and Chairman Cotera that Code Section 40-208 would afford FIPO ample opportunity to recoup any payment ultimately determined to have been improvidently made.

The Board and City also disagree over whether FIPO assets are City funds that the City can control. While the City (as well as the FIPO members) contribute to the FIPO Trust, and those

assets are invested by FIPO to pay the balance of the cost of benefits, the money dedicated for pension purposes belongs to FIPO in trust for the exclusive use of its members. *See* ***City of Miami v. Carter*****, 105 So. 2d 5 (Fla. 1958)** (dedicated revenue for pension may not be withheld); ***Gates v. City of Miami*****, 393 So. 2d 586 (Fla. 3d DCA 1981);** ***Gates v. City of Miami*****, 592 So. 2d 749 (Fla. 3d DCA 1992).**

FIPO further argued that there is no irreparable harm when its action is directly in accord with the decision of the Florida Supreme Court in *Headley* and PERC's order on remand. According to the Board its decision is simply the vindication of the most basic principles in the Declaration of Rights of the Florida Constitution.

Instead of harm accruing to the City, FIPO argues that the City's request would result in irreparable harm to FIPO members, particularly where the City's conduct has been found to violate the fundamental rights set forth in the Florida Constitution's Declaration of Rights. Governmental action in violation of the Declaration of Rights is presumed to be irreparable harm to citizens affected by that illegal action. ***Gainesville Woman Care, LLC v. State,*** **210 So. 3d 1242 (Fla. 2017);** ***State v. J.P.,*** **907 So. 2d 1101 (Fla. 2004);** ***N. Florida Women's Health & Counseling Services, Inc. v. State,*** **866 So. 2d 612 (Fla. 2003).**

The City cites to a series of cases (discussed in more detail *infra)* arguing that where the police power is being enforced, irreparable harm is assumed. In none of those cases, however, was the governmental entity attempting to use its claimed police power to defy a decision of the Florida Supreme Court finding the government action at issue unconstitutional. Moreover, the City's petition and motion cite to no police power except a judicially rejected claim that it did not act unlawfully. Even if it had or could articulate some police power in this instance, the police power is not absolute and cannot destroy rights created and protected by the Constitution. ***Traylor v.***

***State,* 596 So. 2d 597 (Fla. 1992), *citing State ex. rel. Davis v. City of Stuart,* 97 Fla. 69, 120 So. 335 (1929); *In re Seven Barrels of Wine,* 79 Fla. 1, 21, 83 So. 627 (1920).** As noted in the cases cited by FIPO above, any claim of police power fails when it violates fundamental rights protected by the Florida Constitution. As between Miami and the FIPO members, that claim of police power versus constitutional rights was resolved in favor of the members in *Headley*.[9]

City Budget Director Chris Rose testified that the City pays its annual employer contribution to FIPO on the first day of the fiscal year, October 1 of each year. Transcript at p. 150. Mr. Rose testified that the City based its contribution for the period of October 1, 2017, through September 30, 2018, on the actuarial valuation adopted by the FIPO Board this past spring. In response to questions from FIPO's counsel, Mr. Rose admitted that the action of the FIPO Board in November would have no financial impact on the City budget until the October 1, 2018, budget year and that the City would not be required to contribute any additional money to FIPO before October 1, 2018, based on the FIPO Board action. Hearing transcript at pages. 141, 150. Mr. Rose did testify that the Board's action may create a City liability to be addressed in the following budget year, but admitted that if FIPO's investment return exceeded expectations, then the liability may never have a budgetary impact on the City, even in the future.[10] *Id.* at p. 143. Mr. Rose also

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[9] The City's suggestion that irreparable harm should be presumed in this case should be soundly rejected. For decades the Florida Supreme has recognized that general rules do not apply when the police power collides with the sanctity of contracts. *See* ***Yamaha Parts Distributors Inc. v. Ehrman,* 316 So. 2d 557, 559 (Fla. 1975)** ("Virtually no degree of contract impairment has been tolerated in this state") (cited ***in Headley at* 215 So. 3d 8**). Moreover, the City's cases are also distinguishable because 1) it is not acting as a disinterested party; 2) the police power is not implicated since this matter relates to the City's contractual obligations; 3) the City deleted its powers to the Board, which serves as a fiduciary pursuant to the City Code; and 4) the Board's exercise of authority is also authorized by ***Chapters 112, 175 and 185, Fla. Stat.***

[10] According to Mr. Rose, the largest source of income to the Plan is investment earnings. Transcript at p. 63. The Board's actuary uses an annual investment return assumption of 7.42%. Transcript at p. 64. For the prior fiscal year, the Board's investment portfolio returned 9.6%, generating well over $100,000,000 in investment earnings. Transcript at p. 63.

admitted that the longer the Board waits to implement the formula change, the more expensive it would be. *Id.* at p. 63.

During the course of the proceedings, the City argued that the Board's action may create a $200 million future liability for the City. According to the testimony, the 2010 ordinance reduced the City contribution by approximately $20 million per year for a period of seven years. Transcript at pages. 149-150. The result of the *Headley* decision and its effect on that ordinance, could result in the City having to make up those contributions in the future. Chairman Cotera testified and the November FIPO minutes makes clear that the payments at issue in this litigation do not involve that long term liability. Chairman Cotera explained that the Board had the option to set an amortization schedule for any such liability over a period of 15 to 25 years, but had not yet made any decision. Transcript at pages. 108-109.

On cross-examination, Mr. Rose was unaware that the Board decision at issue is in this litigation was limited to only a single payment of $3.3 million and a forward looking increase in the retirement payroll of $66,000. Transcript at p. 110. When asked to compare the $66,000 increase to the $12.5 million monthly payments to retirees, Mr. Rose agreed it was not a significant sum, representing "something like" half of one percent of monthly retirement payroll. Transcript at p. 111.

In terms of the effect of the FIPO decision on the City budget, FIPO introduced portions of the current City budget message and its most recent Comprehensive Annual Financial Statement.[11] Those documents show strong economic growth in City revenues and property

[11] The City reports that "Miami's local economy continues to improve showing strong growth in home prices, and tourism. Miami has become a major center and a leader in finance, commerce, culture, media, entertainment, and the arts." City of Miami Comprehensive Annual Financial Report for the FYE 9/30/16 at p. 7.

values[12] sufficient to have enabled it to reduced tax rates on property for the seventh consecutive year.[13] In addition, Mr. Rose testified that the City maintains a $148 million cash reserve, of which at least half is unrestricted. Hearing transcript at p. 144, 148. In terms of the "future outlook," City Management reports that the City and its surrounding area "have continued to experience sustained growth." The City asserts that "a good business climate" has been created for the South Florida economy which is "encouraging growth in construction, trade, financial services, professional and legal services and tourism."[14] In comparison to this successful economic report, the potential effect of the Board action at issue will cause no irreparable harm to City finances.

Lastly, the City cited numerous cases to the Court in its motion on the issue of irreparable harm and the police power. ***Garcia v. Dumenigo* 46 So. 3d 1085, 1087 (Fla. 3d DCA 2010)** correctly notes that a preliminary injunction is an "extraordinary remedy which should be used sparingly." Of particular interest to the Court is **Garcia's** reliance on a line of cases that recognize that a temporary injunction is not to be used to resolve disputed issues. *See, e.g.*, ***City of Miami Beach v. Kuoni Destination Management,* 81 So. 3d 350, 352 (Fla. 3d DCA 2012)** ("The purpose of a temporary injunction is not to resolve disputed issues, but to preserve the status quo pending final hearing on the merits"). The evidence shows that the City has not established a substantial likelihood that the FIPO will cause any harm to the City at all, much less irreparable harm; thus creating substantial disputed issues. The City admittedly has no additional financial obligation to

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12 According to the preliminary taxable values reported by the Miami-Dade County Property Appraiser, the City of Miami's taxable value increased from $44,602,305,542 to $49,621,309,999 from 2016 to 2017, representing an 11.3% increase. http://www.miamidade.gov/pa/library/reports/2016-17-year-to-year-comparison.pdf

13 The City Manager's Budget Message which is contained in the Adopted Budget for FY 2017-2018 proudly declares that residents and business have not benefited from "the seventh year in a row of lowering the overall property tax rate (from 8.6441 mills in FY 2009-10 to 8.0300 mills in FY 2017-18)." City Manager's budget message dated 11/6/2017 at p. 3.

14 City of Miami Comprehensive Annual Financial Report for the FYE 9/30/16 at p. 7.

FIPO during the budget year, which has nine months remaining, and according to the City Budget Director, any liability in the following year may never materialize.[15] Hearing transcript at p. 143.

***Keystone Creations, Inc. v. City of Delray Beach*, 890 So. 2d 1119 (Fla. 4th DCA 2004)** is not helpful to the City's position. The City action in 2010 which altered the pension benefit levels has been set aside by the Supreme Court. In *Keystone*, irreparable harm was presumed because the business violated a consent judgment concerning violation of the City of Delray Beach zoning code. In the present case, the City of Miami is seeking relief in this Court from the effects of a judgement it lost in the Supreme Court. The public interest is not served in perpetuating constitutional violations. The ultimate cost to the City from the *Headley* decision will not be decided in this Court nor is it appropriate in this proceeding for this Court determine how FIPO, an independent government entity, will apply that decision in the execution of its statutory duties.

The remaining authority cited by the City is also distinguishable. ***In Dade County v. Dunn*, 693 So. 2d 1035 (Fla. 3d DCA 1997)** an injunction was issued based on an immediate danger to public safety where a county resident was destroying city roads. No such issue is presented here. The case of ***Cosmic Corp. v. Miami Dade*, 706 So. 2d 347 (Fla. 3d DCA 1998)** actually supports denial of the relief requested by the City. In ***Cosmic*, the court reversed the entry of an injunction finding a potentially devastating fiscal impact on a business. *Cosmic*, 706 So. 2d at 349.** In the present case, denial of the correct pension formula for as much as seven years has much a greater effect on a group of retired public safety officers than the uncertain economic impact on the City.

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[15] To the extent that the actuary calculates a budget impact for the subsequent fiscal year, the City's higher contribution would be reflected in next year's actuarial valuation. Next year's valuation becomes available in the Spring of 2018, with sufficient time to "enable the City" to properly budget, if there is any budgetary impact in 2019. Transcript at p. 142.

Taking all of the above evidence and the controlling jurisprudence as a whole, the Court finds that the City has failed to establish irreparable harm. Moreover, the actions being taken by the Board are limited in nature and are subject to offset under Section 40-208.

## VIII. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The Court finds that the City does not have a substantial likelihood of success on the merits when this case has already been extensively litigated and the Florida Supreme Court has spoken. When questioning Chairman Cotera, the City envisioned several possible outcomes at the pending PERC back-pay case. Transcript at pages. 123-124. The Court is not in a position to determine which of these outcomes is more likely than any other. The fact that a PERC hearing officer and later the PERC Commission itself have rejected all of the City's exceptions casts doubt on the substantial likelihood of the City's efforts.

The FIPO Board is acting to *restore* benefits pursuant to its broad fiduciary duties and independent powers set forth in both in the Pension Plan and the underlying statutory requirements governing public retirement systems. *See e.g.*, §112.656; §175.071; §185.05, Fla. Stats. For the City to prevail on the merits of its motion, this Court would be required to declare the application of the Florida Constitution, as interpreted by the Florida Supreme Court in *Headley*, invalid. That it cannot do. *See* ***Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).** In fact, the Supreme Court in *Headley* quashed the First District decision earlier in the *Headley* litigation which had found in favor of the City. The Supreme Court made it abundantly clear that the First District disregarded the Supreme Court standard for protection of the fundamental bargaining and contract rights of FIPO members. *Headley*, 215 So. 3d at 10. A governmental action which is quashed is a nullity. ***Smith v. Avino*, 572 So. 2d 1 (Fla. 3d DCA 1990).**

The City also argued that it may somehow be able to convince PERC in the back pay proceeding to abandon its order that the parties be restored to the *status quo ante*. The Court's review of the jurisprudence has convinced the Court that use of a make whole remedy is the standard remedy for violation of the constitutional right to bargain. Nothing in the record suggests that PERC or the courts are likely to abandon their own *stare decisis* in this case and retreat from more than a 30 year history of ordering return to the *status quo ante* in cases such as this one. *See, e.g.,* ***Int'l Union of Police Associations v. State, Dep't of Mgmt. Servs.,*** **855 So. 2d 76 (Fla. 1st DCA 2003);** ***see also Escambia Educ. Ass'n v. Escambia County Sch. Bd.,*** **10 FPER 15160 (1984);** ***Nassau Teachers Ass'n v. Sch. Bd. of Nassau County,*** **8 FPER 13206 (1982).** See also, ***Town of Pembroke Park v. State,*** **446 So. 2d 198 (Fla. 3d DCA 1984).**

The City introduced a series of labor agreements into the record between itself and its labor organizations as proof that it should prevail on the merits of its dispute with FIPO. The Court disagrees. FIPO is not a labor organization nor is it bound to an agreement to which it is not a party. The agreements contain within them the exclusive means of their interpretation and application, a binding arbitration between the union and the City as required by ***§ 447.401, Fla. Stat.*** Whether there is some waiver contained within those agreements that binds the unions in the ***Headley*** back-pay proceedings before PERC, the administrative remedy of the grievance arbitration procedure would be an administrative remedy the City must exhaust before seeking judicial relief. See ***City of Miami v. Fraternal Order of Police,*** **378 So. 2d 20 (Fla. 3d DCA 1980);** ***Miami Ass'n of Firefighters v. City of Miami,*** **87 So. 3d 93 (Fla. 3d DCA 2012);** ***Israel v. Castro,*** **162 So. 3d 328 (Fla. 4th DCA 2105)**[16].

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[16] In ***Miami Firefighters***, part of the lengthy process that ended in the Supreme Court decision in ***Headley***, the City urged that judicial review was not available concerning matters in a

The Court's review of those agreements shows that the City and the unions each agreed that nothing arising from the ***Headley*** litigation was a waiver or evidence of a waiver of any legal position in any proceeding. *See, e.g.*, § 18.20 of the 10/1/12 – 9/30/14 CBA between the City and the FOP (providing that "this agreement shall not be construed as a waiver of the Union's right to challenge the calendar year 2010 imposition. The City shall not raise the act of entering into this agreement as a waiver defense in any pending judicial, administrative, or arbitral proceeding concerning the 2010 imposition." *See also* § 46.7 of the 10/1/14 – 9/30/16 CBA between the City and the IAFF (providing that "The parties understand that during calendar year 2010 the City imposed terms and conditions of employment. If any court, PERC, arbitrator rules that those changes or any portions of them have been illegally or improperly imposed or are otherwise not valid, those matters or portions of matters which have been illegally or improperly imposed will revert to what they were at the moment before they were imposed, and will become the terms and conditions of this Agreement. Provided, however, if any party appeals the aforementioned rulings, and they are stayed, the reversion will not occur as to those matters that are stayed while the stay is in effect. The act of entering into this agreement shall not be construed as a waiver of the Union's right to challenge the calendar year 2010 imposition. The City shall not raise the act of entering into this agreement as a waiver in any pending judicial, administrative or arbitral proceeding concerning the 2010 imposition."). Whether that will ultimately involve the PERC back-pay proceedings is a matter within PERC's exclusive jurisdiction. The Court declines to embroil itself in a labor dispute when the relationship between the parties in this litigation is not a labor matter. The labor unions are not parties to this litigation. If, as the City claims they should be, then this

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labor agreement. The City takes the opposite position here. This further supports the Court's view that any issues arising in the labor context must be decided by an arbitrator or by PERC.

Court would lack subject matter jurisdiction by the City not having joined the unions as indispensable parties. ***Two Islands Development Corp v. Clarke,* 157 So. 3d 1081 (Fla. 3d DCA 2015).**

This case is about the relationship between two independent governmental bodies and their relative powers vis-a-vis each other. The City disagrees with FIPO's reading of ***Headley***. The City has argued it lacks that statutory authority. The labor agreements and the City's legal obligations to non-parties to this litigation is not a matter before the Court nor does it offer a basis for the Court to issue an injunction. Resolving the issues presented to this court will not require construction or interpretation of the labor agreements presented by the City. *See* ***Sucart v. Office of the Commissioner,* 129 So. 3d 1112, 1115-1116 (Fla. 3d DCA 2013).**

## IX. ADEQUATE REMEDY AT LAW

The Court finds that the City has an adequate remedy at law. The City's argument that its remedy is inadequate ignores the remedy for incorrect payments incorporated in Section 40-208 of its own City Code. The City argues that it will suffer financial harm when it is eventually required to make its employer contributions to FIPO. The procedure for payment of employer contributions, however, is spelled out in detail in Section 40-196 (b) of the City Code. That provision establishes the methodology for actuarial determinations and even includes an actuarial arbitration process in the event of a dispute between the City and FIPO. Moreover, the Court may take judicial notice of continuing jurisdiction by a different division of this Circuit under retained jurisdiction to enforce the amended final judgment in ***Gates v. City of Miami*, 11th Circuit Court Case No. 77-9491 CA 04**[17].

[17] The retained jurisdiction arises from a negotiated resolution of the funding disputes originating with ***Carter v. City of Miami***, supra and culminating in the two decisions of the Third District in ***Gates v. City of Miami, supra***.

All that the City offers in support of its position is a copy of its rejected exceptions (objections) to a PERC Hearing Officer claiming the make-whole remedy of back wages and the rescinding of the pension changes was not warranted. PERC rejected *all* of those arguments in its October 18 order. The Court takes notice that FIPO pointed out in its response memorandum that, while serving as Chairman of PERC, the City's own outside labor counsel in *Headley*, opined in a unanimous decision in ***Monticello Professional Firefighters v. City of Monticello,* 15 FPER ¶ 20225 (1989)**, that where the actions of a public employer are the consequence of its own illegal decision, a make whole remedy of restoring the parties to the *status quo ante* is appropriate. PERC agreed with that long-standing practice by ordering rescission of the 2010 pension ordinance in *Headley* and FIPO acted in accordance with that jurisprudence.

Thus, the Court finds that the City's claim that it is likely to succeed on the merits has not been established.

## X. PUBLIC INTEREST

For nearly 100 years, Florida courts have recognized the exalted place occupied by the rights preserved in the Florida Declaration of Rights. Article I of the Florida Constitution is an express limitation on the power of government to infringe upon the fundamental rights that Florida's electors have retained for themselves. The City argues here that the public interest is served if this Court ignores the Supreme Court decision in ***Headley*** and authorizes the City to continue violating the fundamental constitutional rights of FIPO members and further adding to the unpaid pension liability its illegal conduct has created.

It is also noteworthy that the City does not participate in Social Security. Exhibit "2" at ¶15. Accordingly, FIPO pension benefits are the sole source of retirement income for City of Miami police and fire retirees, who have been deprived of their constitutionally protected pension

rights since October of 2010. The testimony is undisputed that commencing payment on the reinstated formula in January will save the City interest payable to the FIPO trust. Transcript at p. 63.

Indeed, with respect to the required balancing of harms, the very fact that this petition does not present an emergency is established by the City's own actions. The City has known about the Board's decision to restore pension benefits since the November 2, 2017 publically noticed Board meeting. *See* Exhibit "2" at ¶8. At the November 2 meeting all of the trustees unanimously voted to restore benefits, including the trustees appointed by the City.[18] *See* Exhibit "1" at p. 1. Thus, the public interest is reflected in the independent vote of the Board, following its fiduciary duties as named trustees of the FIPO Trust, consistent with ***Chapters 112, 175, and 185, Fla. Stat.***

For the foregoing reasons, it is hereby **ORDERED**:

1. Pension Defendants' Motion to Abate is **GRANTED**. This case is abated until such time as either party serves notice that the conciliation procedures of Chapter 164 have been exhausted.

2. The City of Miami's Emergency Motion for Temporary Injunctive / Prohibitory Relief is **DENIED.**

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida this 8th day of January 2018.

**Reemberto Diaz**
**Circuit Court Judge**

Copied furnished to all parties

[18] Of the nine trustees on the FIPO Board, one is appointed by the City Manager and another four are "independent" trustees appointed by the City Commission. *See* Section 40-193(a) of the City Code establishing the composition of the FIPO Board of Trustees.