

STATE OF FLORIDA  
PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA, :  
 :  
 Charging Party, :  
 :  
 v. :  
 :  
 UNIVERSITY OF CENTRAL FLORIDA :  
 BOARD OF TRUSTEES, :  
 :  
 Respondent. :  
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Case Nos. CA-2004-009  
CA-2004-020

HEARING OFFICER'S  
RECOMMENDED ORDER

Thomas W. Brooks, Tallahassee, attorney for charging party.

David V. Kornelch, David Young, W. Scott Cole, and Youndy C. Cook, Orlando,  
attorneys for respondent.

CHATHAM, Hearing Officer.

On February 4, 2004, the United Faculty of Florida (UFF) filed an unfair labor practice charge against the University of Central Florida Board of Trustees (Trustees), alleging a violation of its collective bargaining obligations. The charge was found prima facie sufficient, the undersigned was appointed as hearing officer, and a hearing was scheduled. However, the UFF filed a second unfair labor practice charge against the Trustees on March 8, alleging similar, continuing violations. That charge was found prima facie sufficient to proceed.

Subsequently, the parties agreed the hearing should be re-scheduled and both cases heard together. Both charges allege continuing bargaining violations. Therefore, the issue in both cases is similar and the facts and analysis in this order relate equally to the two charges. Without objection, the consolidated cases were heard on April 15, 2004, in Orlando. Both parties appeared with counsel, presented witnesses and exhibits,

agreed on stipulations, and fully participated in the proceedings. Neither party objected to my taking notice of the historical facts concerning the abolition of the Board of Regents (BOR) and creation of both the Trustees and the Board of Governors, or of my noticing the Commission's bargaining unit certification. Witnesses were sequestered at the request of the Trustees.

Counsel for both parties were cordial and cooperative; thus, the presentation of evidence was not lengthy. After the hearing, both sides filed thorough legal briefs.

### ISSUE

Whether the Trustees unilaterally change the status quo of employee wages in violation of Sections 447.501(1)(a) and (c), Florida Statutes (2003),<sup>1</sup> by implementing "out-of-cycle" pay increases in mid and late 2004?

### FINDINGS OF FACT

Based on the stipulations, testimony, exhibits, and entire record, I make the following findings:

1. The UFF was certified to represent a bargaining unit of faculty at the state universities from the mid-1970s until January 2003. The last of many collective

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<sup>1</sup>All citations are to the 2003 edition.

bargaining contracts between the UFF and the BOR (or its successor the Board of Education) was in effect from July 2001 – January 7, 2003. CP ex. 1.

2. Under the last contract, pursuant to Article 23.9, the employer had the discretionary authority to provide "out of cycle" salary increases for market equity reasons, including verified counteroffers and compression/inversion; increased duties and responsibilities; special achievements; litigation/settlements; and similar special situations. The UFF reserved the right to see the procedures for deciding the raises and had the right to "discuss the procedures ... prior to this implementation." CP ex. 1. This was a continuation of a practice that had existed in the university system for many years regarding "counteroffers, settlement of litigation, assignment of new responsibilities, and reclassification of employees." United Faculty of Florida v. Florida Board of Regents, 20 FPER ¶ 25034 (1993) (HORO paragraph 8). This contract provision constituted a waiver of the UFF's right to bargain over the issue of out-of-cycle raises. United Faculty of Florida v. Florida Board of Education, 28 FPER ¶ 33232 (2002).

3. As a result of this language, BOR representatives at each university awarded out-of-cycle raises to selected faculty without bargaining over the procedure or total amount of money to be awarded. The procedures for some, but not all, of these awards were approved by the faculty senate at the University of Central Florida (UCF). Joint ex. 1.

4. The last contract between the UFF and Board of Education contained a yearly re-opener article for salaries. During re-opener negotiations for the 2002-2003 academic year salaries, the Board of Education proposed an article allowing each university to award bonuses pursuant to plans developed individually at the universities without bargaining. The UFF would not agree to this proposal and the Board of Education presented it for impasse resolution. After special master proceedings not pertinent here, the Board of Education imposed the article for the 2002-2003 year. The UFF filed an unfair labor practice charge with the Commission. In July 2002, the Commission found that the Board of Education's action was an unfair labor practice because it had imposed a waiver of a mandatory subject of bargaining on the UFF. United Faculty of Florida v. Florida Board of Education, 28 FPER ¶ 33232 (2002).

5. For historical background, I adopt the following verbatim excerpt from Florida Public Employees Council 79, AFSCME v. PERC and Florida Board of Governors, Case No. 1D03-1190 (Fla. 1st DCA, March 22, 2004).

During a special session in 2002, the Florida Legislature passed chapter 02-387, Laws of Florida, "the Governance Act," wherein it abolished the Florida Board of Regents, effective July 1, 2001,<sup>2</sup> and established new

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<sup>2</sup>This provision replaced former Section 229.008, Florida Statutes, which was part of the Education Reorganization Act. See Ch. 01-170, § 3, at 1368, Laws of Fla. (abolishing the Board of Regents as of July 1, 2001).

criteria for local boards of trustees at each state university.<sup>3</sup> Ch. 02-387, §§ 3, 83, at 3152, 3236, Laws of Fla. The Legislature amended Section 447.203(2), Florida Statutes (2001), which set forth that "the Board of Regents shall be deemed to be the public employer with respect to all public employees within the State University System..." by replacing the "Board of Regents" with the "university board of trustees" and prescribing that the individual boards would "be the public employer with respect to all public employees of the respective state university...." Ch. 02-387, § 1006, at 4129, Laws of Fla. Thus, Section 447.203(2), Florida Statutes (2002), provides, in pertinent part, that:

With respect to all public employees determined by the commission as properly belonging to a statewide bargaining unit composed of State Career Service System employees or Selected Professional Service System employees or Selected Professional Service employees, the Governor shall be deemed to be the public employer; and the university board of trustees shall be deemed to be the public employer with respect to all public employees of the respective state university.

(emphasis added)<sup>4</sup>

Thereafter, the voters of Florida approved the following constitutional amendment to Article IX of the Florida Constitution in November 2002, which became effective on January 7, 2003:

#### SECTION 7. State University System.

- (a) **PURPOSES.** In order to achieve excellence through teaching students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies, the

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<sup>3</sup>The Legislature had previously created local boards of trustees, directing the Governor to appoint a thirteen-member board for each university no later than November 1, 2001. See Ch. 01-170, § 13, at 1391, Laws of Fla.; see also § 229.008(1)(a), Fla. Stat. (2001). After the Board of Regents was abolished, the Florida Board of Education became the public employer for purposes of collective bargaining. See § 229.003(5)(b), Fla. Stat. (2002) (providing that all the powers, duties, and functions of the Board of Regents were transferred to the Florida Board of Education).

<sup>4</sup>This section was not amended during the 2003 legislative session.

people hereby establish a system of governance for the state university system of Florida.

- (b) **STATE UNIVERSITY SYSTEM.** There shall be a single state university system comprised of all public universities. A board of trustees shall administer each public university and a board of governors shall govern the state university system.
- (c) **LOCAL BOARDS OF TRUSTEES.** Each local constituent university shall be administered by a board of trustees consisting of thirteen members dedicated to the purposes of the state university system. The board of governors shall establish the powers and duties of the boards of trustees. Each board of trustees shall consist of six citizen members appointed by the governor and five citizen members appointed by the board of governors. The appointed members shall be confirmed by the senate and serve staggered terms of five years as provided by law. The chair of the faculty senate, or the equivalent, and the president of the student body of the university shall also be members.<sup>5</sup>
- (d) **STATEWIDE BOARD OF GOVERNORS.** The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs. The board's management shall be subject to the powers of the legislature to appropriate for the

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<sup>5</sup>Pursuant to Sections 1001.71(1) and (4), Florida Statutes (2002), the Boards of Trustees were to be comprised of twelve members appointed by the Governor and confirmed by the state senate with the members to serve staggered four-year terms. The student body president of each university was to serve ex officio as a voting member of his or her university's board. § 1001.71(1), Fla. Stat. (2002). Members could be removed by the Governor upon a recommendation of the State Board of Education. § 1001.71(3), Fla. Stat. (2002). Notably, in 2003, the Legislature amended Section 1001.71(1) to correspond with Article IX, Section 7, with respect to the composition of the Boards of Trustees.

expenditure of funds, and the board shall account for such expenditures as provided by law. The governor shall appoint to the board fourteen citizens dedicated to the purposes of the state university system. The appointed members shall be confirmed by the senate and serve staggered terms of seven years as provided by law. The commissioner of education, the chair or the advisory council of faculty senates, or the equivalent, and the president of the Florida student association, or the equivalent, shall also be members of the board.

On January 7, 2003, appellee, the Board of Governors, the members of which were appointed by the Governor on December 23, 2002, unanimously met and approved a resolution "delineating the powers and duties of the university Boards of Trustees" pursuant to the powers bestowed upon it by the voters of Florida. The resolution, in pertinent part, provides that "[e]ach board of trustees is vested with the authority to govern its university, as necessary to provide proper governance and improvement of the university in accordance with law and with rules of the Board of Governors." The resolution further provides that:

Each board of trustees shall establish the personnel program for all employees of the university, including the president, pursuant to the provisions of chapter 1012 and, in accordance with rules and guidelines of the Board of Governors, including: compensation and other conditions of employment, recruitment and selection, nonreappointment, standards for performance and conduct, evaluation, benefits and hours of work, leave policies, recognition and awards, inventions and works, travel, learning opportunities, exchange programs, academic freedom and responsibility, promotion, assignment, demotion, transfer, tenure and permanent status, ethical obligations and conflicts of interest, restrictive covenants, disciplinary actions, complaints, appeals and grievance procedures, and separation and termination from employment.... No rule of the Board of Governors shall be considered to in any way contravene the responsibility of each of the university board of trustees to act as the sole public employer with regard to all public employees of its universities for the purposes of collective bargaining in accord with chapter 447 Florida Statutes.

BE IT RESOLVED that it is the intent of the Board of Governors that the university boards of trustees shall be the sole public employer with respect to all public employees of the respective state universities as provided in s. 447.203(2) and (10) F.S. for the purpose of collective bargaining....

(emphasis added)

6. The Commission and District Court concluded, based on the above-stated facts, that the Trustees was not a successor employer to the BOR/BOE. Florida Public Employees Council 79, AFSCME v. Public Employees Relations Commission, Case No. 1D03-1190 (Fla. 1st DCA Mar. 22, 2004).

7. On December 22, 2002, the UFF filed a representation petition seeking to be certified as the bargaining agent for the UCF faculty unit in anticipation of the possible change to a new employer. After the Trustees became the employer for collective bargaining purposes on January 8, 2003, they allowed their representatives, specifically the UCF management, to award out-of-cycle raises based on unilaterally designed procedures, including unilaterally decided total amounts. The UFF was notified of each proposed raise and given an opportunity to discuss but not to bargain each raise. They were also not given the opportunity to bargain over the procedures for awarding the raises. In other words, the Trustees continued the procedure for awarding out-of-cycle raises that had existed under the UFF-BOR contract.

8. After voluntary recognition by the Trustees, the UFF was certified to represent faculty employed by the Trustees, effective on April 28, 2003. Commission certification 1319. There are approximately 1,250 faculty members in the new UCF bargaining

unit. The UFF and the Trustees have bargained for an initial contract, but no agreement has been reached.

9. Although informed after April 2003 by the UCF management of individual faculty out-of-cycle pay raises, the UFF initially did not object or demand bargaining over these raises. On occasion, it did request more information about a particular situation. However, in late June 2003, the UFF expressed its unhappiness with proposed "large increases for less than a dozen faculty." CP ex. 7. It requested to bargain over the issue. On August 12, the UFF's chief negotiator e-mailed his Trustees' counterpart with a message that "unilateral action on any such issues (salary and compensation) would be unlawful." CP ex. 8.

10. Before and after certification by the Commission of a formal bargaining relationship between the UFF and Trustees, representatives of both entities were in regular communication, often by e-mail. Based on demeanor, I find this relationship was cordial, professional, and collegial.

11. Even after the UFF had expressly requested to bargain over the out-of-cycle raises, the Trustees continued to award raises using the same procedures that had been used for years without bargaining. The sums awarded in 2003 and 2004 were significant in individual cases, for example \$5,000 added to the employee's base salary for an "excellence" raise, and the raises were funded from the Trustees' general university budget.

12. The types of raises that have been or will be given include those for meritorious performance, increases for counteroffers, increases when counteroffers likely but not in hand, increases where a study has shown salary inequities, teaching incentive program (TIP) awards, research incentive program (RIA) awards, trustee chairship awards (TCA), distinguished professor awards, teaching with technology awards, leadership awards, Pegasus professorship awards, Presidential special merit awards, excellence in undergraduate teaching awards (two categories), excellence in graduate teaching awards (two categories), excellence in faculty advising awards, excellence in professional advising awards, distinguished researcher awards (two categories), excellence in professional service awards, excellence in librarianship awards. See, e.g., CP ex. 13. Some of these raises are added to the employee's base pay and some are one time bonuses that are not included in base pay.

13. The parties have considered and bargained over an out-of-cycle pay raise proposal for the new contract. An agreement has not been reached on that issue. The UFF has since late June 2003 continued to object to the implementation of out-of-cycle raises and the Trustees have continued to implement raises.

### ANALYSIS

#### The Bargaining Obligation

After certification of a bargaining agent, Florida's public sector collective bargaining law requires an employer to "bargain . . . in the determination of the wages . . .

of the public employees within the bargaining unit." § 447.309, Fla. Stat.; Pasco Classroom Teachers Association v. School Board of Pasco County, 3 FPER ¶ 9 (1976), aff'd, 353 So. 2d 108 (Fla. 1st DCA 1977). If either party wants to change the status quo of employee wages, benefits, or conditions of employment, that party must proceed through the bargaining process, in the absence of an emergency or waiver. Florida School for the Deaf and Blind v. Florida School for the Deaf and Blind Teachers, 483 So. 2d 58 (Fla. 1st DCA 1986).

It is undisputed in this case that there were no exigent circumstances requiring immediate unilateral action and that the pay raises at issue were not decided by impasse resolution after bargaining. Moreover, the Trustees do not allege that the UFF waived its right to bargain this issue. On the contrary, the parties have been bargaining over the issue, although they have yet to reach an agreement.

Both parties recognize that they have an obligation to bargain over mandatory subjects, such as wages, and that the bargaining table, rather than unilateral action, is the legislatively mandated process for resolving disputes. Palowitch v. Orange County School Board, 3 FPER ¶ 280 (1977), aff'd, 367 So. 2d 730 (Fla. 4th DCA 1979). Both parties also understand this is a mutual obligation.

The essential gravamen of the charge in both cases is that the Trustees altered the existing status quo of wages without completing the bargaining process, which has as its terminus either a ratified agreement or legislative body impasse resolution. The status

quo can be established by either an explicit contractual provision or absent such a provision, by past practice. E.g., United Faculty of Florida v. Florida Board of Regents, 20 FPER ¶ 25034 (1993) (and earlier cited cases). To constitute a past practice, the evidence must establish (1) the practice was unequivocal, (2) the practice had existed substantially unvaried for a significant period of time prior to the change, and (3) the employees could reasonably have expected the practice to continue. Industrial and Public Employees, Local 1998 v. DeSoto County, 13 FPER ¶ 18015 (1987); cf. Hillsborough County Police Benevolent Association v. City of Tampa, 15 FPER ¶ 20028 (1988) (take home cars). The status quo has been succinctly described as "the benefits which an employer consistently extends to its employees." Central Florida Professional Fire Fighters Association, Local 2057 v. Board of County Commissioners of Orange County, 8 FPER ¶ 13205 (1982) at 382.

The parties disagree over whether the implementation of out-of-cycle faculty raises in mid and late 2003 and early 2004 was a continuation of the status quo. The unilateral grant of an individual merit pay bonus to selected employees by an employer, standing alone, violates the duty to bargain with the representative of the entire group if the bonus is a wage. United Teachers of Dade v. Dade County School Board, 500 So. 2d 508 (Fla. 1986) (master teacher program). Of course, this right to bargain over raises is waivable. In contracts with the prior employer, the UFF waived its right to bargain over out-of-cycle raises. United Faculty of Florida v. Florida Board of Education, 28 FPER ¶ 33232 (2002).

However, the waiver of the right to bargain the total amount and procedure for determining out-of-cycle pay raises to individual faculty members contained in prior collective bargaining contracts does not become the status quo during negotiations for a new contract after the prior contract expires. A union may agree to a waiver of bargaining over a mandatory subject in a prior contract, but it is not bound to continue that waiver indefinitely after the contract expires. Winter Springs Professional Firefighters v. City of Winter Springs, 29 FPER ¶ 167 (2003).

Accordingly, a question arises whether there was any status quo perpetuating the waiver of bargaining over the special out-of-cycle raises. This is clearly a policy issue of interpretation of the Commission's prior order in United Faculty of Florida v. Florida Board of Education, 28 FPER ¶ 33232 (2002), as affected by the more recent decision in City of Winter Springs, *ibid.* Most appropriately, the Commission itself will decide this issue. Assuming for the sake of argument that the bargaining waiver survived the contract expiration, I will apply the traditional status quo analysis.

The prior contract expired before the UFF was certified to represent this new bargaining unit at UCF. Thus, the contract's provisions are compelling only insofar as a reasonable person, being aware that the contract had expired, would expect his or her wages to be maintained as they had unequivocally been provided for a significant time. Moreover, the few months between the contract expiration and the demand to bargain is not significant enough to create a new status quo.

The fact that some bonuses were awarded to some of the faculty in prior years does not create a status quo allowing the employer unlimited discretion in the amount, eligibility, or procedures for awarding future bonuses to selected members of the faculty. See, e.g., United Faculty of Florida v. Florida Board of Regents, 20 FPER ¶ 25034 (1993) (status quo is altered if the amount of bonuses is significantly changed). Nonetheless, the status quo is not altered if the employer maintains the "order" and "amount" as previously paid. United Faculty of Florida v. Florida Board of Regents, *ibid*; cf. In re Canaveral Port Authority, 24 FPER ¶ 29083 (1998) (yearly raises based on employees' annual job appraisals were part of the status quo even though the number and amount of the raises varied depending on performance).

While the parties tend to lump all of the myriad types of raises, incentives, and awards together, they are not based on the same factors. TIP and RIA bonuses are spin-offs of previously existing legislative programs that contained dedicated funds for each university. As legislatively created and separately funded, they may not have been "wages" within the meaning of the Supreme Court's decision in the master teacher case. However, they became funded from the Trustees' general revenue in 2000-2001. Joint ex. 1. Neither party contended these bonuses are not now wages. Performance based awards such as TIP, RIA, and TCA awards are routinely expected each year and based on known and established criteria. These bonuses are a part of the status quo of faculty

wages. See, e.g., In re Canaveral Port Authority, 24 FPER ¶ 29083 (1998). Any changes to these procedures must be negotiated during the bargaining process.

However, other pay increases, such as raises for verified counter-offers, market equity adjustments, compression/inversion adjustments, and settlement of lawsuit adjustments are different. Such pay adjustments may be individual or department wide. More importantly, they are based, at least in part, on management's unilateral assessment of whether the faculty in question is being paid "according to the market" or other equitable factors (Trustees Brief at 7).

The UFF acknowledges a difference in these types of raises and admits the merit/performance raises "may become part of the status quo where the program itself has become a term or condition of employment and such increases are effectively automatic" (UFF Brief at 7). I agree. The Trustees' implementation of annual merit/performance bonuses to selected faculty based on well-established criteria was merely a continuation of a longstanding practice.

However, the implementation of market equity and other non-performance based raises is another matter. The decisions about how to select the recipients, how much to award to each employee, and how much to spend overall are simply too informed "by a large measure of discretion" to constitute an automatic continuation of the status quo of expected pay increases. National Labor Relations Board v. Katz, 369 U.S. 736 at 747, 82 S. Ct. 1107 (1962). For example, the genesis of this dispute arose when the Trustees

decided to grant raises to a group of professors in one department because their dean convinced management they were underpaid.

Accordingly, while I consider this a very complex legal issue because of the uniqueness of these bonuses in the university community,<sup>6</sup> I conclude the implementation of the non-performance based bonuses or adjustments after the contract expired, a new employer was created and the UFF objected in late June 2003 to continuation of the prior practice constituted a bargaining violation. Management's continued implementation of the yearly merit/performance based bonuses after June 2003 did not constitute a bargaining violation.

#### Remedy

If the Commission decides the contract waiver of bargaining over the out-of-cycle raises did not survive the expiration of the contract and creation of a new employer as the status quo, then the UFF will prevail on all of its charges. If not, the UFF will have partially prevailed, assuming the Commission accepts the above-stated analysis. In either event, the remedy should be as follows.

The UFF at least partially prevailed on its charge and its motion for attorney's fees and costs may be considered. § 447.503, Fla. Stat. (2003). I disagree with the UFF's

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<sup>6</sup>The difficulty of applying regular collective bargaining law analysis to the educational setting is discussed in United Teachers of Dade v. Dade County School Board, 500 So. 2d 508 (Fla. 1986) (master teacher plan).

position that there was a clear violation of "established Commission precedent" (Brief at 12). The UFF's eleven page argument referencing a gamut of cases from the National Labor Relations Board, the United States Supreme Court, the Florida courts, and the Commission belies this argument. This issue is complex and difficult. Thus, I do not conclude that the Trustees "knew or should have known" that its unilateral implementation of a variety of bonuses and incentives would be an unfair labor practice. An award of attorney's fees and litigation costs is, therefore, unwarranted. E.g., DeMarois v. Military Park Fire Control Tax District, 7 FPER ¶ 12065 (1981), aff'd, 411 So. 2d 944 (Fla. 4th DCA 1982) (award appropriate only where respondent knew or should have known it was violating the law).

Moreover, I note that the relief sought by the UFF in its brief at 12 would allow it to choose which past pay increase to a particular professor or group of faculty must be retroactively rescinded. This is inappropriate and indicates the UFF does not, in fact, oppose some or even most of the raises already granted. The sticking point appears to be whether the Trustees will agree to negotiate the procedures for selection and also the dollar pot out of which raises will be paid. The latter affects the dollars left for other raises and spending directly affecting all the faculty.

Accordingly, if the Commission adopts the above analysis, I recommend the most appropriate remedy is an order directing the Trustees to immediately cease unilaterally determining the procedures for selection and unilaterally deciding how much to

appropriate for non-performance based bonuses. The Trustees should continue to implement performance based raises pending the bargaining process. A notice to employees explaining the bargaining violation should also be posted where employee notices are typically placed. If the Commission concludes that none of the bonuses was legally implemented after June 2003, then the cease and desist order and notice should delete any reference to only performance based bonuses.

If the Commission concludes that the Trustees prevailed on a substantial part of the charge, its motion for attorney's fees and costs should be considered. Doing so, I recommend that the motion be denied. The critical issues were the subject of "reasonable debate and legitimate argument." Hillsborough County Police Benevolent Association v. City of Tampa, 15 FPER ¶ 20028 (1988), citing Fraternal Order of Police, Ft. Lauderdale Lodge v. City of Ft. Lauderdale, 14 FPER ¶ 19150 at 395 (1988) (fees denied to respondent because charge was not groundless, frivolous, or unreasonable).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of these cases. § 447.503, Fla. Stat. (2003).
2. The Trustees violated their bargaining obligation, at least in part, by implementing out-of-cycle raises without bargaining with the UFF after June 2003. § 447.501(1)(a) and (c), Fla. Stat.

RECOMMENDATION

I recommend that the Commission adopt this order. 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 Rule 28-106.217(1). The Commission may not change the findings of fact in this order without first reviewing an official transcript of the hearing. Any party who desires the Commission to review the transcript must file one with the Commission by the date exceptions are due. An extension of time for filing exceptions will not be granted unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 28-106.216 and SERVED on all parties this 18th day of May, 2004.

  
JERRY CHATHAM  
Hearing Officer

JC/bjk

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