

STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA,

Charging Party,

v.

FLORIDA GULF COAST
UNIVERSITY BOARD OF
TRUSTEES,

Respondent.

Case No. CA-2018-047

HEARING OFFICER'S
RECOMMENDED ORDER

Thomas W. Brooks, Tallahassee, attorney for Charging Party.

Barron F. Dickinson, Michael Mattimore, and Jason E. Vail, Tallahassee, attorneys for Respondent.

LATHROP, Hearing Officer.

On November 8, 2018, United Faculty of Florida (Union) filed an unfair labor practice charge with the Public Employees Relations Commission (Commission) alleging that the Florida Gulf Coast University Board of Trustees (University) violated section 447.501(1)(a) and (1)(c), Florida Statutes (2019).¹ Specifically, the Union alleged that the University committed an unfair labor practice by announcing to bargaining unit advisors that they were no longer in the certified unit and that they would be receiving salary increases without prior notice to or negotiations with the Union; by dealing directly with advisors still included in the certified bargaining unit regarding changes in their wages and other terms and conditions of employment; by treating advisor positions

¹All references to the Florida Statutes are to the 2019 edition. Where facts alleged in the charge occurred in prior years, the statutes in place at the time and the 2019 version are substantively the same.

CA-2018-047

specifically included in the certified unit as excluded from that unit in the absence of a sufficient basis for and a determination by the Commission excluding them; and by conditioning ratification of a tentative collective bargaining agreement (CBA) on the Union's agreement to exclude advisors from the certified unit in the absence of a determination by the Commission excluding them or a proposal in negotiations to do so. The Union requested that it be awarded its attorney's fees and costs.

The Commission's General Counsel reviewed the charge pursuant to section 447.503, Florida Statutes, and issued a notice of sufficiency on November 15. The University filed an answer and requested that it be awarded its attorney's fees and costs.

The Commission appointed the undersigned hearing officer and an evidentiary hearing was held by telephone conference between Tallahassee and Fort Myers on June 3, 2019. The parties were afforded the opportunity to submit evidence, examine and cross-examine witnesses, and fully participate in the hearing. Neither party invoked the rule of sequestration. The Union presented the testimony of four witnesses and entered nineteen exhibits (CP1 - CP19) into the record by stipulation. The University presented the testimony of two witnesses and entered forty-nine exhibits (R1 - R49) into the record by stipulation.² At the Union's request, and with no objection from the University, I took administrative notice of the Commission's case files in case numbers UC-2007-036 and UC-2018-045.

At the close of the hearing, the parties were advised of their right to file written briefs, proposed findings of fact, or proposed orders within fifteen days from the close of

²The University withdrew its proposed Exhibit 50 at hearing.

CA-2018-047

the hearing. Following extensions of time for filing,³ the parties timely filed post-hearing documents that I have duly considered in preparing this recommended order. A transcript of the hearing was filed with the Commission.

FINDINGS OF FACT⁴

Based upon the admissions, the stipulations,⁵ the testimony, the exhibits, and the entire record, I make the following findings of fact:

1. The Union is an employee organization within the meaning of section 447.203(11), Florida Statutes. The University is a public employer within the meaning of section 447.203(2), Florida Statutes. (Stipulation; T12)

2. The Union represents a faculty bargaining unit of University employees pursuant to Certification 1394, which was initially defined in 2003. See *United Faculty of Florida v. Florida Gulf Coast University, Board of Trustees*, 29 FPER ¶ 120 (2003).

3. The unit is currently defined by the Commission as follows:

INCLUDED: All employees in the following position classifications holding regular, visiting, provisional, research, affiliate, or joint appointments:

9001 – Professor
9002 – Associate Professor
9003 – Assistant Professor

³Similar extensions were granted to me to issue my recommended order.

⁴References to the record are made to facilitate review by the Commission, but are not necessarily the only record support for any finding of fact. The transcript of the evidentiary hearing will be designated "T" with the appropriate page number(s). The Union's exhibits will be designated "CP" followed by the relevant exhibit number(s). The University's exhibits will be designated "R" followed by the relevant exhibit number(s).

⁵Admissions and stipulations have been edited for stylistic preference and continuity without affecting their meaning.

CA-2018-047

9014 – Instructor I
9024 – Instructor II
9034 – Instructor III
9005 – Lecturer
9009 – Eminent Scholar
9053 – University Librarian
9054 – Associate University Librarian
9055 – Assistant University Librarian
9115 – Coordinator
9120 – Associate in _____
9121 – Assistant in _____
9126 – Program Director
9166 – Research Associate
9173 – Academic Advisor I
9174 – Academic Advisor II
9175 – Academic Advisor III

and employees in the above classifications with the following administrative titles: Coordinator (N1), Program Director (G1) and Academic Advisor (B1).

EXCLUDED: All other employees of the Florida Gulf Coast University, including but not limited to all employees serving as trustees of Florida Gulf Coast University and all employees who are on administrative contracts or are managerial or confidential employees.

Florida Gulf Coast University Board of Trustees v. United Faculty of Florida, 33 FPER ¶ 296 (2007).

Pertinent Collective Bargaining Agreement Provisions

4. The Union and the University were parties to a CBA that expired on August 7, 2018, that specifically included the positions of academic advisor I, II, and III in Appendix A, which listed positions covered by the CBA. (Admission; CP19; R1)

CA-2018-047

5. Article 1.1 provides in pertinent part: "Attached as Appendix 'A,' for informational purposes only and not made a part of the Agreement, is the listing of titles included in the General Faculty bargaining unit." (CP19 at 2)

6. Article 8.6 provides:

8.6 Reclassification of an Employee to a Non-Unit Classification. Employees shall be provided written notice thirty (30) days in advance, where practicable, with a copy to UFF-FGCU, when the University proposes to reclassify the employee to a classification which is not contained in the bargaining unit. The employee may request a review of such action consistent with the provisions of Article 27.6 and UFF-FGCU may discuss such action pursuant to Article 2, Consultation.

(CP19 at 17)

7. Article 27.6 provides:

27.6 Class Titles.

- A. Whenever the University creates a new faculty classification, it shall designate such classification as being either within or outside the bargaining unit and shall notify the UFF-FGCU. Further, if the University revises the specifications of an existing class so that its bargaining unit designation is changed, it shall notify the UFF-FGCU of such new designation twenty (20) days prior to the effective date of said change. Within ten (10) days following such notification, the UFF-FGCU may request a meeting with the University for the purpose of discussing the designation. If, following such discussion, the UFF-FGCU disagrees with the designation, it may request the Florida Public Employees Relations Commission to resolve the dispute through unit clarification proceedings.
- B. An employee may request a review of the appropriateness of the employee's classification by the appropriate University office. In case of disagreement with the results of the

CA-2018-047

review, the matter shall be discussed in accordance with Article 2, Consultation, but shall not be subject to Article 20, Grievance Procedure and Arbitration.

(CP19 at 92-93)

8. Articles 1.1, 8.6, and 27.6 are identical in the 2015-2018 and 2018-2021 CBAs between the University and the Union. (T126-27, 213-14; CP19; R1, 2)

Prior Advising Structure

9. When the bargaining unit was initially defined in 2003, it included the classification of counselor/advisor. See *United Faculty of Florida*, 29 FPER ¶ 120. At that time, there was only the one academic advisor classification in the unit. (T16, 23)

10. Subsequently, the three levels were created – academic advisor I, II, and III – so that there would be a promotional career ladder. (T16-17, 23-25)

11. In 2007, the University filed a unit clarification petition to, among other things, add to the unit the newly created classifications of academic advisor I, academic advisor II, and academic advisor III and to remove the abolished classification of counselor/advisor. The Commission granted the petition and clarified Certification 1394 to define the bargaining unit to include the academic advisor I, II, and III classifications. *Florida Gulf Coast University Board of Trustees*, 33 FPER ¶ 296.

12. The academic advising services at the University were spread across two different divisions and were delivered by two different types of employees: administrative and professional (A&P) employees and faculty. (T49, 165, 184, 204-06)

13. The first-year academic advisors were in the division of student affairs and were classified as A&P employees who were not in the bargaining unit. (T43-44)

CA-2018-047

14. In the division of academic affairs, each of the five colleges at the University had its own set of academic advisors who were classified as faculty, were in the bargaining unit, and reported to an associate or assistant dean in that college. (T17-19, 58, 165-66) These advisors were classified as academic advisor I, II, or III. Other than differences in responsibility for professional development and presentations, the job duties and responsibilities of the different levels were essentially the same. (T25; R48)

15. The advisors in the colleges were responsible to meeting with students on a one-to-one basis, discussing with the students their success for education, and making a plan for the students to graduate within a four-year period. (T20) The advisors in the colleges advised to different curriculums and the work load differed from college to college, but the basic job duties and functions were the same and the advisors followed the same procedures when advising students. (T18-20, 22, 33, 46, 58-59)

Student Success Initiative and Reorganization of the Advisors

16. For the 2017-2018 academic year, the University did not perform well on the metrics set forth by the Florida Board of Governors in its performance-based funding model, which included the University's four-year graduation rate. As a result, the University took an \$8 million budget cut. (T173-74; R7)

17. After Dr. Michael V. Martin became President of the University, he formed the Student Success and Enrollment Management Task Force in October 2017, which was focused on improving student success and was chaired by Dr. Mitchell L. Cordova. (T159-60; R19) Among the ideas discussed by the task force was the need to reevaluate and revise how advising was conducted at the University. (T161)

CA-2018-047

18. The task force issued a preliminary version of its report and then held three public forums on January 25, January 26, and February 14, 2018. On January 26, the task force did a presentation on its recommendations, including organizing a new advising structure. (T175-76)

19. The task force's final report was issued on February 9. (T160; R18) One of the task force's recommendations was to restructure advising to better serve students, including "[r]eclassify[ing] the position of academic advisor to ensure equity" and ensuring that advisors are fairly and equitably compensated. (T161; R18 at 7-8)

20. On February 7, Martin announced that Cordova would be the new vice president for student success and enrollment management. (T158, 162, 176-77, 200) To execute the task force's recommendations, Cordova launched a series of design teams, including an academic advising design team that included both in-unit and out-of-unit advisors. (T28-29, 44, 61, 162-63; R20) Cordova led the teams and guided them through a specific agenda from March until July 2018. (T163)

21. The advising design team assisted Cordova with developing a University-wide advising structure to support best practices in advising, including creating job descriptions and a new compensation structure. (T28-29, 44, 49, 61, 165, 177)

22. Dr. Edwin M. Everham III and Morgan Paine were co-presidents of the local Union chapter. (T83, 95) Beginning in the fall of 2017, the Union and the University were in the midst of collective bargaining negotiations. (T90) The Union also had regular meetings with Provost Jim Llorens, which were not required by the CBA. (T87)

CA-2018-047

23. During the spring of 2018, Everham had several meetings with the University administration in which he raised the issue that he was hearing indirectly that the reorganization of advising could result in moving advisors out of the unit. (T87)

24. By May 3, the Union had heard "rumors" that the University was planning on moving the in-unit advisors out of the bargaining unit. (T93, 120-21; R21) On May 3, Everham sent an email to Paine and others, copying Dr. Tony Barringer, the University's chief negotiator. (T83, 95, 208-09; R21) Everham stated that the Union had been hearing "rumors" that the University administration was wanting to reclassify the advisors so that they were out of the unit, that "[o]ur review indicates not 'illegal', Article 8.6, p.17," and that he had not yet reached out to the State-level Union. (T221-22; R21)

25. Shortly thereafter, Everham had a meeting with Llorens, in which Everham was informed that it looked like the University was moving forward with moving the advisors out of the unit. (T87, 93)

26. Everham had encountered reclassification of faculty lines in the past, but not a similar situation in which the University reclassified positions to take them out of the bargaining unit. (T86-88, 131)

27. After the meeting with Llorens, Everham sent an the following email to Martin on May 7, copying Llorens, Cordova, and Paine:

Mike:

We are anticipating an official notification of a plan to change the contractual status of faculty advisors from In-Unit to Out-of-Unit. As we have discussed, Article 8.6 appears to give administration that power, given adequate notice and the opportunity for the UFF to consult. We encourage you to communicate the known details

CA-2018-047

of this plan as soon as possible to the affected faculty; we hope that a conversation with them about these details will facilitate the process.

In performing our due diligence in preparing for the consultation, we were informed by the State UFF office that any such change resulting in moving a group of faculty out of the bargaining unit is subject to a hearing and review by the Public Employees Relations Commission (PERC). We were just informed of this requirement and are passing the information on to you.

The co-presidents of UFF are both traveling after Thursday, May 10th for a couple of weeks, so it may be good to have the consultation sooner rather than later. Please let us know.

Win Everham and Morgan Paine
FGCU UFF Co-Presidents 2017-2018

(T 87; CP1; R22)

28. Thereafter, the Union maintained the position that the Commission needed to approve the reclassification of the academic advisors before the advisors were officially moved out of the unit. (T220, 223-24)

29. In the next bargaining meeting, on May 10, the Union requested clarification and details regarding the University's preliminary plans to move the advisors out of the unit. The Union also requested to bargain regarding the issue. The University did not respond other than to listen to the Union. There was no agreement at the meeting that the issue would be brought to the bargaining table. (T91; R23)

30. On May 16, Martin sent a memo to Everham and Paine, notifying them of the University's plan to remove the advisors from the unit. The memo stated:

The details of the advising reclassification plan are as follow[sic]. Currently, there are 47 total advisors at FGCU, all providing advising services to students. Of these advisors, 38 are classified

CA-2018-047

as faculty (35 in-unit faculty and 3 out-of-unit faculty, Program Directors). The other nine (9) advisors are classified as Administrative & Professional (A&P) staff. The plan is to reclassify all 47 advisors as A&P staff under a position number and job description different from those identified in the [CBA], thus removing them from the bargaining unit. In preparation for the reorganization, job descriptions and position numbers have been created consistent with the new plan.

The memo further stated, "Each advisor will have his/her base salary adjusted upward as a result of the new position classification." The memo also stated that each advisor "will be notified of his/her change in classification, as well as a new salary amount as soon as the compensation analysis has been completed" and that "[t]hese changes will be made effective July 2, 2018." (T91-92, 122, 202-03, 211-12; CP4; R24)

31. On that same day, Cordova sent a substantially similar email to the advisors, notifying them of its plan to reclassify all advisors as A&P staff, thus removing the in-unit advisors from the unit, as well as details of the plan, such as the upward salary adjustments. The email stated, "Once the HR process is complete, each of you will be individually notified of your new position classification and new salary. These changes will be made effective July 2, 2018." (T27-28, 34-35, 92, 189, 201; CP3; R25)

32. Prior to the May 16 announcement, the University did not propose the plan in negotiations with the Union or bring the issue to the bargaining table for discussion. (T91-94, 100, 136)

33. The possibility of moving the advisors out of the unit had been discussed during task force and design team conversations, but the decision was ultimately made by Cordova. (T183) Cordova took into account what he believed was best for the

CA-2018-047

University and the best practices in advising, felt that the University was authorized under the CBA to move the advisors out of the unit, and believed that doing so would give the administration greater autonomy in how to run the university-wide advising services, including with respect to giving pay raises. (T185-86, 189, 195-97, 203-04, 206-07)

34. Everham and Paine had a consultation with Martin, Llorens, and others on June 4. (T94-96, 123-25, 212; R26) At the meeting, the Union made it clear that it was not in favor of moving the advisors out of the unit and that there was a need for a Commission review. (T95-96) From Everham's perspective, the meeting did not go well. (T96-97) The University took the position that it was within its rights under the CBA and that once the advisors saw the new job descriptions and compensation packages, the advisors would be comfortable with the move. (T96-98)

35. During the first two or three weeks of June, the advisors' supervisors met with the advisors individually to inform them of what classification they were going to be put in and what raise they would receive. (T37-38; CP6; R31)

36. On June 15, Martin sent an email to Everham, which stated that "[i]t seems best to put the reclassification/compensation plans on hold until in or out of the unit is resolved. If the advisors are in then all of this falls under negotiations and thus should be taken up at that table when the time comes. So we will await the next outcomes[.]" (T98-99, 124-25; CP5)

37. In late June, the Union again brought up the issue of reclassification of the advisors during a collective bargaining session. (T99; R30)

CA-2018-047

38. On July 23, Cordova sent an email to the advisors, stating that it was an update to the prior email to them⁶ as well as the individual meetings they had with their supervisors during the first two or three weeks in June. The email stated:

Since that time, it was decided that a broader conversation with the UFF-FGCU Chapter should take place regarding moving faculty advisors out of the unit. Due to this decision, no further announcements were made until such conversations occurred. These conversations occurred in mid-June, as a result, a forum has been planned to provide advisors an opportunity to ask questions regarding the reclassification plan.

The email stated that the forum was planned for July 26. The email also included frequently asked questions and the University's answers. (T37-38, 44-45; CP6; R31)

39. The forum took place on July 26, during which Cordova answered questions from the advisors about how they were reclassified. (T38-39)

40. The University designated the academic advisors as being out of the unit on August 1. (T111, 145-46, 170) On that date, Martin sent an email to faculty stating:

There has been considerable conversation about the roles, classification and alignment of academic advisors. However, the time has come to move beyond these conversations and put into place this important element of the Initiative. Thus, effective today, all in-unit and out-of-unit faculty advisors will be classified as A&P professional staff Academic Advisors. Along with the reclassification, all advisors affected by this change also will have a new compensation structure made retroactive to July 1, 2018.

(T111, 125; CP7; R32)

41. There was no notification to the Union prior to the August 1 email that the plan to remove the advisors out of the unit was no longer on hold. (T100) After the

⁶Although the July 23 email references the prior email as being sent on March 16 instead of May 16, it is clear from the record and context that this is a scrivener's error.

CA-2018-047

August 1 email, the executive committee of the local Union chapter decided it would authorize the State-level Union to represent it at a Commission hearing. (T125)

42. On August 3, the University and the Union had a collective bargaining meeting. (T149-50) The meeting minutes state in pertinent part:

Management provided information regarding advisors forum. Management confirmed with UFF that the decision has been made to move the Advisors out of unit and that the associated efforts to that end would continue.

* * *

UFF Statement: "Regarding advising, President Martin has announced the decision. Clearly, UFF executive team disagrees, and according to Article 27 we have executed our right to counsel and PERC review. We don't believe it is necessary to pursue the topic at the table. We're ready to move to Article 23."

(T149-50, 152-56; R33) The Union's statement was a recognition that the University was not going to bargain about the issue, that the matter would be resolved by the Commission, and that further attempts to bargain would be futile. (T153-56)

43. The University did not make any proposals during the collective bargaining meetings regarding removing the academic advisors from the bargaining unit. No aspects of the terms and conditions for the academic advisors were brought to the table by the University or negotiated. (T85, 135-36) The University consistently took the position that it had the right to remove the advisors from the unit. (T223)

44. The University finalized the revised job descriptions in August 2018. (T177-78, 219-20; CP9) Many of the advisors were reclassified from academic advisor II to academic advisor III. (T25, 64, 181; CP8) If any academic advisors disagreed with the classification assigned to them, they could appeal it. (T53, 68, 178-79; CP11)

CA-2018-047

Approximately eleven advisors appealed, and a significant number of the appeals were resolved in favor of the advisor. (T178-79)

45. The University gave the academic advisors substantial pay raises. (T53-54, 75-76, 178-81) The pay raises were reflected in the academic advisors' pay checks after the University designated them as being out of the unit. (T54, 214)

46. The University ceased dues deductions for the academic advisors. The dues authorization form provided that dues deductions would be revoked by the employee's transfer or promotion out of the bargaining unit. (Admission; R1 at App'x B; R2 at App'x B; R49)

Advising Structure and Job Duties After the Reorganization

47. As a result of the reorganization, all of the academic advisors are now classified as A&P positions, which are governed by the University's regulations pertaining to A&P employees rather than the CBA, and are organized under the newly created division of student success and enrollment management. (T40, 43-44, 50, 64, 70; R40)

48. As part of the reorganization, new supervisory levels were created over the advisors. (T169-70, 198) The academic advisors at each of the five colleges report to a director of advising at that college who is an advisor rather than an associate or assistant dean. (T36, 47, 70, 169-70, 206)⁷ There are also directors of advising over first-year and exploratory studies as well as athletics advising. (T165, 169)

⁷At the time of the hearing, the hiring process for some of the directors of advising was still being conducted, with the academic advisors in some colleges still reporting to the assistant deans of those colleges. (T36, 69-70, 172) There is no indication that the job duties and responsibilities of the advisors in those colleges will change after directors of advising are hired. (T36-37)

CA-2018-047

49. The directors of advising report to an assistant vice president for university advising services. (T47-48, 70, 169, 198) That individual reports to the associate vice president for academic engagement, who in turn reports to Cordova. (T169-70)

50. The actual job duties of the academic advisors that were previously in the unit have not changed following the reclassification and reorganization. (T26, 29-31, 34, 60, 62, 72, 193; R40, 48)⁸

51. The job duties, responsibilities, and requirements of the revised academic advisor I, II, and III classifications are substantially similar to those of the in-unit academic advisor I, II, and III classifications. (T26, 29-31, 34, 60, 62, 72, 193; R40, 48)

52. There is no indication that the duties or responsibilities of the revised academic advisor I, II, or III classifications are different from the in-unit academic advisor classifications such that they no longer have a community of interest with the classifications in the bargaining unit. (T26, 29-31, 34, 60, 62, 72; R40, 48)

53. There is no indication that the revised academic advisor I, II, or III classifications have a supervisory conflict with any of the classifications in the bargaining unit or were given managerial or confidential duties that would justify excluding them from the bargaining unit. (T40; R40)

⁸I credit the testimony of Mary Swanson and Olivia Hung-Simons based on their demeanor and first-hand knowledge. They were academic advisors that have been at the University since before 2007 and were previously in the bargaining unit before the reorganization. (T16, 25-26, 57-60) At the time of the hearing in June 2019, it had been almost a year since the effective date of the reclassification in August 2018. (T26, 34)

CA-2018-047

Ratification of the 2018-2021 CBA

54. In August 2018, the University and the Union reached a tentative agreement in collective bargaining, which included raises and promotions. (T108-09, 137, 146) The Union did not propose any changes to Article 8 or 27. (T126-27, 213-14)

55. On August 23, Everham sent an email to Llorens and Cordova stating that "apparently our federal mediator around the bargaining table indicated at a recent meeting (I was not present), that the *Advisors must still be included as In-Unit until PERC makes a ruling.*" Everham stated that the advisors must be sent ratification ballots and that the Union had tried to raise the issue of a required review by the Commission "[e]arly on." (T100-04; CP10)

56. Within the next week, the Union went forward with the ratification vote. (T109-10) Because the Union's position was that the advisors were in the unit until the Commission ruled on the matter, it included them in the ratification vote. (T111, 139) The version sent to the bargaining unit members listed the advisors in Appendix A. (T137-38, 140-41)

57. On August 31, Barringer called Michael in for a meeting, during which Barringer brought up the issue of whether the University's Board of Trustees was going to be asked to ratify a version of the CBA with the advisors in Appendix A. (T110, 137-38; 140-41; R34)

58. On September 7, the Union completed the collection of the ballots and conducted a count, which was overwhelmingly in favor of ratification. (T110, 145)

CA-2018-047

59. On September 9, Everham and Paine met with Martin and Llorens to discuss the issue of possible ratification of different CBAs. Martin stated that he would have to pull the ratification from the Board of Trustees meeting agenda if the issue could not be resolved. He also suggested that if the ratification vote had to be delayed until the next meeting, which was not until January 2019, the pay raises agreed to in the tentative CBA may not be retroactive as agreed. He claimed that advisors were already out of the unit and their removal from the agreement was essentially a housekeeping item.

(Admission; T110-12)

60. On September 10, the Union decided that the best thing for its bargaining unit members would be to allow the CBA to go to the Board of Trustees without the academic advisors listed in Appendix A. (T112-13) The Union proceeded under the understanding that the advisors were in the unit until the Commission ruled otherwise.

(T113, 139-40, 146-47)

61. That evening, Everham and Michael met with Barringer and Llorens to authorize the modified CBA to go forward to the Board of Trustees but did not state that the Union was in favor of changing the status of the advisors. (T113-15)

62. The Board of Trustees ratified the revised tentative CBA on September 11. (Admission; R37) During that meeting, Everham gave a standing report on behalf of the Union; he did not address the issue of the reclassification of advisors. (T128-30; R37)

63. The CBA ratified by the Board contained an Appendix A that did not list the advisors. (T127-28, 137-38; R2) The versions ratified by the Board of Trustees and the Union were otherwise identical. (T137-38, 140)

CA-2018-047

Subsequent Commission Proceedings

64. On November 8, the Union filed a unit clarification petition seeking to affirm that the classifications of academic advisor I, II, and III remained in the bargaining unit. See Unit Clarification Petition, PERC Case No. UC-2018-045 (filed Nov. 8, 2018). In the accompanying statement of facts, the Union stated that it was filing the petition in compliance with CBA Article 27.6(A) because it disagreed with the University's designation of these positions as out of the unit. *Id.* The Union asserted that there had been no material change in the qualifications, duties, or responsibilities of these positions that requires or supports the exclusion of these positions from the certified unit. *Id.*

65. On December 21, the hearing officer issued an order recommending that the petition be dismissed because it was essentially seeking affirmation of the Commission's unit definition based on the Union's belief that the University was attempting to unilaterally remove classifications already included in the unit. See *United Faculty of Florida v. Florida Gulf Coast University Board of Trustees*, 45 FPER ¶ 243 (2019). The hearing officer determined that a unit clarification petition was not the proper vehicle to decide this issue. *Id.* The Commission accepted the hearing officer's recommended order, dismissed the unit clarification petition, and closed the case. *Id.*

ISSUES

1. Whether the charge was untimely filed.
2. Whether the University violated section 447.501(1)(a) and (1)(c), Florida Statutes.
3. Whether either party is entitled to an award of attorney's fees and costs.

CA-2018-047

ANALYSIS

Timeliness of the Charge

I begin by addressing whether the charge was timely filed. Section 447.503(6)(b), Florida Statutes, provides that an unfair labor practice charge is untimely if it is based on events which occurred more than six months prior to the filing of the charge, unless the filing was delayed by service in the armed forces. The six-month period is initiated when a charging party "knew or should have known" of the alleged unfair labor practice. See *Local 1464, Amalgamated Transit Union, AFL-CIO-CLC v. City of Tampa*, 17 FPER ¶ 22012 (1990). Here, the charge was filed on November 8, 2018, and, thus, the charge is untimely if based on events occurring prior to May 8.

The University argues that the six month period began prior to May 8 because the Union had actual knowledge of the University's intent to reclassify the academic advisors as early as January 2018. However, the record reflects that the matter was being discussed in the task force and then in the advising design team as part of preliminary and brainstorming discussions of how best to implement and restructure advising. By May 3, the Union had heard "rumors" that the University wanted to remove the advisors from the unit and on May 7, the Union reached out to the University to state that it was "anticipating an official notification." It was not until May 16 that the Union received unequivocal notice of the University's decision. The unfair labor practice charge was filed within six months of that date.

CA-2018-047

Moreover, the specific allegations in the charge are based on events that took place after May 8. The announcement to bargaining unit advisors that they would no longer be in the bargaining unit and would be receiving salary increases took place on May 16 and August 1. The allegation of direct dealing is based on events that took place on May 16 and thereafter. The University's treatment of the bargaining unit positions as excluded arguably did not begin until August 1, and certainly not before May 16. Finally, the actions that form the basis of the ratification allegation occurred in August and September. For the foregoing reasons, I conclude that the charge is timely.

Reclassification of the Advisors

Turning to the merits of the charge, I begin with the Union's allegation that the University violated section 447.501(1)(a) and (1)(c), Florida Statutes, by treating the academic advisor I, II, and III classifications as being out of the bargaining unit without a sufficient basis and a determination by the Commission excluding them. The resolution of this issue in this case depends on whether an employer may designate bargaining unit classifications as being out of the unit without materially changing the duties and responsibilities of the classifications. Here, the Commission previously defined Certification 1394 to include the academic advisor I, II, and III classifications, determining that they were appropriate for inclusion in the unit. *Florida Gulf Coast University Board of Trustees*, 33 FPER ¶ 296. The University has revised these classifications to designate them as A&P positions rather than faculty, thereby removing them bargaining unit, without materially changing their job duties or responsibilities.

CA-2018-047

Resolving this issue requires an examination of both the Commission's jurisdiction to determine or approve bargaining units and an employer's management rights to have control and discretion over its organization and operations. The Florida Legislature has given the Commission jurisdiction to "determine or approve units appropriate for purposes of collective bargaining." § 447.207(6), Fla. Stat.; see also § 447.307(3)(a)1., Fla. Stat. The Commission has the sole responsibility pursuant to section 447.207(6), Florida Statutes, to determine the appropriateness of a unit for purposes of collective bargaining. See *Florida Corrections Association, Inc. v. Florida Department of Management Services*, 22 FPER ¶ 27217 (1996); see also *Hialeah International Association of Fire Fighters, Local No. 1102 v. City of Hialeah*, 9 FPER ¶ 14364 (1983) (holding that unilaterally removing a position from the unit that the Commission had previously expressly placed in the unit constituted an unfair labor practice).

The Commission's statutory responsibility cannot be delegated or waived even by agreement of the parties. In *Florida Corrections Association*, the employer and the certified bargaining agent added supervisors to the unit without filing a petition with the Commission. 22 FPER ¶ 27217. The Commission explained that the legislature delegated this authority solely to the Commission and the Commission has no authority to delegate that authority and the employer has no right to assume it. *Id.* The Commission concluded that to permit the employer and the certified bargaining agent to add the positions in the unit in the middle of a clash between two unions would "abrogate the role of the Commission as the guardian of a level playing field in these hotly contested labor issues." *Id.*

CA-2018-047

The Commission has also long held that the abolishment and creation of job classifications are within the scope of management rights enumerated within section 447.209, Florida Statutes, and are not a required subject of bargaining. See *National Association of Municipal Employees v. City of Casselberry*, 10 FPER ¶ 15205 (1984). However, the Commission has made it clear that “mere re-titling of bargaining unit positions to remove them from the unit is not a good faith change in an employer’s organization and operations that falls within the management discretion afforded by section 447.209, Florida Statutes.” *Marion Education Association v. School District of Marion County, Florida*, 40 FPER ¶ 177 (2013); cf. *City of Jacksonville v. Jacksonville Supervisor’s Association, Inc.*, 791 So. 2d 508 (Fla. 1st DCA 2001) (addressing the obligation to bargain over the impact of transferring bargaining unit work outside of the bargaining unit by deleting positions within the bargaining unit and creating positions outside of the bargaining unit, where the creation of the positions outside of the bargaining unit were not a mere retitling of the positions that were abolished).⁹

Here, the credited testimony reflects that the duties and responsibilities of the academic advisors I, II, and III did not materially change when the University revised the classifications. Importantly, the classifications were not changed such that they were no

⁹The Commission’s case law is consistent with National Labor Relations Board (NLRB) cases, which have held that an employer may not unilaterally alter the scope of a bargaining unit and may not transfer employees out of the unit and then fail to recognize the union as the collective bargaining agent for those employees where the transferred employees performed essentially the same work as before. See *United Food and Commercial Workers International Union, Local 1625, AFL-CIO v. Beverley Enterprises, Inc.*, 341 NLRB No. 38 (2004); see also *NLRB v. Bay Shipbuilding Corporation*, 721 F.2d 187 (7th Cir. 1983).

CA-2018-047

longer appropriate for inclusion in the unit. There is no evidence that the revised classifications no longer have a community of interest with the other bargaining unit members, that they have a supervisory conflict with any of the bargaining unit members, or that they were otherwise given managerial or confidential responsibilities that would justify their exclusion. To the extent that the University argues that reclassifying the positions to A&P rather than faculty in and of itself means that the advisors no longer have a community of interest with the in-unit classifications,¹⁰ I reject that argument where the very reason for the A&P designation was to remove them from the unit.

This case stands in contrast to cases where classifications were created outside of the unit and given additional duties such that they were not a mere retitling of the in-unit classifications. See *Jacksonville Supervisors Association, Inc. v. City of Jacksonville*, 26 FPER ¶ 31140 (2000), *rev'd in part*, 791 So. 2d 508; *Ormond Beach Fire Fighters Association, Local 3499 v. City of Ormond Beach*, 27 FPER ¶ 32007 (2000) (addressing situation where City created a new classification outside of the bargaining unit whose duties encompassed both those previously performed by unit employees and additional duties that were managerial in nature); *cf. International Association of Fire Fighters, Local 2577, AFL-CIO-CLC v. Lehigh Acres Board of Fire Commissioners*, 10 FPER ¶ 15166 (1984) (holding that an employer need not bargain over a newly created position if the classification lacks a community of interest with the bargaining

¹⁰See, e.g., *United Faculty of Florida v. Florida State University, Board of Trustees*, 29 FPER ¶ 158 (2003) (discussing in a representation-certification case that the A&P employees were under a different pay plan and personnel administration as part of the rationale for finding that certain employees should be excluded from the unit).

CA-2018-047

unit). Instead, this case is similar to *Marion Education Association*, where the Commission held that it was an unfair labor practice for the school district to create non-unit substitute positions that were a mere retitling of vacant instructional positions and positions of teachers on approved leaves of absence. 40 FPER ¶ 177.

The University contends that it was permitted to revise the classifications to designate them as non-unit positions by virtue of Articles 8.6 and 27.6 of the CBA.¹¹

Those provisions provide as follows:

8.6 **Reclassification of an Employee to a Non-Unit Classification.** Employees shall be provided written notice thirty (30) days in advance, where practicable, with a copy to UFF-FGCU, when the University proposes to reclassify the employee to a classification which is not contained in the bargaining unit. The employee may request a review of such action consistent with the provisions of Article 27.6 and UFF-FGCU may discuss such action pursuant to Article 2, Consultation.

* * *

27.6 **Class Titles.**

- A. Whenever the University creates a new faculty classification, it shall designate such classification as being either within or outside the bargaining unit and shall notify the UFF-FGCU. Further, if the University revises the specifications of an existing class so that its bargaining unit designation is changed, it shall notify the UFF-FGCU of such new designation twenty (20) days prior to the effective date of

¹¹To the extent that the University is asserting collateral estoppel based on *Florida State University, Board of Trustees*, 29 FPER ¶ 158, a 2003 representation certification case in which the parties to that case filed a consent election agreement, such an argument should be rejected. The CBA in effect during that prior case involved nearly identical CBA language. (R47 at 15, 72) However, collateral estoppel does not apply because that case did not involve the same parties and the issue of the meaning of these provisions was not actually litigated in that proceeding. See *Holt v. Brown's Repair Service, Inc.*, 780 So. 2d 180, 182 (Fla. 2d DCA 2001).

CA-2018-047

said change. Within ten (10) days following such notification, the UFF-FGCU may request a meeting with the University for the purpose of discussing the designation. If, following such discussion, the UFF-FGCU disagrees with the designation, it may request the Florida Public Employees Relations Commission to resolve the dispute through unit clarification proceedings.

- B. An employee may request a review of the appropriateness of the employee's classification by the appropriate University office. In case of disagreement with the results of the review, the matter shall be discussed in accordance with Article 2, Consultation, but shall not be subject to Article 20, Grievance Procedure and Arbitration.

The University asserts that the language of these provisions plainly and unambiguously permit the University to create or revise a classification and assign it a designation of being within or without the bargaining unit.

I begin with Article 8.6, which by its terms refers to reclassifying an *employee* to a classification not in the bargaining unit. This does not apply to the crux of the situation here, where the University changed the *classifications* so as to remove them from the unit. Moreover, I note that Article 8.6 is consistent with an employer's management right to promote an employee to a supervisory position outside the bargaining unit. See *City of Orlando v. Orlando Professional Firefighters Local 1363*, 442 So. 2d 238 (Fla. 5th DCA 1983), *rev'g* 9 FPER ¶ 14076 (1983); *City of Orlando v. PERC*, 435 So. 2d 275 (Fla. 5th DCA 1983), *rev'g* 8 FPER ¶ 13045 (1981).

I next turn to Article 27.6.A. That article provides that when the University creates a new faculty classification, it shall designate the classification as being either within or

CA-2018-047

outside the bargaining unit. This is consistent with *City of Ormond Beach*, 27 FPER ¶ 32007, and *Lehigh Acres Board of Fire Commissioners*, 10 FPER ¶ 15166. Here, however, the University did not create a new classification, but rather effectively retitled – or revised – an existing classification.

Article 27.6.A. also addresses the situation where the University “revises the specifications of an existing class.” The CBA does not define or shed light on what is meant by “the specifications” of an existing classification. I conclude that the language of the CBA does not unambiguously provide the University with the authority to revise a classification by essentially changing only its bargaining unit designation. Rather, Article 27.6.A. provides that University may “*revise[] the specifications of an existing class so that its bargaining unit designation is changed.*” (Emphasis added.)

The reasonable interpretation of this language is that the University may revise the specifications – e.g., the classification's job duties and responsibilities – of an existing classification so that it is no longer appropriate for inclusion in the bargaining unit. If the Union disagrees and believes that the classification is still appropriate for inclusion, it “may”¹² file a unit clarification petition with the Commission pursuant to Article 27.6.A.¹³ This interpretation is reasonable and consistent with the law.

¹²Notably, the Union is not required to do so. See *The Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) (“The word ‘may’ when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word ‘shall.’”).

¹³Such a situation would likely involve classifications that were substantially altered after certification and thus be a proper invocation of the unit clarification procedure. See *Village of Key Biscayne v. International Union of Police Associations, AFL-CIO*, 41 FPER ¶ 290 (2015).

CA-2018-047

To read Article 27.6.A. in the manner that the University suggests would give the University the authority to redefine the bargaining unit by simply changing a classification's bargaining unit designation and nothing else, or by ostensibly creating a "new" out-of-unit position that is essentially the same as the in-unit position except for its bargaining unit designation. This interpretation would be absurd and tread on the Commission's statutory authority and role. See *Vyfvinkel v. Vyfvinkel*, 135 So. 3d 384, 386 (Fla. 5th DCA 2014) ("Where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner.").

Moreover, even if the CBA clearly and unambiguously provided the University with the authority to revise a classification by essentially changing only its bargaining unit designation, the parties do not have the ability to waive the Commission's exclusive statutory authority to determine the appropriateness of a unit for purposes of collective bargaining. Accordingly, such a provision would be of no effect. See *Florida Corrections Association*, 22 FPER ¶ 27217 (declaring that a document purporting to add positions to the unit was a "nullity insofar as it purports to perform the duties of the Commission in determining the appropriateness of a unit for purposes of collective bargaining"); see also § 447.309(3), Fla. Stat. (providing a CBA provision that conflicts with any law, ordinance, or regulation is not effective until such law, ordinance, or regulation is amended).¹⁴

¹⁴For the same reason, the University's waiver defense, also discussed below, even if proven, would not alter my analysis.

CA-2018-047

The University additionally contends that the Union failed to properly utilize the unit clarification process,¹⁵ faulting the Union for failing to accurately describe the reclassification process in its petition and failing to allege that new classifications have been created or substantially altered – facts with which the Union does not agree. However, as discussed above, I have found that the revised classifications were a mere retitling of the existing in-unit classifications and that they were not substantially altered. Under these facts, the unit clarification procedure was not appropriate. *See Village of Key Biscayne*, 41 FPER ¶ 290.

I conclude that the University's actions in revising the academic advisor I, II, and III classifications were a mere retitling to remove them from the bargaining unit and not within its managements rights. The Commission, in an exercise of its sole statutory responsibility, has previously determined these classifications to be appropriate for inclusion in the bargaining unit, and the classifications were not changed such that they were no longer appropriate for inclusion. By designating these in-unit classifications as being out of the unit, the University attempted to unilaterally change the composition of the bargaining unit, in violation of section 447.501(1)(a) and (1)(c), Florida Statutes.

¹⁵I note that nothing prevents the University from itself filing a unit clarification petition with the Commission, which may be the prudent course of action if there is a dispute over the creation of a new position or revision of an in-unit position that would result in it being moved out of the unit. *See, e.g., Florida Gulf Coast University Board of Trustees*, 33 FPER ¶ 296 (granting unit clarification petition filed by the University to add the newly-created classifications of academic advisor I, II, and III to the unit); *Lehigh Acres Board of Fire Commissioners*, 10 FPER ¶ 15166 (granting unit clarification petition filed by the employer seeking to exclude a position from the unit, which had been consolidated with an unfair labor practice case filed by the union regarding the position).

CA-2018-047

It follows that the University's actions in failing to recognize the Union as the certified bargaining agent for the advisors and in treating the academic advisors as being out of the unit, such as by unilaterally giving them pay raises without bargaining with the Union on the matter and ceasing dues deductions,¹⁶ also violated section 447.501(1)(a) and (1)(c), Florida Statutes. For the reasons discussed above, the academic advisors are properly included in the bargaining unit. See *United Faculty of Florida v. Florida Atlantic University Board of Trustees*, 34 FPER ¶ 33 (2008) (holding that the Commission has jurisdiction to decide whether specific employees are in or out of the unit in the context of an unfair labor practice). Accordingly, the University was obligated to bargain with their certified bargaining agent regarding their wages, hours, and terms and conditions of employment. See *Bay Shipbuilding Corporation*, 721 F.2d at 189 (holding that the employer committed an unfair labor practice by failing to recognize the union as the certified bargaining agent for a group of employees it had improperly designated as being outside of the bargaining unit).

It is well-settled law that a public employer's unilateral alteration of the status quo with respect to wages, hours, and terms and conditions of employment of employees represented by a certified bargaining agent is a per se violation of section 447.501(1)(a) and (c), Florida Statutes, absent a clear and unmistakable waiver, legislative body action

¹⁶The University contends that the Union abandoned any claim with respect to the dues deductions because it did not introduce testimony or evidence regarding this issue at the hearing. However, it appears from the University's answer that it admitted that it ceased dues deductions. Regardless, the dues deductions issue is ultimately inconsequential to the outcome of this case and serves only to further illustrate the University's treatment of the academic advisors as being out of the bargaining unit.

CA-2018-047

taken as a result of impasse, or extraordinary circumstances requiring immediate action. *United Faculty of Florida v. University of Central Florida Board of Trustees*, 30 FPER ¶ 229 (2004). Waiver is an affirmative defense regardless of whether it is by express agreement, by bargaining history, or by inaction.¹⁷ However, in any situation the waiver must be "clear and unmistakable." *Local 2266, International Association of Fire Fighters v. City of St. Petersburg Beach*, 10 FPER ¶ 15211 (1984).

The University contends that the Union waived its right to bargain over the classification of advisors based on Articles 8.6 and 27.6.¹⁸ The Commission has long held that a contractual waiver must be clear and unmistakable to be effective. *United Faculty of Florida v. University of Central Florida Board of Trustees*, 36 FPER ¶ 60 (2010). A clear and unmistakable waiver of bargaining rights is only demonstrated by contractual language which unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. *Id.* A waiver of this type must

¹⁷There is no indication on this record that the Union waived its rights to bargain by inaction. The Commission has explained that an employee organization may waive its right to bargain by inaction where, after appropriate notice of a proposed change, it fails to make an effective demand to bargain. *Amalgamated Transit Union, Local 1596 v. Orange-Seminole-Osceola Transportation Authority, a/k/a Tri-County Transit*, 12 FPER ¶ 17134 (1986). For inaction to ripen into a "clear and unmistakable" waiver, consideration of all the circumstances must reveal that the Union's conduct is such that the only reasonable inference is that it has abandoned its rights to negotiate over the noticed change. *Leon County Police Benevolent Association, Inc. v. City of Tallahassee*, 8 FPER ¶ 13400 (1982), *aff'd*, 445 So. 2d 604 (Fla. 1st DCA 1984). On this record, in considering all of the circumstances, including that the Union requested to bargain the issue, the University maintained the position that it was within its management rights to reclassify the academic advisors, and the Union took the position that the University was not permitted to do so without a Commission ruling on the matter, the Union's conduct is not such that the only reasonable inference is that it abandoned its rights to negotiate.

¹⁸The University does not argue that the CBA contains a waiver granting it the unilateral authority to give pay raises such as the ones in this case to in-unit employees.

CA-2018-047

be stated with such precision that simply by reading the pertinent provision employees will be reasonably alerted that the employer has the power to change the terms and conditions of employment. *Id.* For the same reasons that I have concluded that Articles 8.6 and 27.6 do not plainly and unambiguously authorize the University to essentially retitle classifications to remove them from the unit, I also conclude that the articles do not constitute a clear and unmistakable waiver.

The University also argues that the Union waived its right to bargain regarding the classifications when it stated on August 3 that it no longer wished to discuss the matter at the bargaining table. At this point, however, the University had already announced on August 1 that the change was effective that same day. The Union's statements were a recognition that the University was not going to bargain about the issue and that further attempts to bargain would be futile. I conclude that the Union did not waive its rights by its statements in the August 3 meeting.

The University additionally contends that the Union waived its right to bargain regarding the classification of a bargaining unit employee by ratifying Articles 8.6 and 27.6 of the 2015 and 2018 CBAs. The University avers that the Union's position regarding Articles 8.6 and 27.6 is completely undermined by the fact that the Union did not propose any revisions to these articles and ratified them as part of the 2018-2021 CBA. However, as discussed above, Articles 8.6 and 27.6 do not unambiguously authorize the University to essentially retitle classifications to remove them from the unit. Thus, I conclude that the Union did not waive its rights to bargain regarding the reclassification of the academic advisors by ratifying these provisions.

CA-2018-047

The University also raises the defense of equitable estoppel, arguing that the Union should be estopped from asserting that the University does not have the contractual authority to reclassify bargaining unit employees pursuant to Articles 8.6 and 27.6 of the 2015 and 2018 CBAs. The elements of equitable estoppel are: (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it. *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006); see also *Watson Clinic, LLP v. Verzosa*, 816 So. 2d 832, 834 (Fla. 2d DCA 2002). Estoppel rests on the premise that the party asserting the estoppel has acted in reliance upon the prior inconsistent conduct. *Goodwin*, 939 So. 2d at 1103. The party raising the defense of equitable estoppel has the burden to prove the elements. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 596 n.6 (Fla. 1st DCA 2009); *Goodwin*, 939 So. 2d at 1103.

In support of this argument, the University asserts that Everham admitted on two occasions that the University had the right to reclassify the advisors, citing Everham's May 3 and May 7 emails.¹⁹ However, the University has not demonstrated that it relied on Everham's statements or that it changed its position to its detriment. It is apparent

¹⁹I note that at the time that these statements were made, the Union did not have the specific details of the University's plan to reclassify the advisors. Moreover, Everham stated in the May 7 email that he had consulted with the State-level Union office and had been advised that a Commission review would be required. This position was then consistently held by the Union.

CA-2018-047

from this record that the University consistently maintained the position that it was permitted to unilaterally reclassify the advisors out of the unit under the CBA.

The University further contends that the Union did not submit any proposals revising the language of Articles 8.6 and 27.6 of during negotiations, instead ratifying it in both 2015 and 2018. However, as discussed above, Articles 8.6 and 27.6 do not unambiguously authorize the University to effectively retitle classifications to remove them from the unit, and the parties disagreed as to the operation and meaning of these provisions as applied to the circumstances here.²⁰ Accordingly, I conclude that equitable estoppel should not apply.

I conclude that the University violated section 447.501(1)(a) and (1)(c), Florida Statutes, by unilaterally changing the wages and terms and conditions of employment of the academic advisors and otherwise treating them as being out of the bargaining unit. By its actions, the University unlawfully refused to recognize and bargain with the Union as the exclusive bargaining agent for the academic advisors.

Direct Dealing

I next to turn to the allegation that the University violated section 447.501(1)(a) and (1)(c), Florida Statutes, by dealing directly with the advisors regarding changes in their wages and terms and conditions of employment. An example of conduct that is

²⁰This case is distinguishable from *City of Gainesville v. International Association of Firefighters, Local 2157*, 22 FPER ¶ 27021 (1995), where the employer proposed and agreed to a parity clause in the CBA but then later asserted that it was void as against public policy. Here, the issue is the interpretation and operation of the CBA provisions as applied to these circumstances. Moreover, there is no indication that the Union proposed the provisions or benefited from them.

CA-2018-047

indicative of bad faith is negotiating directly with employees rather than with their certified bargaining agent. § 447.203(17)(f), Fla. Stat. The primary harm which occurs in a direct dealing case is that the public employer can undermine the viability of the employee organization. *St. Petersburg Association of Fire Fighters, IAFF Local 747 v. City of St. Petersburg*, 37 FPER ¶ 157 (2011). This interferes with the right of employees who have chosen an exclusive bargaining agent to collectively bargain for them. *Id.*

An employer is allowed to communicate with employees so long as such expression contains no promise of benefits or threat of reprisal or force. *Id.* (citing § 447.501(3), Fla. Stat.). A communication transmitted directly from a public employer to employees represented by a certified bargaining agent is not unlawful if it is non-coercive and informational. *Id.* The inquiry focuses on whether the communication concerning terms and conditions of employment has the effect of enlisting unit employees to withdraw or abandon their support of the certified bargaining agent through coercive statements. *Id.*

Here, the University's communications were informational in nature. There is no indication that the University bargained or negotiated with the academic advisors during this process – rather, it informed them that they would be removed from the unit, that they would be receiving pay raises, and explained the process and its rationale for doing so. See *Zephyrhills Professional Firefighters, Local 3884, IAFF v. City of Zephyrhills*, 32 FPER ¶ 112 (2006) (reasoning that communication informing an employee that he was receiving a raise would be merely informational and lawful, but where the employer's representative extended an offer contingent on the employee's agreement to remain with

CA-2018-047

the employer, this placed the communication in the posture of a negotiation and thus was unlawful). Moreover, the University's communications to the advisors were non-coercive and did not contain a promise of benefits or threat of reprisal or force. There is no evidence that the communications had the effect of enlisting unit employees to withdraw or abandon their support of the certified bargaining agent through coercive statements.²¹

It is evident from this record that the University's direct communications to the academic advisors flowed from its incorrect position that it had the right to move the advisors out of the unit and unilaterally give them pay raises. However, the fact that the mere dissemination of information that may have concerned an unlawful action by the University does not make the relation of that information unlawful. See, e.g., *International Brotherhood of Firemen and Oilers, Local 1227 v. Palm Beach County School District*, 20 FPER ¶ 25243 (G.C. Summary Dismissal 1994); *International Association of Fire Fighters, Local 1158, AFL-CIO v. City of Clearwater*, 12 FPER ¶ 17353 (G.C. Partial Summary Dismissal 1985).

The Union cites *Hillsborough Community College Chapter of the Faculty United Service Association v. Board of Trustees for Hillsborough Community College*, 15 FPER ¶ 20161 (1989), as support. However, that case is distinguishable. There, the provost for the employer met directly with faculty to discuss a proposal for implementation of a ten-week summer term, solicited their approval, and obtained a unanimous favorable response. The hearing officer reasoned that in doing so, the employer went beyond

²¹To the contrary, both of the academic advisors who testified on behalf of the Union testified that they would prefer to remain in the bargaining unit. (T41, 62)

CA-2018-047

simply providing information about the ten-week summer term by seeking to convince the faculty of the merits and obtaining their consent to implementation. Here, in contrast, the evidence does not show that the University sought the consent or approval of the academic advisors through its communications – rather, it informed them of the plan and answered questions about how the process would be implemented. For the foregoing reasons, I conclude that the University did not violate section 447.501(1)(a) and (1)(c), Florida Statutes, by dealing directly with the academic advisors.

Conditioning Ratification of the CBA

I next address the Union's allegation that the University violated sections 447.501(1)(a) and (1)(c), Florida Statutes, by conditioning ratification of a tentative CBA on the Union's agreement to exclude advisors from the certified unit. "[I]t is an unfair labor practice to require an adverse party to agree to a nonmandatory bargaining point as a condition to bargaining on mandatory matters." *City of Casselberry v. Orange County Police Benevolent Association*, 482 So. 2d 336, 340 (Fla. 1986). However, the record does not reflect that the University required the Union to agree to excluding the advisors from the unit as a condition to bargaining on mandatory matters or ratifying the CBA. Rather, the University conditioned ratification on the Union's agreement to submit a version of Appendix A of the CBA to the Board of Trustees that did not list the advisors. This is an important distinction because Appendix A is not part of the CBA pursuant to the terms of the contract and is attached "for informational purposes only." Accordingly, I

CA-2018-047

conclude that the University did not commit an unfair labor practice by conditioning ratification on the removal of the advisors from Appendix A.²²

Attorney's Fees and Costs

Both parties have requested an award of attorney's fees and costs. Section 447.503(6)(c), Florida Statutes, authorizes the Commission to award reasonable attorney's fees and costs to a prevailing party when it determines such an award to be appropriate.

A prevailing charging party is entitled to fees if the respondent knew or should have known that its conduct was unlawful. See *City of Tallahassee*, 8 FPER ¶ 13400. The case law is clear regarding the Commission's sole responsibility to determine or approve bargaining units and the limits on an employer's management rights to have control and discretion over its organization and operations by abolishing and creating positions. Accordingly, I conclude that the University knew or should have known that its conduct in attempting to unilaterally reconfigure the bargaining unit and then in treating those employees as being out of the unit, including unilaterally giving the employees a raise without bargaining with the Union, was unlawful. Thus, I conclude that the Union should be awarded fees for those portions of the charge. The Union did not prevail on

²²For the same reasons, the University's fifth affirmative defense plead in its answer that the Union ratified a CBA that contained information acknowledging that new/revised A&P advisor classifications is not included within the bargaining unit is meritless. Appendix A is not part of the CBA. Moreover, even if it were, ratification does not constitute a waiver of an unfair labor practice when coerced. See *International Association of Fire Fighters, Local 1365 v. City of Orlando*, 4 FPER ¶ 4214 (1978) (holding that ratification did not waive a bad faith bargaining charge where the ratification was coerced by a "take it or leave it" offer by the employer), *aff'd*, 384 So. 2d 941 (Fla. 5th DCA 1980).

CA-2018-047

the portions of the charge pertaining to direct dealing and ratification and thus is not entitled to fees and costs with respect to them.

A prevailing respondent is entitled to attorney's fees if the charge was frivolous, unreasonable, or groundless when filed or if the charging party continued to litigate after the charge clearly became so. *United Faculty of Palm Beach State College v. Palm Beach State College Board of Trustees*, 41 FPER ¶ 394 (2015). Upon review, I do not find that the Union's arguments with respect to direct dealing and conditioning ratification were so without merit so as to justify attorney's fees. I conclude that the University should not be awarded fees and costs.

Remedy

I conclude with a note regarding the appropriate remedy in this case. As part of its unlawful actions in reclassifying the bargaining unit advisors, the University gave the advisors substantial raises. The Union requests an award of a traditional make-whole remedy, with one caveat: that the order and notice to employees include a provision that nothing in them shall be construed as requiring rescission of any wage increase or other benefits that were previously granted to academic advisors as part of their reclassification. The Union states that it has no intention of making such a request.

The Commission has held that where an employer has unilaterally raised wages, rather than lowered them, that a return to the status quo with respect to the wages is an appropriate remedy only if requested by the employee organization. *See Professional Fire Fighters of Pembroke Pines, IAFF, Local 2292 v. City of Pembroke Pines*,

CA-2018-047

15 FPER ¶ 20023 (1988); *see also Bradford Education Association v. Bradford County School District*, 21 FPER ¶ 26017 (1994); *Florida Classified Employees Association v. Taylor County School Board*, 7 FPER ¶ 12100 (1981). Here, the Union has asserted that it has no intention of making such a request and therefore has waived its right to make it. Accordingly, I have not recommended that the Commission order the remedy of decreasing the academic advisors' salaries and have included a note that the Union has waived its right to request a return to the status quo with respect to the salary increases.

CONCLUSIONS OF LAW

Based on the entire record in this case, I make the following conclusions of law:

1. The Commission has jurisdiction of this case pursuant to Chapter 447, Part II, Florida Statutes.
2. The unfair labor practice charge was timely.
3. The University violated section 447.501(1)(a) and (1)(c), Florida Statutes, by attempting to unilaterally change the composition of the bargaining unit.
4. The University violated section 447.501(1)(a) and (1)(c), Florida Statutes, by failing to recognize the Union as the certified bargaining agent for the academic advisors and by treating the academic advisors as being out of the unit after it improperly designated them as such.
5. The University did not violate section 447.501(1)(a) and (1)(c), Florida Statutes, by dealing directly with the academic advisors.

CA-2018-047

6. The University did not violate section 447.501(1)(a) and (1)(c), Florida Statutes, by conditioning ratification of the CBA on the Union's agreement to exclude the advisors from the bargaining unit.

7. The Union should be awarded its reasonable attorney's fees and costs for the portions of the charge on which it prevailed.

8. The University should not be awarded attorney's fees and costs.

RECOMMENDATION

In order to effectuate the purposes of Chapter 447, Part II, Florida Statutes, I recommend that the Commission adopt the findings of fact and conclusions of law set forth above, and enter an order directing the University to:

1. Cease and desist from:
 - (a) Attempting to unilaterally change the composition of the bargaining unit by removing classifications without materially changing their job duties or responsibilities;
 - (b) Treating the academic advisor I, II, and III classifications as being excluded from the bargaining unit;
 - (c) In any like or related manner, failing to bargain collectively in good faith over wages, hours, and terms and conditions of employment; and
 - (d) In any like or related manner interfering with, restraining, or coercing bargaining unit members in the exercise of any rights guaranteed under them under Chapter 447, Part II, Florida Statutes.

CA-2018-047

2. Take the following affirmative action:
- (a) Restore the academic advisors I, II, and III to their prior status of in-unit faculty rather than out-of-unit administrative and professional employees;
 - (b) Recognize the United Faculty of Florida as the certified bargaining agent for the academic advisors in the bargaining unit;
 - (c) Restore the status quo as it pertains to the academic advisor I, II, and III classifications, with the exception of rescinding salary increases, as the United Faculty of Florida has waived its right to request that the raises be rescinded;
 - (d) Post immediately in the manner in which the Florida Gulf Coast University Board of Trustees customarily communicates with its employees, the attached Notice to Employees²³; and
 - (e) Pay to the United Faculty of Florida its reasonable attorney's fees and costs incurred in litigating this case.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within fifteen days from the date of this order. See Fla. Admin. Code R. 28-106.217(1).

ISSUED and SUBMITTED to the Public Employees Relations Commission and SERVED on all parties this 6th day of September, 2019.


ALYSSA S. LATHROP, Hearing Officer

ASL/bjk

²³The University 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).