

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

LOCAL 1158, CLEARWATER FIRE FIGHTERS ASSOCIATION, INC., IAFF, :

Charging Party, :

v. :

CITY OF CLEARWATER, :

Respondent. :

Case No. CA-2005-086

HEARING OFFICER'S
RECOMMENDED ORDER

Paul A. Donnelly and Laura A. Gross, Gainesville, attorneys representing charging party.

Leslie K. Dougall-Sides and Paul Richard Hull, Clearwater, attorneys representing respondent.

ZAHNER, Hearing Officer.

On December 23, 2005, Local 1158, Clearwater Fire Fighters Association, Inc., IAFF (Local 1158) filed an unfair labor practice charge alleging that the City of Clearwater (City) violated Section 447.501(1)(a) and (b), Florida Statutes (2005).¹ The charge was found sufficient and a hearing officer was appointed. The City timely filed its answer and denied that it committed an unfair labor practice.

On May 19, 2006, without objection, a telephone hearing was held between Clearwater and Tallahassee.² All parties were afforded the opportunity to appear, present evidence and argument, cross-examine witnesses, and fully participate in the

¹All statutory references are to the 2005 edition of the Florida Statutes.

²Two unopposed motions to continue the hearing were granted.

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proceeding. The rule of sequestration of witnesses was invoked, and the witnesses were instructed accordingly. At the conclusion of the testimony, the parties were advised of their right to file written briefs, proposed findings of fact, or proposed orders. Both parties timely filed a written post-hearing document, and these were considered.³ A transcript of the evidentiary hearing has been filed.

ISSUES

1. Whether the City violated Section 447.501(1)(a), Florida Statutes, by promulgating and maintaining an overly broad no solicitation rule?
2. Whether the City's no solicitation rule violates Section 447.501(1)(a) and (b), Florida Statutes, because it discriminates against Local 1158's messages?
3. Whether Local 1158 is entitled to an award of attorney's fees and costs pursuant to Section 447.503(6), Florida Statutes?

ADMINISTRATIVE NOTICE

Without objection, I take administrative notice of the charges and the answers in PERC Case Nos. CA-2005-065 and CA-2005-071.

³The Commission granted the parties two extensions of time for filing post-hearing documents and equal amount of time for the issuance of this recommended order.

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FINDINGS OF FACT

Based on the testimony, exhibits, stipulations, and the record as a whole, I make the following findings:⁴

Background

1. The City is a public employer and Local 1158 is an employee organization within the meaning of Section 447.203, Florida Statutes. (Stipulation 1; T 10-11)
2. Local 1158 represents a bargaining unit comprised of supervisory certified fire fighter employees and a bargaining unit comprised of rank-and-file certified fire fighters. The parties have negotiated a collective bargaining agreement (CBA) for the rank-and-file unit which is effective from October 1, 2004, through September 30, 2007. (Stipulation 2; T 10-11)
3. Bargaining unit employees in the City's Clearwater Fire/Rescue Department (CFR) are assigned to one of three rotating twenty-four hour shifts. During their twenty-four hour shifts, the employees sleep and eat at their fire stations and are allowed non-work time during which they may engage in certain personal or non-work activities and communications. (Stipulation 3; T 10-11 and 15)

⁴For stylistic purposes, the parties' stipulations have been included in my findings of fact. In addition, some of the stipulations have been reworded without altering their meaning.

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4. CFR Standard Operating Procedure Section 618 sets forth the daily work schedule. It identifies non-work or "down" times, including, from 9:00 a.m. until 9:30 a.m. for a morning coffee break; from 11:00 a.m. until 1:00 p.m. for exercise, lunch, individual study, relaxation, T.V. viewing, resting, etc.; and from 5:00 p.m. until 7:30 a.m., when the employees are on standby status. Unless they are responding to a fire or rescue call, during these periods bargaining unit employees may read, socialize, or engage in other personal or non-work activities and communications including using their own laptop computers or the City's computer. (Ch. Party Ex. 1; T 16-17 and 25-27)

5. The fire stations have non-work areas including sleeping quarters, an exercise room, a fully equipped kitchen, a dining room, and a living room with recliners, a telephone, and a television. Outside of the stations, there are patio areas with picnic tables and grilling equipment. (T 22-25)

6. Local 1158's executive board members are elected by Local 1158's members. The President since 1998 is John Lee, a driver-operator who has been employed in the fire department since 1978. The Executive Vice-President since 2001 is Vincent J. Carino, a driver-operator who has been employed in the fire department since 1977. The Secretary/Treasurer since 1998 is David Hogan, a fire-medical who has been employed in the fire department since 1989. (Stipulation 4; T 10-11 and 15)

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7. On October 24, 2003, then Chief Rowland Herald issued a draft or tentative directive restricting the CFR employees' use of the City's email system. However, the directive did not become effective.⁵ (Resp. Ex. 4; T 97-98, 133-37, and 152-53)

8. On or before March 31, 2004, the City Manager approved a revised computer resource use policy which prohibited the use of internal distribution lists to disseminate non-business related information. Chief Herald clarified that the City's policy did not restrict Local 1158's use of the computer system. He stated:

The existing policy has been to permit the union to utilize the City email system to notify employees of official Union matters (meetings, negotiating session or updates) and your annual picnic. That will continue although the City reserves the right to discuss the future use of the City email system by the Union in the Labor/Management or negotiating process....

(Ch. Party Ex. 4; T 98-100)

9. Jamie Geer was hired as Fire Chief by City Manager William Horne in August 2004. During his employment, Chief Geer has taken actions within the fire department. The City proposed the elimination of district chief positions in collective bargaining discussions. Chief Geer has made changes to the shift bid/assignment system, has amended certain job descriptions, and has recommended the termination of

⁵For this finding, I rely on Hogan's credible testimony, and do not credit the contrary testimonies of Fire Chief Jamie Geer and Human Resource Director Joseph Roseto. Hogan's assertion that the directive did not become effective is supported by the City's failure to explain the timeline notation at the bottom of the directive. Moreover, an explanation of email use in Charging Party Exhibit 4 sent by former Chief Herald on April 1, 2004, supports Hogan's testimony that the directive was never in effect.

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three African-American bargaining unit employees. He also increased the number of managerial and administrative employees and has issued a temporary directive banning female firefighters from entering burning structures. (Stipulation 5; T 10-11 and 59-60)

10. Local 1158 opposed many of the changes proposed by Chief Geer. It filed numerous grievances and requested impact bargaining over some of the changes. It publicly expressed its opposition by writing letters to the newspaper and posting notices on its web page. It also examined the qualifications of the persons hired. (Stipulation 6; T 10-11 and 60-63)

11. Some of the changes proposed by Chief Geer resulted in Local 1158 being dissatisfied with his administration. During Local 1158's regular monthly membership meeting in July, 2005, the issue of no confidence in Chief Geer's ability to lead the CFR was raised and hotly debated. The motion to vote on the issue passed. Ballots were mailed on August 30 and tallied on September 20. Of the one hundred twenty-one members voting, eighty-seven voted no confidence in Chief Geer. (Ch. Party Ex. 8; T 63-66)

Union Communications

12. Article 3, Section 3.A., of the Agreement provides:

Stewards: There shall be one (1) Union Official or designee for all bargaining unit members on each shift in addition to the Union Official for Fire District Chiefs. An employee working in the classification of Fire Inspector shall be represented by the "on-duty" or other union official.

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An employee having a grievance shall have the right to take the matter up with his/her Shift Steward or other Union Officer during working time, provided that neither the employee nor the Shift Steward may leave their assigned Fire Station or work area outside a Fire Station without prior permission of the Fire Chief or his/her specifically designated representative, and, provided further, that the employee and the Union Official shall not interfere with the normal operations of the Department.

All members of the bargaining unit may wear the I.A.F.F. pin on their uniforms.

(Stipulation 7; Ch. Party Ex. 2; T 10-11)

13. Article 3, Section 3.D, of the Agreement provides:

Bulletin Boards: The City agrees to provide a 2 feet x 4 feet space on bulletin boards at each Fire Station for posting by the Union of notices of meetings or other official Union Information; provided the Assistant Chief or his/her designee shall first review such posting, and if found to be outside of the scope of this Section, such posting shall be modified to the mutual agreement of the parties. The District Chief will continue to include the Union notices in the intra-departmental mail which he/she delivers to the stations.

(Stipulation 8; Ch. Party Ex. 2; T 10-11)

14. Article 6, Section 2 (last sentence), of the Agreement provides:

For purposes of this Grievance Procedure, normal working hours shall be considered 8:00 a.m. to 5:00 p.m. and normal workdays shall be considered Monday through Friday, holidays excepted.

(Stipulation 9; Ch. Party Ex. 2; T 10-11 and 19-20)

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15. Article 8, Section 6.B., of the Agreement provides, in part:

The Union may, upon request, be allowed up to 400 duty hours per fiscal year to be excused for Union business, conferences, training, and Executive Board meetings pertaining to the City of Clearwater. Any such request must be initiated in writing through the chain of command, via the District Chief, and will give the name of the person wanting off, date the person is to be off, and the number of hours the person will be off. Time off from duty under this provision must be approved by the Fire Chief or his/her designee and must be taken in not less than four-hour increments....

(Ch. Party Ex. 2)

16. Article 3, Section 1, of the Agreement provides:

Except as expressly limited by any provision of this Agreement, the City reserves and retains exclusively all of its normal and inherent rights with respect to the management of its operations, whether exercised or not, including, but not limited to, its rights to determine, and from time to time redetermine, the number, location and type of its various operations, functions and services; the methods, procedures and policies to be employed; to discontinue the conduct of any operations, functions or services, in whole or in part; to transfer its operations, functions or services from or to, either in whole or in part, any of its departments or other divisions; to select and direct the working force in accordance with requirements determined by the City; to create, modify or discontinue job classifications; to establish and change working rules and regulations; to establish and change work schedules and assignments; to transfer, promote or demote employees; to lay off, furlough, terminate or otherwise relieve employees from work for lack of work, lack of funds, or other legitimate reason; to suspend, discharge or otherwise discipline employees for proper cause; to alter or vary past practices and otherwise to take such measures as the City may determine to be necessary to the orderly and efficient operation of its various operations, functions and/or services.

(Ch. Party Ex. 2)

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17. The City maintains a computer and email system through which employees communicate internally with each other and externally with non-employees.

(Stipulation 10; T 10-11)

18. The City's Computer Resources Use Policy, Paragraph A, Business Use, dated March 2004, states, in pertinent part:

A. BUSINESS USE

The Computer Resources are the property of the City of Clearwater and are intended for use for legitimate business purposes. Users are permitted access to the Computer Resources to assist them in the performance of their jobs. Individual Department Directors may allow incidental use for personal research or communications providing such use does not violate this Policy. Such use must not interfere with performance of the Users' job duties or consume a significant amount of City computing resources. Department Directors shall determine what shall be considered appropriate incidental use during time periods when employees are on standby status. Use of the Computer Resources is a privilege that may be revoked at any time. In using or accessing the Computer Resources, Users must comply with the following provisions.

The Policy lists 17 prohibited activities, including:

4. Users will not use the Computer Resources to promote charitable activities, volunteer organizations or special interest organizations that are not explicitly sponsored or financially supported by the City of Clearwater; or receive prior approval as granted by the City Manager.
5. Users will not utilize internal distribution lists to disseminate non-business related information. This includes distribution lists created by Network Services and those created by individual users.

(Stipulation 11; Ch. Party Ex. 3; T 10-11 and 28-29)

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Use of Computers and Communications Prior to August 26, 2005

19. Prior to August 26, 2005, employees were allowed to use the computer and email system for certain non-work related purposes. In addition, Local 1158 used the City's computer and email system for (1) incidental support of Local 1158 and dissemination of union related information to bargaining unit employees; and (2) to send out emails to "all fire department employees" regarding union meetings and activities. (Stipulations 12 and 13; Ch. Party Ex. 4; T 10-11)

20. CFR employees were permitted to use the City's computer and email system on and off their twenty-four hour shift and on and off City premises. There were essentially no restrictions on CFR bargaining unit employees using the City's computer and email system during their down time to research, create documents, send or receive non-work related messages, including union related messages, and communicate with management about matters related to the CBA, negotiations, and grievances. For such use, the City did not require pre-approval. (Ch. Party Exs. 4, 5, 7, and 10; T 29-35 and 37-38)

21. Local 1158 and CFR employees sent emails about union meetings, negotiating sessions, updates, its annual picnic, employee surveys of issues related to contract negotiations, and "Good and Welfare" information, which included announcements of significant personal events involving employees. (Ch. Party Exs. 4 and 6; T 29-31 and 39-40)

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22. Local 1158, through its employee representatives, was authorized to and did communicate in person and by telephone and email with CFR employees about union related activities or to prepare for negotiations at the fire stations during the down times of the representatives and the employees. (Ch. Party Ex. 6; T 34 and 40-43)

23. Local 1158 held evening union meetings with on-duty employees at fire stations during down time. Chief Geer approved requests for executive board meetings, a negotiation team meeting, and a district chief representatives' meeting for contract negotiations at stations 48 and 51. Chief Geer and former Chief Herald approved on-duty units to attend monthly union meetings held at the union hall. Units attending such meetings were not taken "out-of-service," meaning that they were not available. Rather, such units either remained in "in-service" status or were placed in "delayed" status. In-service status means that the unit is in its response area. Delayed status, which requires approval through the chain of command, means that the unit is available for responding to a call but because it is out of its response area its response time is delayed.⁶

(Ch. Party Ex. 6; T 43-44 and 168-72)

⁶For this finding, I credited Hogan's testimony over that of Chief Geer's. Additionally, the City did not establish that it was necessary to place units out-of-service to attend union meetings. Moreover, out-of-service and delayed status requires approval through the chain of command. Therefore, contrary to his testimony, Chief Geer knew or should have known the status of units attending such meetings.

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24. Since 1999, Local 1158 has provided new hires with a union orientation as part of the City's orientation. The orientation is held after the new hires are released at the end of the day at stations 45 and 48 and at the union hall. (T 41-43)

Chief Geer's Restrictions

25. On August 9, Chief Geer denied Local 1158's request to hold an executive board meeting at station 51. In response to Hogan's email request for a reason for the denial, Chief Geer asserted, "I am not required to provide reasons, just a decision." In his email response Chief Geer also criticized Local 1158 by asserting that its collaborative labor/management efforts lacked sincerity and that success in that area required a fundamental change in union leadership and moral and ethical principals and values. (Ch. Party Ex. 11; T 70-71)

26. On August 5 and 22, Chief Geer forwarded to all CFR employees emails in which he and Human Resources Director Roseto expressed disapproval of Local 1158's representatives. In the August 5 email, Chief Geer disapproved of the discourteous tone of an email Hogan sent to Operations Chief Bacher. Chief Geer asserted that the email system will not be used to conduct union business. He also stated, "Understand that if you use the email system again in a similar manner, I will prohibit the local's use of the system. 1158 has been giving tremendous latitude to use the email system. No other labor union enjoys the privilege. If you have further questions, you are to direct them to my office." In response to Chief Geer's email, Roseto asserted that he supported limiting

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the use of the email system. In the August 22 email, Roseto criticized Lee for his lack of professionalism in scheduling and attending meetings. (Ch. Party Exs. 9 and 12; T 66-68 and 71-72)

27. On August 26, Chief Geer issued an email of "High" importance to all fire department employees regarding "Directive Regarding Emails - EFFECTIVE IMMEDIATELY" which stated:

Effective immediately, the use of the email system to send group messages to all fire department employees is prohibited unless cleared through your respective Division Chief.

All personnel are also reminded and must comply with the City of Clearwater's Computer Resources Use Policy (Administrative Policy 7001).

(Stipulation 14; Ch. Party Exs. 3 and 13; T 10-11 and 72-73)

28. On August 31, Chief Geer sent the following email to Lee, Carino, and Hogan:

Please note that my direction is that there will be no union activity on duty or on premises without my approval. No employee will be allowed to visit, participate, or view any union hall activity while on duty or paid status until further notice and without my approval. Florida Statute 447.509 is very clear in its prohibition of these activities and the appropriate discipline for a violation. Any of these activities will be reported to the office of the Fire Chief.

Chief Geer's email was sent following other emails related to a Local 1158 orientation. Local 1158 had at certain times in the past provided such orientation on City premises.

(Stipulation 15; Ch. Party Ex. 15; T 10-11 and 73-75)

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29. The following day, Chief Geer sent out a mass email to "all fire department employees" and several managerial employees, including but not limited to Horne, regarding the subject "Vote of No Confidence." Chief Geer's email targeted Lee, Carino, and Hogan and stated:

It has come to my attention that the e-board of Local 1158 is conducting a vote of no confidence in the Fire Chief. I have believed all along that Lee, Carino, and Hogan would commit one last desperate act. I am through playing around and it is time for change. Three years of disgraceful behavior and irresponsibility rests with their leadership. Lee, Carino, and Hogan have disgraced our honorable profession and most importantly have disgraced our honorable brotherhood of the IAFF. This assault on the office of the Fire Chief is an assault on the entire management team, an amazingly talented and experienced team. I will not stand by and allow my office and my team to be insulted. I will use every means at my disposal to finally hold these firefighters accountable. We cannot advance to the next level until we cleanse our organization of the disgraceful and incompetent behavior of these representatives. Their credibility has declined to nothing.

It is decision time. Every member of this department must make a decision, to support and become a partnership of labor and management, or to support the pre-sent representatives of this local. I cannot express to you the importance of this decision in the minds of our entire community. We have struggled to gain approval for resources because of the recognition of irresponsible behavior. Each and every time your representatives have demonstrated unprofessional and irresponsible behavior, we have moved another step toward alternatives to providing fire protection and EMS services.

The world recognizes what my administration has brought to this department and that is accountability. No one in this past years events [sic] has been wrongly accused, all were held accountable and rightfully so. Time and time again, though their words supported accountability, their actions do not. I have watched the

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tremendous struggle this caused Lee and company. Our moral, ethical, and professional standards were never compatible and never will be. That is why our collaborative partnership was doomed from the start and always will be. It is time to move on and move ahead. The actions I have taken this year have provided the community, the media, elected officials, and city management hope that our much needed cleansing was taking place, long overdue, and leading to our success. If we choose a different course, we will fail. I challenge you all to take control and decide your future. It is time for the silent majority to be heard and replace these representatives. I have people every day ask me what would it take to get the silent majority to act and address this issue. I believe that this is our defining moment. Our future is at stake. I challenge you all to do the right thing and do it openly. The deadline is September 20th.

The City asserts that the allegations contained in this paragraph are the subject of PERC Case No. CA-2005-065 and therefore are not at issue in this case. (Stipulation 16; Ch. Party Ex. 16; T 10-11 and 75)

30. On September 1, Horne sent an email to Local 1158's Officers Lee, Carino, and Hogan which stated:

John, The scheduled vote of no confidence on Chief Geer, regardless of the outcome, will generate unintended consequences for your IAFF Local 1158 members. Given the level of media exposure CFR [Clearwater Fire-Rescue] has had over the past 3 years, this most recent development answers the question the council has asked about the relationship between the fire administration and IAFF Local 1158. I hope that you and your board are prepared to accept the internal and public unintended consequences that are sure to come during and after the vote. I am extremely disappointed in you and your board. However, life goes on and I am fully prepared to embrace the uncertain future in our relationship.

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The City asserts that the allegations continued in this paragraph are the subject of PERC Case No. CA-2005-065 and therefore are not at issue in this case. (Stipulation 17; Ch. Party Ex. 17; T 10-11)

31. On September 1, fire department employee William Wargin sent out an email to all fire department shift employees voicing his approval of Chief Geer. In response, Roseto sent an email to Chief Geer which stated:

While these comments are certainly welcome, I would suggest you remind your folks that you have just issued a directive prohibiting the sending of group emails without your permission. This will ensure we are consistent when the need to enforce the policy is required.

(Stipulation 18; Ch. Party Ex. 18; T 10-11)

32. On September 6, Chief Geer sent an email to all fire department employees which stated:

Effective immediately, union activities are prohibited on duty and on city property unless approved by the Fire Chief. This includes any and all email related union activities and solicitations. Emails must be sent to the Fire Chief for approval and re-sent from my office. Officers are responsible for reporting to the chain of command any infractions of this directive.

The same day, Roseto responded:

A reminder that the contract does mandate the right to discuss a grievance (Art 3, Sec 3a) and a 2x4 space on bulletin boards at each Fire Station for Union info (Art 3, Sec 3d) provided the information posted is first reviewed by the Asst Chief/designee.

(Stipulation 19; Ch. Party Ex. 19; T 10-11)

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33. On October 11, Hogan contacted information technology employee Sharon Marzolo about his inability to receive emails, specifically one from his son on his son's research paper relating to labor organizations. Marzolo responded:

The City's policy has always stated that technology was in place for City business. Recently I was asked to enforce this policy more strictly. If there is a work related task/project/etc. that you can't perform without internet mail, please see your management. They will send me authorization to allow your internet mail.

(Ch. Party Ex. 21; T 80-81)

34. On October 12, Chief Geer responded to a question raised in an earlier email by Lieutenant Robert Shawn Tellone (President Lee's immediate supervisor) to Operations Chief Bacher. Tellone had asked:

Chief, I was hoping to give DO [driver/operator] Lee clarification on union business. There was a directive by the Fire Chief regarding no union business on duty. DO Lee has received several emails regarding union business [from City management]. May he respond to these emails on duty? I would like to give him a response in writing (email). Thanks. Shawn

Bacher did not know the answer to Tellone's question so he forwarded the email to

Deputy Fire Chief Robert Dube stating:

Dear Chief – I know I sent John the Kelly Day items on the City email. What is your interpretation on his ability to respond to these types of email from administration and/or the City?

Deputy Chief Dube forwarded both emails to Chief Geer who responded:

My directive means there is to be no union activity unless approved by Chief Dube or myself, unless specifically permitted in the contract. Any communication with firefighter Lee or others

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representatives [sic] shall be in writing without using the email system. FF Lee may not respond to union business emails, on duty or off, effective since my last order.

Section 3A of the current contract states that employees, stewards, and other union officer [sic] may not leave their assigned fire station or work area without prior permission of the Fire Chief, related to any grievance. Furthermore, the employee and union official shall not interfere with the normal operations of the department. Therefore, effective immediately, no on duty personnel will participate in any grievance procedure or hearing without permission of the Fire Chief.

Chief Dube, please draft a letter to FF Lee detailing this order.

Fire Chief Geer then sent a second response and stated:

I have issued a directive addressing this union business. Both IAFF and CWA will be notified in writing and by email. I have made one adjustment to the previous email. Mr. Lee has approval to respond to union business emails only if they are addressed to me directly. I will forward his responses as needed. Please respond to all personnel concerned.

(Stipulation 20; Ch. Party Ex. 22; T 10-11)⁷

35. On October 12, Chief Geer sent the following directive to all fire department personnel, Local 1158's President Lee, and the President of CWA, Local 3179, which represents non-certified employees in the fire department and other City departments.

The email stated:

⁷Charging Party Ex. 22 is a series of emails, the first of which was sent October 7. The response by Chief Geer prohibiting Lee from responding to union business emails, on duty or off, was sent on October 7. Chief Geer's adjustment to this email permitting Lee to respond to union business emails only if they are addressed to him directly was sent on October 12.

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Effective immediately, there is to be no union business conducted on-duty unless specifically approved by the Fire Chief. The only exceptions to this directive are the contracted stipulations that are outlined in the current bargaining agreements in:

Article 3 Rights of Parties
IAFF under Section 3. Union Rights
CWA under Section 5. Union Rights

As stated in the agreements, approved activities "shall not interfere with the normal operations of the Department."

There will be no more occurrences of placing units out of service for any union business unless approved by the Fire Chief.

(Stipulation 21; Ch. Party Ex. 23; T 10-11)

36. On October 14, Bacher sent an email to the district chiefs regarding union activities which stated:

The Chief has asked me to make sure that everyone understands his direction regarding Union activities while on duty. Any Union activity must be preapproved by the Fire Chief or Chief Dube. Any need for Union time, which will include grievance hearings, negotiations, etc., must be requested in accordance with the Union contract. At no time will a unit be placed out of service (or delayed) to facilitate a Union activity. I would suggest that any activity that even remotely appears to have a Union connection should be approved.

Play safe-

(Ch. Party Ex. 24)

37. Chief Geer's August 26 and October 12 directives and his August 31, September 6, and October 12 emails remain in effect. (Ch. Party Exs. 13, 15, 19, 22, and 23; T 82)

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38. In response to the directives and emails restricting union communications and activities, Local 1158's representatives have ceased using the City's email system for union business and activities. However, after August 26, Local 1158's representatives have continued to receive union related emails from the City to which they can not respond. (Ch. Party Exs. 20 and 25; T 82-87)

39. Local 1158 and its representatives' ability to communicate with and to serve the bargaining unit members has been hampered by the restrictions imposed by Chief Geer in his August 26 and October 12 directives and his August 31, September 6, and October 12 emails. They have been unable to promptly and effectively respond to emails from City management requesting meetings; communicate by email with members; talk with employees on duty or at stations about their wages, hours, terms and conditions of employment, and union meetings or events; meet with new recruits for orientation; meet with employees in preparation for negotiations; and receive input from Local 1158's members. On October 7, Lee was completely prohibited from using the City's email system both on duty and off duty to respond to union business. Later, he was permitted to send and receive email messages only if the emails were first sent to Chief Geer. (Ch. Party Exs. 13, 15, 19, 22, and 23; T 82-83, 86-87, and 115-21)

40. Representatives of Local 1158, including Lee and Hogan, are intimidated by the restrictions Chief Geer placed on email and other communication on and off duty and on City premises. As a result of the reference to the discipline imposed by

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Section 447.509, Florida Statutes, in Chief Geer's August 31 email and the warning in Bacher's October 14 email to have "any activity that even remotely appears to have a Union connection" approved, Lee and Hogan are afraid that they will be disciplined for union communications or for contacting Local 1158. Because all CFR unit members are aware of the directives and have been given access to the emails and because attendance at union functions and meetings has dropped, I infer that CFR unit members are also intimidated by the restrictions. (Ch. Party Exs. 15 and 24; T 86-87, 110-12, and 115-18)

41. CFR employees continue to be allowed to (1) engage in non-work related, non-union related communications in person, by telephone, and by email with other employees and by telephone and by email with non-employees during their twenty-four hour shifts at work; and (2) be solicited while on duty at work by email for a wide variety of non-work purposes so long as the topics are not union related. The topics of permissible non-work communications and solicitations include, but are not limited to, personal matters, sale of extra retirement and investment benefits, meetings with representatives of the health insurance plan, sale of tickets for special events, donations of time or money to humanitarian causes, invitations to social events, announcements of significant personal events, and participation in a variety of charitable fundraisers, such as the "Holiday Food Basket Program." (Ch. Party Ex. 27; T 34-37)

42. The CWA and FOP also represent City employees. The representatives of these two unions continue to use the City's email system to communicate with bargaining unit employees on an individual and group basis. They also communicate with City management about committee meetings, wages, benefits, work assignments, fund raisers, awards banquets, and negotiations. The City has not required the emails sent by and to CWA and FOP employees to be forwarded to City management for pre-approval and then forwarded by City management to the intended recipient.⁸ (Ch. Party Exs. 28 and 29; T 87-95)

ANALYSIS

Local 1158 alleges that Chief Geer's August 26 and October 12 directives and his August 31, September 6, and October 12 emails violated Section 447.501(1)(a) and (b), Florida Statutes, because they constitute an overly broad and discriminatory no solicitation rule. It asserts that these directives and emails ban employee use of the City's computer and email system for the support of Local 1158 and ban union messages and talk during the employee's twenty-four hour shifts while on City property.

⁸I relied, in part, on Hogan's credible testimony for this finding. In addition, the City failed to present documentary evidence that group emails sent by the CWA and the FOP were pre-approved. Moreover, the CWA and the FOP emails entered into evidence by Local 1158 (Ch. Party Exs. 28 and 29) did not contain notations that the information was sent to City management and then forwarded.

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The City asserts that Local 1158 has no contractual or other right to use the City's email system, that policies and procedures established prior to Chief Geer's employment define the proper use of the City's email system, and that these policies and procedures are universally applied to all employees and unions. It also asserts that it has not enforced the directives that are the subject of this charge and that the directives could not reasonably be interpreted as a threat.

Section 447.501(1)(a), Florida Statutes, prohibits public employers or their agents from interfering with, restraining or coercing public employees in the exercise of any rights guaranteed them by Chapter 447, Part II. One of the rights guaranteed to employees is the right to self-organize and bargain collectively. § 447.301, Fla. Stat. By necessity, the Commission has held that public employees must have the ability to communicate with one another on the job site. The Commission has determined that, absent extraordinary circumstances, a public employer may not restrict the rights of employees to discuss organizational interests and distribute literature at the work site during employees' non-work time, except that they may not distribute literature where the actual work is performed. In addition, a public employer may prohibit solicitation activities during work time. See United Faculty of Florida v. Florida Board of Education, 29 FPER 89 (2003); Okaloosa-Walton Junior College v. PERC, 372 So. 2d 1378 (Fla. 1st DCA 1979), cert. denied, 383 So. 2d 1200 (Fla. 1980).

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The right of public employees to solicit and distribute literature stems from the reverse implications of Section 447.509, Florida Statutes. That section provides:

- (1) Employee organizations, their members, agents or representatives, or any persons acting on their behalf are hereby prohibited from:
 - (a) Soliciting public employees during working hours of any employee who is involved in the solicitation.
 - (b) Distributing literature during working hours in areas where the actual work of public employees is performed, such as offices, warehouses, schools, police stations, fire stations, and any similar public installations. This section shall not be construed to prohibit the distribution of literature during the employee's lunch hour or in such areas not specifically devoted to the performance of the employee's official duties...

- (3) The circuit courts of this state shall have jurisdiction to enforce the provisions of this section by injunction and contempt proceedings, if necessary. A public employee who is convicted of a violation of any provision of this section may be discharged or otherwise disciplined by his or her public employer, notwithstanding further provisions of law, and notwithstanding the provisions of any collective bargaining agreement.

The Commission has determined that a no solicitation rule is overly broad if it imposes restrictions on employee organizational efforts greater than those set forth in Section 447.509(1)(a) and (b), Florida Statutes. See United Faculty of Florida v. Florida Board of Education, 29 FPER 89 (2003); Florida Nurses Association v. Southeast Volusia Hospital District, 3 FPER 273 (1977); Okaloosa-Walton Higher Education Association. FTP-NEA v. Okaloosa-Walton Junior College Board of Trustees, 3 FPER

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153 (1977), aff'd in part and rev'd in part, 372 So. 2d 1378 (Fla. 1st DCA 1979).

Moreover, the Commission has long recognized the unique working hours of fire personnel and that their twenty-four hour work schedule makes solicitation away from the station difficult. See Town of Palm Beach Firefighters Local No. 1866 v. Town of Palm Beach, 2 FPER 41 (1976).

In addition, the Commission has decided that a rule prohibiting all solicitation during working hours is invalid on its face. Sarasota County Teachers Association v. School Board of Sarasota County, 6 FPER ¶ 11048 (1980); Florida Nurses Association v. Southeast Volusia Hospital District, 3 FPER 273 (1977). In Southeast Volusia Hospital District, the Commission stated:

It is apparent that the above-quoted rule, which broadly bans all solicitation and distribution of literature "during working hours and in areas of the hospital where employees work," goes beyond the bounds of legitimate restrictions set forth in Section 447.509(1)(a) and (b), Florida Statutes (1975). Although this statutory provision is specifically directed toward controlling the activity of employee organizations and their membership and is not one of the enumerated unfair labor practice provisions, it nonetheless limits the content of any solicitation/distribution rule that may be validly imposed by a public employer and embodies the legislative intent concerning this subject. Restrictions placed on employee organizational efforts involving solicitation and distribution cannot be greater than those set forth in Section 447.509(1)(a) and (b). Okaloosa-Walton Higher Education Association, FTP-NEA v. Okaloosa-Walton Junior College Board of Trustees, 3 FPER 153 (June 29, 1977). As construed by the Commission in Okaloosa-Walton, supra, Section 447.509(1)(a) permits solicitation on the public employer's premises during the non-working time of both parties to the solicitation. Here the hospital's rule contains no provision which would allow such solicitation and is thus subject to

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an interpretation which is more restrictive than permitted by the statute. Therefore, the solicitation portion of the Respondent's rule is invalid on its face.

Here, there is no provision in the CBA that allows CFR employees or Local 1158's representatives to use the City's email system. Nevertheless, prior to August 26, 2005, CFR employees on their twenty-four hour shifts were permitted to use the City's email system during their down time to engage in non-work related activities and discussions including union related communications. The City did not follow its computer and email policies, and it imposed few restrictions on Local 1158's representatives and CFR employees' use of the City's computers and its email system.

Beginning on August 26, Chief Geer imposed several restrictions. On that date, he issued a directive prohibiting employees from using the City's email system to send group messages to all fire department employees unless cleared through the appropriate division chief. On August 31, Chief Geer sent an email explaining his directive which stated that "my direction is that there will be no union activity on duty or on premises without my approval. No employee will be allowed to visit, participate, or view any union hall activity while on duty or paid status until further notice and without my approval." This email referenced the disciplinary authority for violations contained in Section 447.509, Florida Statutes.

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Chief Geer sent an email to all fire department employees on September 6, prohibiting union activities on duty and on City property, including all email related union activities and solicitation, unless approved by him. He stated that emails must be sent to him for approval and then forwarded from his office. Furthermore, he directed his officers to report any infractions through the chain of command.

On October 12, Chief Geer distributed a sequence of emails in which he stated that "there is to be no union activity unless approved by Chief Dube or myself, unless specifically permitted in the contract." He prohibited Local 1158 from using the email system and specifically prohibited Lee from responding to union business emails either on or off duty. In addition, he prohibited on duty personnel from participating in any grievance procedure or hearing without permission from him. In one of the emails, Chief Geer modified an earlier statement regarding Lee, stating that Lee had approval to respond to union business emails only if the emails were addressed to him directly and that he would forward any such response by Lee as needed. On October 12, Chief Geer also issued a directive prohibiting union business on duty unless specifically approved by him. At Chief Geer's request, on October 14, Operations Chief Bacher warned CFR employees that the restrictions meant that any activity that even remotely appeared to have a union connection needed approval.

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Based on the evidence, I conclude that the City's prohibitions against union messages and activities on duty and on City property by employees who work twenty-four hour shifts, taken as a whole, constitute an overly broad no solicitation rule which violates Section 447.501(1)(a), Florida Statutes. The directives and the emails from Chief Geer require all union communications made while on duty and on City property to be pre-approved and that union emails must be sent to Chief Geer's office for approval and re-sent, if appropriate, from Chief Geer's office. Furthermore, Local 1158's representatives are prohibited from using the City's email system for union communications. At one point, Lee was specifically prohibited from responding to union emails and then later permitted to respond only if the emails were sent to Chief Geer for Chief Geer to forward. These restrictions remain in effect, and they provide no exceptions permitting union activities or communications during down time and in non-work areas of the fire stations.

The City asserts that there is an extraordinary circumstance requiring the restrictions. See e.g., Jacksonville Employees Together and Jewel Simmons v. City of Jacksonville, 25 FPER ¶ 30092 (1999) (ruling that the sheriff could prohibit solicitation and distribution in communications break room located in secure area in an effort to maintain order and discipline because employees provided critical support services to law enforcement personnel). It claims that for safety reasons units must be prohibited from being placed "out of service" to attend any union activity. However, the City did not

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prove that units had been taken out of service to attend union meetings or to engage in other union activities. Rather, units either remained in service or were placed in "delayed" service. Moreover, Local 1158 demonstrated that its activities were scheduled to minimize the disruption of City services. Even assuming that placing units in delayed status caused sufficient disruption in City services to ban such a practice, the restrictions the City placed on union activities and communications went beyond keeping all units in an "in service" status. Therefore, the City has failed to demonstrate an extraordinary circumstance requiring the restrictions it imposed on union activities.

The restrictions also violate Section 447.501(1)(a), Florida Statutes, because they have been promulgated so as to discriminate against Local 1158. The Commission has ruled that a solicitation rule, though reasonable and lawful in form, may not be administered in an arbitrary or discriminatory manner. See United Faculty of Florida v. Florida Board of Education, 29 FPER 89 (2003); Okaloosa-Walton Higher Education Association, FTP-NEA v. Okaloosa-Walton Junior College Board of Trustees, 3 FPER 153, 156 (1977), aff'd in part and rev'd in part, 372 So. 2d 1378 (Fla. 1st DCA 1979).

The record evidence demonstrates that CFR employees are still allowed to engage in non-union and non-work related communications and are solicited in person, by telephone, and by email with other employees and by telephone and by email with non-employees during their twenty-four hour shifts at work. Such permissible non-work related communications and solicitations include the sale of extra retirement and

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investment benefits, meetings with representatives of the health insurance plan, sale of tickets for special events, donations of time or money to humanitarian causes, invitations to social events, announcements of significant personal events, and participation in a variety of charitable fundraisers, such as the "Holiday Food Basket Program."

Accordingly, I conclude that the restrictions targeting Local 1158 and its representatives violated Section 447.501(1)(a), Florida Statutes, because they were administered in an arbitrary and discriminatory manner.

Local 1158 also alleges that the City violated Section 447.501(1)(a) and (b), Florida Statutes, by discriminatorily enforcing its restrictions on union email and union communications. Section 447.501(1)(b), Florida Statutes, prohibits public employers, their agents, or representatives from encouraging or discouraging membership in any employee organization by discrimination with regard to hiring, tenure, or other conditions of employment. To demonstrate a violation of this section, it must be demonstrated that: (1) the employee was engaged in protected activity; and (2) the protected activity was a substantial or motivating factor in the decision taken against the employee by the employer. If the action taken by the employer was motivated by a non-permissible reason, the burden then shifts to the employer to show by a preponderance of the evidence that, notwithstanding the existence of factors relating to protected activity, it would have made the same decision. See Pasco County School Board v. PERC, 353 So. 2d 108 (Fla. 1st DCA 1977).

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Section 447.301, Florida Statutes, sets forth the activities that are protected by Section 447.501(1)(a), Florida Statutes. Such activities include the "right to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection." § 447.301(3), Fla. Stat. The Commission broadly construes the provision protecting an employee's right to engage in protected concerted activities. See Southwest Florida PBA v. City of North Port, 15 FPER ¶ 20179 at 374 (1989), and cases cited therein. Furthermore, the Commission has held that while the proximate timing of an adverse act by an employer is a proper consideration to a determination of whether protected activities motivated the adverse act, in the absence of any facts demonstrating animus flowing from the protected conduct, timing alone is insufficient to establish that the employer was motivated by that conduct to act discriminatorily. See Federation of Public Employees, A Division of District No. 1, PCD/MEBA v. City of Coral Springs, 5 FPER ¶ 10388 (1979).

The City does not dispute that Local 1158 was engaged in protected concerted activity prior to the restrictions. Local 1158 had grieved and demanded to bargain over some of the changes Chief Geer made, publicly opposed many of Chief Geer's recommendations and decisions, and examined the qualifications of the persons Chief Geer hired. In July, Local 1158's members discussed and decided to hold a vote of no confidence in Chief Geer. The vote was scheduled in August and tallied on September 20. These communications and activities constitute protected concerted

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activity. See Hialeah IAFF, Local 1102 v. City of Hialeah, 9 FPER ¶ 14364 (1983); Communication Workers of America, Local 3172 v. City of Largo, 8 FPER ¶ 13043 (1981); City of Dunedin v. Local No. 2327, International Association of Fire Fighters, 4 FPER ¶ 4258 (1978); American Federation of State, County and Municipal Employees v. City of Venice, 4 FPER ¶ 4059 (1978).

It is clear that the relationship between the City and Local 1158 was strained and that the restrictions were imposed shortly after the members of Local 1158 held heated discussions regarding the no confidence vote. In addition, statements by Chief Geer and other City officials are reasonably interpreted as threats against Local 1158's representatives. In August, Chief Geer forwarded to all CFR employees emails in which he expressed disapproval of Local 1158's representatives. Chief Geer stated that if the email system was again used in a similar manner, he would prohibit Local 1158's use of the system. In a September 1 email opposing the vote of no confidence, Chief Geer stated that he "will use every means at my disposal to finally hold these firefighters accountable." On that same day, City Manager Horne sent an email to some of Local 1158's officers warning that, regardless of the outcome, the vote of no confidence would have unintended consequences for Local 1158 and its members. Based upon the timing of the restrictions, the threats to act against Local 1158, and my previous determination that the restrictions were placed discriminatorily on Local 1158, I

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determine that Local 1158's protected concerted activity was a substantial or motivating factor in the promulgation of the restrictions.

Moreover, the City failed to demonstrate that it would have imposed the restrictions regardless of Local 1158's protected concerted activities. Based on my credibility resolutions, I believe that the only reason Chief Geer imposed the restrictions on Local 1158 was because of its actions opposing his changes at the CFR. Moreover, as previously noted, the City failed to demonstrate an extraordinary circumstance for the restrictions imposed. I also reject the City's argument that the management right clause authorized it to impose the restrictions. First, the City imposed the restrictions on Local 1158 in an arbitrary and discriminatory manner. See United Faculty of Florida v. Florida Board of Education, 29 FPER 89 (2003). In addition, the parties' general management rights clause does not grant the City plenary authority to alter any and all working conditions which are not explicitly delineated in the agreement. See Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 7 FPER ¶ 12300 (1981), aff'd, 425 So. 2d 133 (Fla. 1st DCA 1983), aff'd in relevant part, 475 So. 2d 1221 (Fla. 1985). Furthermore, Local 1158's ability to communicate using the telephone, bulletin boards, and other methods does not excuse the City's violation because an employer may not specify the means through which employees engage in protected concerted activities unless the method chosen is prohibited by law or so

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opprobrious that the action is indefensible. See Southwest Florida PBA v. City of North Port, 15 FPER ¶ 20179 (1989). Neither of these circumstances is pre-sent here.

The restrictions limited Local 1158's and its representatives' ability to communicate with and serve bargaining unit members. Lee and Hogan were intimidated by the references to the disciplinary penalties set forth in Section 447.509, Florida Statutes, and by the responsibility of officers to report infractions. As a result, they significantly altered their behavior to comply with the restrictions. In addition, CFR employees have modified their behavior by not participating in union activities to the extent they have in the past. Accordingly, Local 1158 has demonstrated that the City violated Section 447.501(1)(a) and (b), Florida Statutes.

Attorney's Fees and Costs

Local 1158 requested that it be awarded attorney's fees and costs of litigation. A prevailing charging party is entitled to fees if it demonstrates that the respondent knew or should have known that its conduct was unlawful. See DeMarois v. Military Park Fire Control Tax District, 7 FPER ¶ 12065 (1981), aff'd, 411 So. 2d 944 (Fla. 4th DCA 1982). The Commission has ruled on the validity of similar restrictions. See United Faculty of Florida v. Florida Board of Education, 29 FPER 89 (2003). Thus, I conclude that the City should have known that Chief Geer's directives and emails were overly restrictive and that the restrictions were discriminatorily applied. I, therefore, recommend that Local 1158 be awarded its reasonable attorney's fees and costs.

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Remedy

In its post-hearing brief, Local 1158 requested that the Commission order the City to provide special notice of the remedies ordered and/or apologize for its violations. However, the City's violations were not so egregious that they require special remedies. Thus, I do not recommend that the City be required to apologize, publicly read the Commission's notice finding unfair labor practices, or publish the notice through the City's email system.

CONCLUSIONS OF LAW

1. The Public Employees Relations Commission has jurisdiction of this case pursuant to Chapter 447, Florida Statutes.
2. The City is a public employer pursuant to Section 447.203(2), Florida Statutes, and Local 1158 is an employee organization pursuant to Section 447.203(11), Florida Statutes.
3. The City violated Section 447.501(1)(a), Florida Statutes, by promulgating and maintaining an overbroad no solicitation rule.
4. The City violated Section 447.501(1)(a), Florida Statutes, by banning the use of the City's email system for Local 1158's communications.
5. The City violated Section 447.501(1)(a) and (b), Florida Statutes, by discriminatorily enforcing its restrictions against Local 1158's communications.

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6. Local 1158 is entitled to an award of attorney's fees and costs of litigation.

RECOMMENDATION

I recommend that the Commission ADOPT the foregoing analysis and conclusions of law and require the City to:

1. Cease and desist from:
 - (a) Maintaining an overly broad no solicitation rule;
 - (b) Prohibiting employees from using the City's email system to send union messages on non-work time;
 - (c) Prohibiting employees from discussing union matters during non-work time;
 - (d) Discriminating against Local 1158 by imposing its no solicitation rule in an arbitrary manner;
 - (e) In any like and related manner interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them by Chapter 447, Part II, Florida Statutes; and
 - (f) In any like and related manner encouraging or discouraging membership in any employee organization by discriminating in regard to hiring, tenure, or other conditions of employment.
2. Take the following affirmative action:
 - (a) Rescind its overly broad and discriminatory no solicitation policy;
 - (b) Pay to Local 1158 its reasonable attorney's fees and costs of litigation;

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- (c) Post immediately for sixty days in conspicuous locations, where notices to bargaining unit employees are customarily posted, copies of the notice to employees which states that the City will cease the conduct set forth in paragraph one above and will take the affirmative action set forth in paragraph two; and
- (d) Notify the Commission by affidavit or other proof of the date of posting and final compliance with 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). 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 26th day of July, 2006.


SHARON A. ZAHNER
Hearing Officer

SAZ/mad

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**NOTICE
EFFECTIVE OCTOBER 10, 2003**

Pursuant to the Uniform Facsimile Signature of Public Officials Act, Section 116.34, Florida Statutes, this order is being issued to you by facsimile delivery. You will NOT receive a duplicate paper copy by mail. Accordingly, please retain this facsimile as your copy of the order. If you have encountered problems with the electronic delivery of the copy, please contact the Commission's Clerk at (850) 488-8641.