

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES,

Petitioner

v.

Case No.: SM-2008-058

UNITED FACULTY OF FLORIDA,

Respondent

**FLORIDA ATLANTIC UNIVERSITY'S
PROPOSED RECOMMENDED ORDER**

COMES NOW, Petitioner, the Florida Atlantic University Board of Trustees (hereinafter "FAU"), by and through undersigned counsel, respectfully submits its Proposed Recommended Order in the above styled matter.

An evidentiary hearing was conducted before Special Magistrate Joseph M. Schneider in Boca Raton, Florida, on Tuesday, February 24, 2009.

APPEARANCES

For the Respondent:

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¹ Luke C. Savage, Esquire, of Allen, Norton & Blue, P.A., appeared in Boca Raton to assist in the facilitation of the hearing.

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STATEMENT OF THE CASE

Florida Atlantic University ("FAU") and the United Faculty of Florida ("UFF") have enjoyed a very positive collective bargaining relationship since the creation of the Florida Board of Governors ("BOG") in 2003. Since that time, FAU was the first university in the Florida State University System ("SUS")² to secure a ratified collective bargaining agreement ("CBA") with the UFF. After the expiration of the first collective bargaining agreement, FAU and UFF were successful in negotiating a second, successor contract. After reopener negotiations for the second CBA in contract year 2007-2008, the parties reached a deadlock over certain issues. In particular, the issues of Article 23 - Salaries, and Article 12 – Non-Reappointment are at impasse from the 2007-2008 negotiations, and the issues of Article 23 - Salaries and Article 8 – Appointment are at impasse from the 2008-2009 negotiations.³ Accordingly, on November 24, 2008, Florida Atlantic University declared impasse with regard to those issues and requested that a Special Magistrate from the Commission be appointed to hear the matter.

With regard to salaries for 2007-2008, the parties executed a Memorandum of Understanding ("MOU") dated October 3, 2007, in which all eligible bargaining unit employees whose salary was funded by Education and General (E&G) funds received a

² The BOG is the governing body of the State University System pursuant to Art. IX, Sec. 7 of the Florida Constitution.

³ In addition, FAU declared a financial urgency pursuant to Section 447.4095, Florida Statutes, with regard to the issue of appointment, Article 8 of the CBA.

non-recurring single payment of \$1,000.00, and promotional pay increases at nine percent (9%) and twelve percent (12%) for associate professor and professor, respectively. It is FAU's position that due to budgetary cutbacks from the E&G funds by the State of Florida it cannot fund an additional recurring across the board base salary increase for 2007-2008. With regard to the issue of Article 23 - Salaries for 2008-2009, it is FAU's position that due to ever increasing cuts in funding to its E&G budget the most FAU can fiscally responsibly offer is a wage package costing approximately \$2.2 million dollars. Specifically, FAU proposes a one percent (1%) base salary increase for all permanent bargaining unit employees who were employed as of May 1, 2008, and have continued employment through November 1, 2008, a \$1,000.00 non-recurring, lump sum wage payment, and promotional pay increases at nine percent (9%) and twelve percent (12%) for associate professor and professor, respectively.

With regard to the issue of Article 12 – Non-Reappointment, FAU's position is that the parties maintain the status quo language in the contract, or alternatively accept the modified position proposed by the University at the point of impasse.

With regard to the issue of Article 8 – Appointment, FAU's position is that full-time bargaining unit employees without an existing summer appointment in the categories of tenured employees, tenure earning employees, employees with multi-year appointments, and instructors who have taught at FAU for at least three consecutive years shall be offered first preference for an available summer appointment; other bargaining unit employees without an existing summer appointment who are qualified shall be offered a summer appointment as a second preference; and others who are qualified shall be offered a course as a third preference. Thereafter, it is FAU's position

that the University may offer any bargaining unit employee with an existing summer appointment an additional summer appointment at any time, at the University's discretion.

The UFF agrees with FAU that the issues of Article 23 - Salaries and Article 12 – Non-Reappointment are at impasse. However, the UFF argues that Article 23 - Salaries is at impasse for years 2007-2008 and 2008-2009. To that end, UFF seeks a two and one-half percent (2.5%) across the board base salary increase for 2007-2008, and an additional two and one-half percent (2.5%) across the board base salary increase for 2008-2009, for a total across the board base salary increase of five and one-sixteenth percent (5.0625%) for all permanent bargaining unit employees who were employed as of the 2007-2008 academic year.⁴

With regard to Article 12 – Non-Reappointment, it is the UFF's position that the language in the contract be modified to provide full-time faculty employees with the following types of notice of non reappointment: a) not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or if a one year appointment terminates during an academic year, at least three months in advance of its termination; b) not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or if an initial two year appointment terminates during an academic year, at least six months in advance of its termination; and c) at least twelve months before the expiration of an appointment after two or more years in the institution.

⁴ The UFF did not submit its proposed wage articles in writing. Accordingly, the UFF's proposed effective dates or retroactivity dates for its wage articles are unknown.

With regard to Article 8 – Appointment, the UFF argues that full-time bargaining unit employees in the categories of tenured employees, tenure earning employees, employees with multi-year appointments, and instructors who have taught at FAU for at least three consecutive years should be offered first preference in summer appointments for up to two (2) summer appointments. In other words, all available summer classes should be taught by bargaining unit employees.⁵

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

**ANALYSIS AND MEMORANDUM IN SUPPORT OF
RESPONDENT’S PROPOSED RECOMMENDED ORDER**

COMES NOW, the Petitioner, Florida Atlantic University Board of Trustees, (“FAU” or “University”), by and through undersigned counsel, and respectfully submits this Memorandum in Support of its Proposed Recommended Order in this case.

I. INTRODUCTION

The State of Florida is experiencing losses in revenue at historic proportions. Currently, even prior to another expected cut to the budget which is anticipated to be announced during the first few weeks of the Legislative Session convening in March 2009, state revenues are plummeting. The current projection of \$66.3 billion dollars in revenues for 2008-2009 is well below last years’ revenue of \$70.4 billion and the \$73.8 billion collected in 2006 and 2007. This year’s revenue is actually at levels equal to the revenue collection in 2005.

In light of these massive reductions in revenue, the state funds provided to Florida Atlantic University have been and continue to be significantly reduced. Based

⁵ The issue of whether Article 8 is appropriate at impasse is addressed in Section IV, below.

on current Florida Board of Governors revenue and budget projections for the remainder of this fiscal year and next, FAU's appropriated budget for the educational and general ("E&G") line will have been reduced by twenty-five percent (25%) over the past two (2) years of operation – an expected total cut in state E&G appropriations to the University of forty five million six hundred ninety six thousand and thirty one dollars (\$45,696,031.00).

In light of these extraordinary reductions, it has been a difficult challenge to maintain jobs, ensure the quality of the education delivered, and protect wages and benefits. The \$45 million dollars in reductions are from the University's resources in the E&G category, the only funds available to pay for the recurring wage increases sought by the UFF. These cuts in state funding virtually eliminate any possibility of wage increases.

Additionally, the State Legislature, with the constitutional authority to control the appropriations for the University, provided no funding for any wage increase for 2008-2009. So any funds required for a wage increase must be found in the already constricted E&G budget line.

In spite of these challenges, Florida Atlantic University has identified approximately \$2.2 million dollars for wage compensation for the approximately nine hundred (900) members in the bargaining unit. These funds are proposed to be administered in an equitable manner, giving all eligible faculty a one percent (1%) base salary increase, a \$1,000.00 non-recurring, lump sum bonus, and promotional pay increases for associate professor and professor at nine percent (9%) and twelve percent (12%), respectively.

In these times, this is all and everything that can be committed to new wages. Florida Atlantic University did not seek to negotiate to some advantage on the issue of wages. The grim realities of these fiscal circumstances do not allow for such posturing. Rather, the approach was to identify any funds available that would still preserve a policy of fiscal responsibility and then propose this wage article. This same proposal, even in the interim worsening news on revenue, is still our commitment and is submitted to the Magistrate for his consideration and recommendation.

There are two other issues unresolved between the Parties and at impasse. Article 8 (Appointments) was revised in 2006-2007 to allow for a priority assignment for certain bargaining unit members. The University agreed to allow these unit members to have a summer assignment if a course was available and they were qualified to teach the course. Prior to FAU's agreement to this new language at the bargaining table in 2007, in-unit faculty had no preference and all summer courses were assigned at the University's discretion. Since its first summer's application, the new language has been in dispute. The UFF has placed various glosses and renderings on the contract language and it has been raised at the bargaining table, in consultation and in grievances. The University seeks a fiscally feasible recommendation consistent with our understanding and practice. Even with the adoptions of the University's proposed language on the summer assignment issue, the contract would still be more generous to the Florida Atlantic University faculty than any other collective bargaining agreement at any other State University System institution.

Lastly, FAU seeks to maintain the status quo, current contract language for the notice period for non-reappointment actions, or in the alternative, accept the modified

position proposed by the University at the point of impasse. The University's position is consistent with the contractual language historically followed by the Board of Regents, the language continued in every other contract at every other State University institution, and our current practice.

II. THE CURRENT STATE OF FAU'S FINANCIAL FUTURE

FAU's approach when bargaining wages was to identify any funds available that would still reflect a policy of fiscal responsibility during these dire economic times. For fiscal years 2007-2008 and 2008-2009, FAU identified available funds, and then proposed the present salary articles. The same proposals, despite the almost daily worsening news on projected revenue, are still FAU's commitment and are submitted to the Magistrate for his consideration and recommendation.

A. Background - Florida Atlantic University's Operating Budget

The Florida Constitution was amended on January 7, 2003, to add language creating a Florida Board of Governors (BOG) and eleven (11) separate Boards of Trustees, one at each University or College, in the State University System (SUS). On January 7, 2003, the BOG passed a Resolution which extended constitutional authority to the Boards of Trustees, including the Florida Atlantic University Board of Trustees, to adopt regulations on matters involving personnel. The BOG's Resolution also identified the university boards of trustees as the public employer of their respective universities' employees for the purposes of collective bargaining.

Each university of the State University System is funded by a separate line item in the State of Florida appropriations budget. Within those line item budgets, there are further delineations that can and do occur, i.e., the Harbor Branch Oceanographic

Institute and Torrey Pines Institute for Molecular Studies budget delineations for FAU. Higher education budgets are generally funded by two types of funds: recurring funds and non-recurring funds. Recurring revenues are likely to continue in the future with a great deal of certainty. Non-recurring revenues are one-time revenues that once exhausted will be depleted and are unlikely to continue. FAU and other institutions rely on recurring sources of funding to support annual salaries and expenses. As a general rule these institutions do not rely on non-recurring revenues to fund a recurring budgetary item like salaries because the non-recurring revenues are not guaranteed to continue in the future.

To fund higher education, FAU relies on General Revenue from the State of Florida to fund its Operating Budget. FAU's Operating Budget is broken down into seven budgetary components: Education and General (E&G Budget); Student Financial Aid; Contracts and Grants; Auxiliary Enterprises; Athletics Local; Student Government; and Concessions. Of those seven budgetary components, only the E&G budget is comprised of recurring revenues available for salaries. FAU's Financial Aid, Student Government, and Contracts and Grants budgetary components are restricted for use either by State statute or Federal law. FAU's Auxiliary Enterprises budgetary component is non-recurring and not suitable for funding recurring budgetary commitments. In addition, some budgetary components within the Auxiliary Fund are restricted due to capital project bond covenants.

FAU's E&G Budget is the only source of recurring revenue that allows for discretionary spending for recurring salary increases. The E&G Budget is funded by General Revenue from the State of Florida, the Education Enhancement Trust Fund,

and the Student Fee Trust Fund.⁶ General Revenues consist primarily of sales and use taxes, corporate income taxes, and documentary stamp taxes. The Education Enhancement Trust Fund consists primarily of collections from the sale of Florida Lottery tickets. The Student Fee Trust Fund consists primarily of matriculation fees and out-of-state tuition.

Included within the University's E&G Budget are expenditures for instruction, research, library and learning resources, student services, plant operations and maintenance, and administrative support. Of the 1,090 faculty members at FAU, nearly ninety percent (90%) of those salaries are funded from the E&G budget. The remaining ten percent (10%) of the salaries are funded through research grants. Of the 11 universities in the SUS, FAU ranks sixth overall in expenditures on Undergraduate Instruction, seventh overall in expenditures on Graduate Instruction, sixth overall in expenditures on Library Resources, first overall in expenditures on Library Staffing, fifth overall in expenditures on Research and Service, ninth overall in expenditures on Plant/Operations and Maintenance, and eighth overall in expenditures on University Support.

In addition, Section 1013.61, Florida Statutes, requires that the FAU Board of Trustees adopt a capital outlay budget for the ensuing year to inform the public of the University's capital outlay needs. The Board of Trustees approved the University's Capital Outlay Improvement Plan on June 27, 2007, as recommended by the Board's Strategic Planning Committee. The Board of Trustees also approved the University's Capital Improvement Trust Fund (CITF) projects on February 20, 2008, as

⁶ Most of these revenues are recurring in nature, i.e., they are likely to continue in the future with a great deal of certainty.

recommended by the Audit and Finance Committee. The BOG approved the FAU fixed capital outlay request for the Public Education Capital Outlay (PECO) projects and the CITF projects. These projects were approved by the 2008 Florida Legislature as recommended by the Board of Trustees. FAU's Capital Outlay Budget funds are restricted in their use for the approved capital improvements and are not available for faculty salaries.

B. Recent Budget Reductions

The State of Florida General Revenue budget is projecting a deficit of approximately \$2.3 billion dollars for fiscal year 2008-2009. For fiscal year 2009-2010 the deficit is tentatively projected at \$3.8 billion dollars. In recent years FAU has seen steady reductions in State General Revenue and Lottery allocations towards its Operating Budget. For the period of July 1, 1997, to June 30, 2007, FAU's Operating Budget incurred a \$29.9 million dollar reduction. Recently budget reductions have rapidly increased, as FAU's Operating Budget incurred an \$8.4 million dollar reduction for 2007-2008, and a \$10.1 million dollar reduction for 2008-2009. In January 2009, the Florida Legislature approved an additional four percent (4%) reduction to FAU's budget of approximately \$7 million dollars for fiscal year 2008-2009.

Thus, for fiscal year 2008-2009 to date, the State of Florida has reduced FAU's budget by \$17.1 million dollars. While not finalized, FAU also expects that the Legislature will soon approve an additional three percent to three and one half percent (3%-3.5%) reduction for the 2008-2009 fiscal year due to the state's downward revised estimates of General Revenue. FAU projects this reduction will translate to an additional \$5 million dollar reduction in its current Operating Budget, on top of the recent

mid-year four percent (4%) reduction of \$7.1 million dollars. All totaled, the estimated impact of the reductions is a roughly \$30.5 million dollar reduction in recurring appropriations for fiscal years 2007-2008 to 2008-2009. In addition, FAU conservatively estimates based on continuing revenue shortfalls that the State of Florida will reduce FAU's budget by an additional \$15 million dollars for fiscal year 2009-2010, bringing FAU's total budget reduction for the three year period of 2007-2008 to 2009-2010 to approximately \$45.7 million dollars. That amount represents a reduction of nearly twenty five percent (25%) of FAU's General Revenue and Lottery allocation over the three year period of 2007-2008 to 2009-2010.⁷

FAU is steadfastly dedicated to its mission of undergraduate studies. Despite the State's ever increasing reduction in FAU's General Revenue and Lottery allocations, FAU has strived to apply those shortfalls across its Operating Budget in an effort to decrease the impact on its E&G budget. For example, for fiscal year 2007-2008, FAU's College Budgets constituted 51.5% of its Operating Budget, and its Non-Instruction Budgets constituted 48.5% of its Operating Budget. However, with a focus on maintaining the University's mission of undergraduate studies, FAU has implemented the funding reductions to its Operating Budget heavily within the Non-Instruction Budgets at a reduction of 63.5%, with only a 36.5% reduction to its College Budgets.

C. Clearwire Lease

In April 2008, the FAU Board of Trustees entered into a long-term *de facto* lease agreement with Clearwire Spectrum Holdings II, LLC ("Clearwire"), a Nevada limited liability company, for the lease of bandwidth assigned for use by FAU by the Federal

⁷ At the hearing the UFF provided the Special Magistrate with information on E&G budget growth that they knew was incorrect. Specifically, the UFF used a graph of figures titled "10 Year Growth Factor: Education & General Positions" that they had previously acknowledged contained incorrect data.

Communications Commission ("FCC") for educational purposes. Under the terms of the lease, Clearwire paid to FAU a lump sum payment up front, along with regular installments paid thereafter for the term of the agreement. From a financial standpoint, FAU has concerns regarding the sustainability of the Clearwire company for the term of the lease, as well as whether the technology can sustain itself without becoming obsolete. The Clearwire business plan is one such that the sustainability of the company is subject largely to market fluctuation. As a result, from a financial standpoint FAU would be fiscally irresponsible if it were to rely on the proceeds from the Clearwire lease as a source of anything other than non-recurring funds.

Notwithstanding, FAU has been utilizing the large lump sum initial payment from the lease to invest in long-term University growth, including funding faculty initiatives, studies on students and the completion of academic degrees, investment in research, as well as upgrading the University's information technology infrastructure. Additionally, FAU's 2008-2009 wage proposal is funded, at least initially, from Clearwire initial payment funds, as no other funds were available to fund any salary increase whatsoever. The University understands that the Clearwire payment will only fund the first year of the recurring wage proposal and FAU will have to cut additional recurring operating budget items to fund the base increase thereafter.

While the Clearwire lease does not provide FAU with a source of recurring funds for immediate use towards recurring budget items such as faculty salaries, FAU is positive the investments it has made with the funds will pay long term dividends for the University and enable it to develop and grow its financial resources for long term sustainability. For example, the upgrade to FAU's communication network should

provide additional opportunities for distance learning offerings on multiple campuses from one location, thereby increasing FTEs and boosting the University's potential for additional recurring funds from the legislature—which can be used for faculty salary increases.

The UFF argues that the “long-term” lease should be considered recurring due to what is termed a “10 year minimum” lease. This fiscally dangerous assumption is erroneous. Rather, if Clearwire terminates the lease, perhaps because of insolvency or because the technology they are using the leased bandwidth for becomes obsolete, FAU's primary recourse against Clearwire will be the return of the leased frequency channels back to the University.⁸ Clearly, this will not fund recurring base salaries for faculty.

III. THE MAGISTRATE SHOULD RECOMMEND THE ADOPTION OF THE UNIVERSITY'S PROPOSAL FOR ARTICLE 23 ON “SALARIES”

A. UFF's Wage Proposal

The UFF has proposed a two and one half percent (2.5%) across the board base salary increases in each of fiscal years 2007-2008 and 2008-2009. The cost of UFF's proposal to FAU for fiscal year 2007-2008 would be approximately \$1.9 million dollars, paid out retroactively. The cost of UFF's proposal for fiscal year 2008-2009 would be the \$1.9 million dollars from above, plus approximately \$1.974 million dollars. In total, FAU would have to cut its budgets by approximately five million seven hundred and forty seven thousand and five hundred dollars (\$5,747,500.00) to fund UFF's salary proposal. To make such cuts FAU would be required to eliminate additional faculty and

⁸ See Section 11(g) of the Clearwire lease.

staff, in contravention of its current desire and dedication to maintaining its standard of service to the public.

B. 2007-2008 Memorandum of Understanding

In fiscal year 2007-2008 FAU and the UFF executed a Memorandum of Understanding ("MOU") dated October 3, 2007. Under that MOU all eligible bargaining unit employees whose salary was funded by E&G funds received a non-recurring single payment of one thousand dollars (\$1,000.00). This was a non-recurring compensation action funded by the State of Florida. In addition, the parties agreed to promotional increases in amounts equal to nine percent (9%) of an employee's previous year's base salary rate in recognition of promotion to Associate Professor, Associate in _____, Associate Scholar/Scientist, Associate Engineer, Associate Research Professor, and Associate University Librarian; and twelve percent (12%) of an employee's previous year's base salary in recognition of promotion to Professor, Scholar/Scientist, Engineer, Research Professor, and University Librarian. The cost of UFF's wage proposal for 2007-2008, above, does not include the monies already committed pursuant to the October 3, 2007, Memorandum of Understanding.

C. FAU's Current Wage Proposal

With cutbacks in General Revenue and Lottery allocations from the State of Florida in the amount of approximately \$8.4 million dollars in 2007-2008, FAU is unable to fund a recurring increase to base salaries for that fiscal year. For fiscal year 2008-2009, it is FAU's position that due to ever increasing cuts in funding to its E&G budget by the State, the most FAU can responsibly offer on a recurring basis is a one percent (1%) base salary increase. Presently, FAU offers for fiscal year 2008-2009 a one

percent (1%) base salary increase for all permanent bargaining unit employees who were employed as of May 1, 2008, and have continued employment through November 1, 2008, plus a \$1,000.00 non-recurring, lump sum bonus. FAU's proposal is projected to cost the University approximately \$2,158,793 dollars in new compensation for fiscal year 2008-2009. That figure does not include the cost of the non-recurring lump sum payment of \$1,000.00 per eligible faculty member pursuant to the October 3, 2007, MOU, which FAU proposes for fiscal year 2007-2008.

Not only is FAU's wage proposal for 2008-2009 fiscally responsible in light of the steep budget cuts, but it is also in step with FAU's position with regard to the ten other universities in the State University System. For example, for Fall 2007 FAU ranked sixth overall in total number of faculty (1,066), total students (26,525) and Full Time Equivalent (FTE) students (14,154), respectively. FTEs are used as a measure of productivity of a university throughout the SUS. In that same year FAU ranked seventh overall in average 9 month salaries of faculty members (\$67,703). Notably, the range between sixth and fourth is slim--slightly more than \$4,000 dollars. Of the eleven universities and colleges in the SUS, two other schools (UCF and FGCU) have offered a similar wage proposal to FAU's at one percent (1%) base increase and a \$1,000.00 lump sum bonus. Of the institutions in the SUS offering a larger proposed wage increase, all of them have substantially larger student bodies (UF – 52,084; FSU – 41,002; USF – 45,524; FIU – 38,614), and substantially larger FTEs (UF – 34,792; FSU – 27,695; USF – 25,857; FIU – 24,606). Additionally, of the remaining four institutions in the SUS, one is proposing only a one-time lump sum bonus of \$1,000.00 (FAMU),

and the other three institutions propose no wage increase for 2008-2009 at all (UWF, UNF, and NCF).

A five year salary comparison of the eleven institutions in the SUS reveals that FAU is also in step with its overall ranking among the institutions based on the number of its full time students and FTEs as compared to average salaries. For example, for 2007-2008 FAU ranked seventh in average salaries of professors, ninth in average salaries of associate professors,⁹ third in average salaries of assistant professors, and sixth in average salaries of instructors. In addition, a review of a five year salary comparison of fourteen "Peer Institutions" – institutions from around the country with similar enrollment, faculty size, and FTEs designated as peers by the FAU Board of Trustees and the Board of Governors – reveals that FAU has steadily increased its ranking in faculty compensation among its peers.¹⁰ For example, since 2003-2004 FAU has increased from twelfth to ninth in average salaries of professors, from tenth to eighth in average salaries of associate professors, and from seventh to fifth in average salaries of assistant professors. Accordingly, despite mounting reductions in its Operating Budget over the past ten years, FAU has been able to maintain competitive salaries for its faculty employees in comparison to universities of comparable size.

A comparison of Peer Institutions, or SUS universities of similar enrollment, faculty size, and FTEs, is much more illustrative of FAU's ranking of average salaries than the comparison group the UFF proposed, referred to as the UFF's "SUS

⁹ While FAU's overall rank with regard to associate professors would appear to be low, in actuality approximately \$1,900 dollars separates sixth from ninth, and among the universities ranked fifth, sixth, seventh, and eighth, only two universities have proposed a merit increase for fiscal year 2008-2009 (FSU and FGCU).

¹⁰ Those institutions designated by the FAU BOT and the BOG as Peer Institutions of FAU include Georgia State, George Mason, UNLV, Virginia Commonwealth, University of Louisville, University of Toledo, Old Dominion, University of Wisconsin-Milwaukee, University of Memphis, University of Akron, University of Texas-Arlington, Portland State, and Indiana University-Purdue.

Subgroup". UFF's SUS Subgroup consists of SUS universities UCF, USF, and FIU. Each of those universities had substantially higher enrollment and FTEs as compared to FAU for Fall 2007, with UCF's enrollment at 48,699, USF's enrollment at 45,524, and FIU's enrollment at 38,614. For Fall 2007, FAU's enrollment was 26,525. In addition, each of UFF's SUS Subgroup universities had substantially higher FTEs as compared to FAU for 2006-2007, with UCF's 30,032 FTEs, USF's 25,857 FTEs, and FIU's 24,606 FTEs. For 2006-2007, FAU had 14,154 FTEs. Moreover, the universities among the UFF's proposed "SUS Subgroup" have been authorized by the Florida Legislature to charge "differential tuition", or additional tuition to be charged beyond what is normally allowed by law, whereas FAU has not. Accordingly, the "SUS Subgroup" has additional sources of revenue to fund salary increases that are not available to FAU, and thus this group is not an appropriate comparator.

Despite drastic cuts to FAU's budget over the past two years, and a forecasted cut in the range of at least \$15 million dollars more for fiscal year 2009-2010, FAU is making every effort to preserve the University's academic and research mission. FAU can realistically expect the ongoing cuts to the State's General Revenue and Lottery funds to continue into the future, and as such FAU cannot responsibly undertake to fund a recurring salary increase of the unsustainable variety proposed by the UFF. Nevertheless, FAU's wage proposal continues to keep FAU competitive with Peer Institutions, as well as comparable institutions within the State University System. Accordingly, FAU requests that the Special Magistrate consider FAU's salary proposal and recommend its adoption.

IV. THE MAGISTRATE SHOULD RECOMMEND THE ADOPTION OF THE UNIVERSITY'S PROPOSAL FOR ARTICLE 8 ON "APPOINTMENT"

The University seeks to clarify language in the contract that defines the process for assigning summer appointments. Currently the contract, dating back to 2006-2007, sets out a three tier priority list for the assignment of a summer course. Ordinarily and historically, the assignment of a summer course is left to the discretion of the University without any priority guidance, and was supplemental to the nine month academic year contract.

By accepting language allowing faculty to have the opportunity to option for a summer assignment, the University agreed to the most generous summer assignment language of any contract at any of the state universities. Surprisingly to the University, upon the implementation of the language in 2007, the UFF asserted that faculty had the right to option for two (2) summer assignments.

The UFF's gloss on this contract language is unacceptable because it is not affordable, would limit the extent of the summer curriculum, eliminate teaching opportunities for certain ranks in the unit, and obtain a result never intended or agreed upon by the University. Undisputed testimony established at the hearing that the UFF's reading of Article 8 would cost approximately three million four hundred thousand dollars (\$3,400,000.00) in additional funding that is not available to the University.

The University respectfully requests that the Magistrate recommend the adoption of the University's proposal for Article 8 clarifying the intent of the contract and resolving any lingering dispute between the parties.

V. THE MAGISTRATE SHOULD RECOMMEND THE ADOPTION OF THE UNIVERSITY'S PROPOSAL FOR ARTICLE 12 ON "NON-REAPPOINTMENT"

Historically, the Universities of the State University System have enjoyed the contractual right to non-reappoint a non-tenured faculty member. It is in essence the ability of the University to not renew the employment of faculty who have yet to secure an expectation of continuing employment by the award of tenure.

The non-renewal process is codified in Article 12 in the current collective bargaining agreement between the UFF and the University. Part of this process is a notice requirement. The current contract's notice period is generally consistent with all other contracts for all other Universities in the State University System. Copies of each contract provision at the other institutions have been submitted to the Magistrate for his review and comparison.

The University initially expressed a desire to retain the current contract language defining the notice period for a non-reappointment. Through negotiations, the University modified its position to bring the contract language closer to the UFF's proposal. At impasse our modified position is as follows:

Employees during the first year of employment (on 9 month contracts) shall receive notice by March 1 of the academic year or for twelve – month appointments at least twelve (12) weeks.

Employees in their second year of continuous employment (on a 9 month contract) shall receive a one semester notice or for twelve – month appointments at least 19.5 weeks.

Employees with two (2) or more years of continuous employment (on 9 month contracts) shall receive a two semester notice or for twelve – month appointments at least 39 weeks.

These notice periods are of sufficient duration to allow for a bridge in employment and are calibrated by semester length to allow for a separation consistent with academic employment. Academic year faculty will receive notice that will allow for employment to end at the close of an academic term.

A non-reappointment may be necessary in circumstances where an instructor is not delivering quality education or is teaching in an area that is not needed or wanted. To extend this notice period significantly as proposed by the UFF would disserve the public interest and the delivery of quality education. Given the already lengthy notice period required by the University's proposal, the UFF's proposal to prolong for an additional year or an additional semester the services of an employee who is not delivering quality education is without merit.

The University's proposal also allows for greater flexibility in structuring the notice period for non-reappointed employees. The semester notice, including all forms of semesters, would allow for an individual to be able to agree to work during a summer semester instead of necessarily returning to a partial year.

The UFF urges the adoption of a non-reappointment notice as recommended by the American Association of University Professors (AAUP). But the University is not an institution in the AAUP, bound by the AAUP or guided by the AAUP. As reflected above, no University in the State University System has negotiated the expanded notice period proposed by the UFF. Additionally, no University in the State University System has adopted the recommended notice period of the AAUP.

The UFF also errs in suggesting that the adoption of the expanded notice period would be of no cost to the University. Obviously, whenever the University expands the

duration of compensated employment for an individual who has been identified for non-reappointment, there is a cost.

The University respectfully requests that the Magistrate recommend the adoption of its proposed language for Article 12.

VI. THE APPROPRIATENESS OF ARTICLE 8 AT IMPASSE

Since the Summer 2007 the Parties have disagreed as to the interpretation and application of Article 8 and in particular Section 8.4(b). The gravamen of the dispute arises from new language allowing preferences for a summer appointment by rank. The University always intended for the preference to be for a summer appointment. The UFF asserts that the preference is for up to two (2) course assignments.

This disagreement has been the subject of discussions at the collective bargaining negotiating sessions, consultations, correspondence and a grievance. During the transition of negotiations from the 2007-2008 year to negotiations for the 2008-2009 year, the University proposed new contract language that would bring a mutual understanding of the contractual language and intent.

The reading of the contract by the UFF is not feasible. As stated herein, there are insufficient funds available for the bargaining unit faculty to have the authority to option for two summer course assignments. Additionally, the UFF's position would interfere with the availability of courses needed by the students during the three summer terms.

When a dispute exists over terms and conditions of employment to be incorporated into a collective bargaining agreement, the parties are entitled to have an impasse resolved by the legislative body. See 447.403(4)(c)-(e), Fla. Stat. (2008); see

also City of Winter Springs v. Winter Springs Prof'l, 885 So. 2d 494 (Fla. 1st DCA 2004). It is appropriate to declare impasse if, after a reasonable period of negotiation, a dispute exists between the parties regarding a mandatory subject of bargaining. Id. (citing United Faculty of Florida v. Florida Bd. of Educ., 28 FPER ¶ 33232 (2002)).

In Manatee Educ. Assoc. v. Manatee County Sch. Bd., 8 FPER ¶ 13408 (1982), the Commission opined that, “the procedures governing special master proceedings and legislative body resolution of impasse issues require each party, following declaration of impasse, to provide the special master and each other a list of issues at impasse. Following the special master hearing and issuance of the special master recommended decision, a public hearing is held.” In Manatee, the school board committed an unfair labor practice because it resolved certain reopener subjects that had not been presented to the special master. Importantly, the Commission clearly set forth the general rule that if an issue is expressly identified to the special master as at impasse the neutral arbitrator shall render a decision on that issue. The legislative body resolution of issues should occur only when there has been a clear failure to reach agreement on precisely drawn issues. Id. at 8 FPER ¶ 13408, p. 747.

In the instant matter, the issue of Article 8 is properly before the Special Magistrate for impasse resolution because the issue was clearly identified as at impasse and unresolved between the parties. The issue was raised during negotiations by the University, final proposals were provided to the UFF at the bargaining table and the issue remained unresolved for a period of several months. The UFF admittedly refused to engage in collective bargaining on Article 8 when raised at the bargaining table. The matter is clearly at impasse and should be resolved through this process.

See Declaration of Impasse (November 24, 2008), letter to Sharmila Vishwasrao (November 24, 2008), letter to Magistrate Schneider (January 14, 2009). At the impasse hearing, the UFF is on record explaining that it desires this dispute to be decided through arbitration rather than the statutory bargaining/impasse process. This argument is contrary to Florida's labor policy which favors the bargaining table for dispute resolution.¹¹

Further, the University notified the UFF on November 24, 2008 of the need to invoke Section 447.4095, Florida Statutes, with regard to Article 8. This provision in Florida Law allows for the Parties to take issues to impasse. The University advised the UFF that it did not possess the funding that would be required of its reading if the contract was pursued.

Specifically the law states, in pertinent part:

If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred . . .

§ 447.4095, Fla. Stat. (2008).

The University invoked Section 447.4095 related to Article 8, allowed for the passage of fourteen (14) days and identified that the Article was at impasse. As a result this issue is properly before the Magistrate for a recommendation.

The UFF's objection to the issue being at impasse is without merit. Its contention seems to be that the University did not identify this issue as subject to being reopened in February 2007. This is a specious argument because neither party identified any

¹¹ As PERC frequently states, "The bargaining table is the preferred forum for resolving labor disputes between public employers and the labor organizations representing public employees." E.g., Manatee Educ. Ass'n v. School Dist. Of Manatee County, CA-2008-067 at p.13 (February 27, 2009).

articles for reopener in February 2007. Rather the Parties agreed to identify issues for negotiations at the bargaining table.

This practice is consistent with the bargaining history between the University and the UFF. From 2003 through the present, the Parties have raised issues for bargaining at the negotiating table instead of by a "February" notice.

Additionally, the 2007-2008 reopener negotiations ran a full annual cycle without resolution. The Parties in the Summer 2008, at the table, agreed to turn our attention forward to the 2008-2009 contract year. It was in this context that the University provided a proposal for Article 8.

In any event, the UFF concedes that the summer assignment issue is a dispute and an ongoing matter to be resolved between the Parties. Any technical legal objection argued by the UFF should be directed at the Public Employees Relations Commission at a proper time and in the proper venue.

Lastly, for the purposes of judicial economy, it is appropriate to make a recommendation on this issue in this proceeding. No Party was surprised by this issue. It was properly matured and fully briefed by both Parties at the hearing. The UFF's suggestion that this issue at impasse should be submitted to a different magistrate for a separate hearing has no support in statute or case law. The University is confident that this issue is properly submitted to the Magistrate and it makes no sense to defer this for a separate proceeding by a different magistrate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by
U.S. mail, postage prepaid, on this 9th day of March, 2009, upon:

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