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July 20, 2018

Thomas K. Perona, Chair
Fort Pierce Retirement Board
100 North U.S. Highway One
Fort Pierce, FL 34950

RE: Case Update, *City of Miami v. City of Miami Firefighters' and Police Officers' Retirement Trust and Plan*

Dear Mr. Perona:

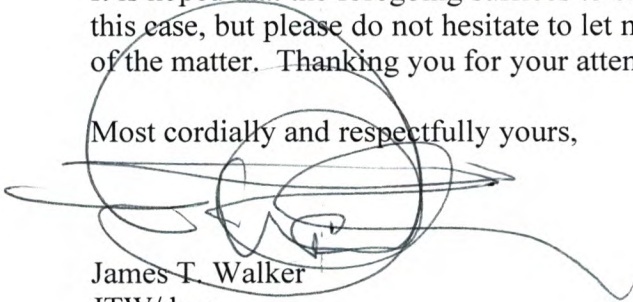
This letter serves to briefly update you for background purposes and, through you, the Retirement Board, with news of the most recently reported Florida decision involving pension funds, *City of Miami v. City of Miami Firefighters' and Police Officers' Retirement Trust and Plan*, ___ So.3d ___, Case No. 3D18-86 (Fla. 3rd DCA 6/6/18), 43 FLW D1270. A copy is enclosed.

This is not believed to impact any concern of immediate interest to our Board though, as with any pension case, it might conceivably be found instructive on future occasions as need arises. This case finds its roots in 2010, during the financial recession, when the City of Miami elected to unilaterally impose certain changes to its pension ordinance, without submitting to collective bargaining with its unions. After protracted litigation, the Florida Supreme Court determined that the City was not at liberty to declare a “financial emergency” and to cancel pension benefits unless or until it went through impasse resolution proceedings under Fla. Ch. 164. Subsequently, the pension board determined that the ruling amounted to an invalidation of the City’s amendatory ordinance and the Board voted to therefore administer the retirement system as if the ordinance had never been enacted. The City sued and argued that the pension board had no authority to ignore the City’s legislative directive. The trial court denied the City’s request for an injunction against the Board. Upon the City’s appeal to the 3rd District Court, the Appellate Court found that, yes, the City was correct that the City’s ordinance remained valid notwithstanding the Board’s effort to ignore it. But, no, the City could not proceed with suit until both sides had first exhausted conflict resolution proceedings under Ch. 164: “... because the City filed suit without the parties having first exhausted Chapter 164’s conflict resolution procedures, the trial court properly abated the action.”

The message, for our purposes, is that while it is hoped the City of Fort Pierce and its Retirement Board will never find cause for either to sue the other, in such eventuality it is first required that effort be made to resolve any conflict within the parameters of Fla. Ch. 164 before undertaking active litigation. Court proceedings must be abated until any such process is complete.

It is hoped that the foregoing suffices to clearly address any questions that might be presented by this case, but please do not hesitate to let me know of any remaining interest in further discussion of the matter. Thanking you for your attention, I am and shall ever continue to remain, as always

Most cordially and respectfully yours,

A handwritten signature in black ink, appearing to read "James T. Walker", is written over a large, circular scribble. The signature is partially obscured by the scribble and extends to the right with a long, thin tail.

James T. Walker
JTW/dam
Enclosure

any misunderstanding he had with his own interpreter does not constitute fraud. Indeed, a party to a marital settlement agreement “is presumed to know what [he] is signing and is charged with the duty of procuring a reliable person to explain the document to [him] prior to [him] signing it.” *Rivero v. Rivero*, 963 So. 2d 934, 938 (Fla. 3d DCA 2007). Second, any alleged misrepresentation in discovery came from the nondisclosure of the former husband’s own assets, not the former wife’s. Finally, evidence of “pressure to settle” is “insufficient proof of coercion necessary to set aside such an agreement.” *Crupi*, 784 So. 2d at 614. We reject the former husband’s characterization that these matters rise to the level of fraud, misrepresentation, and coercion when they were completely within his control.

Accordingly, we reverse and direct the trial court to reinstate the parties’ marital settlement agreement and final judgment of dissolution of marriage.

Reversed.

* * *

Venue—Transfer—Order granting motion to transfer venue and transferring action must be reversed where affidavit in support of motion to transfer is legally insufficient to establish substantial inconvenience to parties or witnesses, trial court’s order contained no findings, and record is devoid of any indication that trial court granted the motion “in the interest of justice”—On remand trial court to consider whether to transfer venue based on purported inconvenience to parties or witnesses, including whether interests of justice require action to be transferred

OLGA GONZALEZ, Appellant, v. HILTON PALM BEACH AIRPORT HOTEL, etc., et al., Appellees. 3rd District. Case No. 3D17-2611. L.T. Case No. 17-3287. June 6, 2018. An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge. Counsel: Alfaro & Fernandez, P.A., and Elbert Alfaro, for appellant. Cole, Scott & Kissane, P.A., and Scott A. Cole and Lissette Gonzalez, for appellees.

(Before EMAS, FERNANDEZ and LUCK, JJ.)

(PER CURIAM.) Olga Gonzalez (“Gonzalez”), plaintiff below, appeals the trial court’s order granting defendants’ motion to transfer venue and transferring the action to Palm Beach County, pursuant to section 47.122, Florida Statutes (2017), which provides: “For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.”

The defendants’ motion and the affidavit in support focused on the purported inconvenience to the parties or witnesses if the case remained in Miami-Dade County. Indeed, the only discussion at the hearing on the motion was limited to whether defendants had established substantial inconvenience to the parties or to the witnesses. The trial court’s order contained no findings.

The burden was upon defendants to establish substantial inconvenience to the parties or to the witnesses. As we held in *Taylor v. DaSilva*, 401 So. 2d 1161, 1162-63 (Fla. 3d DCA 1981):

Under Section 47.122 . . . a defendant seeking a change of venue bears the burden of proving that substantial inconvenience or undue expense to the parties would result from trial in the forum chosen by the plaintiff and that a change is therefore required for the convenience of the parties or witnesses. When venue is proper in more than one county, the choice rests with the plaintiff, and should not be disturbed without a showing of substantial inconvenience or the likelihood of injustice.

...

Although a grant or refusal of application for change of venue is generally within the sound discretion of the trial court, the discretion of the court is not unbridled and must be predicated upon a proper showing of convenience or interests of justice.

(Internal citations omitted).

And in *P. V. Holding Corp. v. Tenore*, 721 So. 2d 430, 431 (Fla. 3d DCA 1998) we observed:

It is well established that where venue is proper in more than one county, the choice of forum rests with the plaintiff. However, while a plaintiff’s choice of forum is entitled to respect, that choice is not paramount. The plaintiff’s venue privilege will not be honored where the convenience of the parties or witnesses, or the interests of justice, require the action to be transferred.

(Internal citations omitted).

Upon our review of the record, the affidavit submitted by defendants in support of their motion is legally insufficient to meet their burden of establishing substantial inconvenience to the parties or witnesses. Given that the record is devoid of any indication that the trial court granted the motion “in the interest of justice,” we reverse the order and remand for the trial court to consider whether to transfer venue on any other basis asserted in the motion, including whether the interests of justice require the action to be transferred. We express no opinion on this issue.

Reversed and remanded with instructions.

* * *

Municipal corporations—Labor relations—Action by city against Firefighters’ and Police Officers’ Retirement Trust and Plan and Board of Trustees of City Firefighters’ and Police Officers’ Retirement Trust seeking injunction to prevent Board from unilaterally adjusting payments and providing benefits as if city’s pension ordinance had never been adopted—Pension ordinance was not invalidated by Florida Supreme Court decision, and is valid—City is not required to establish irreparable harm and lack of an alternate remedy in order to obtain temporary injunctive relief, as it is seeking to protect its police power to enforce its own existing ordinance—Trial court erred in denying city’s emergency motion for temporary injunctive relief—Trial court did not err in abating proceedings until Chapter 164 conflict resolution procedures are exhausted—Where a governmental entity files suit against another governmental entity, abatement is required until procedural options of Florida Governmental Conflict Resolution Act have been exhausted

CITY OF MIAMI, Appellant, v. CITY OF MIAMI FIREFIGHTERS’ AND POLICE OFFICERS’ RETIREMENT TRUST & PLAN, et al., Appellees. 3rd District. Case No. 3D18-86. L.T. Case No. 17-29242. June 6, 2018. An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge. Counsel: Victoria Méndez, City Attorney, and John A. Greco, Deputy City Attorney, and Kerri L. McNulty and Kevin R. Jones, Assistant City Attorneys, for appellant. Klausner, Kaufman, Jensen & Levinson, and Robert D. Klausner, Adam P. Levinson and Paul A. Daragjati (Plantation), for appellees.

(Before ROTHENBERG, C.J., and EMAS and LINDSEY, JJ.)

(EMAS, J.)

INTRODUCTION

The City of Miami (“the City”) filed suit against the City of Miami Firefighters’ & Police Officers’ Retirement Trust & Plan (“the Trust”) and the Board of Trustees of the City of Miami Firefighters’ & Police Officers’ Retirement Trust (“the Board”), seeking temporary and permanent injunctive relief.

In the instant appeal, the City seeks review of the trial court’s order (1) denying the City’s emergency motion for temporary injunctive relief; and (2) granting the Trust and the Board’s motion for abatement and abating the proceedings below, pending exhaustion of the conflict resolution procedures in Chapter 164.

For the reasons that follow, we reverse the trial court’s order denying the City’s emergency motion for temporary injunctive relief, and affirm the trial court’s order abating the proceedings.

FACTS AND PROCEDURAL HISTORY

On July 28, 2010, the City declared a “financial urgency,”

pursuant to section 447.4095, Florida Statutes (2010), and, on August 31, 2010, voted to unilaterally alter the terms of its collective bargaining agreement (“CBA”) with Miami Lodge No. 20, Fraternal Order of Police (“the Union”). The City implemented this change to the CBA by amending its pension ordinance, resulting in reduced pension benefits for retired police officers (“the 2010 pension ordinance”).

The Union filed an unfair labor practice charge with the Public Employees Relations Commission (“PERC”) on September 21, 2010, contending that the City improperly modified the CBA without completing the impasse resolution process¹ required by the financial urgency statute. *See* §447.403, Fla. Stat. (2010). The hearing officer found that the City had properly invoked the financial urgency statute and was not required to complete the impasse resolution procedures before implementing changes to the CBA. PERC adopted the hearing officer’s recommendation in its final order dismissing the Union’s charge.

The Union appealed to the First District Court of Appeal, which affirmed PERC’s final order, finding PERC did not err in interpreting or applying section 447.4095. *Headley v. City of Miami*, 118 So. 3d 885 (Fla. 1st DCA 2013).

The Union sought review from the Florida Supreme Court, and on March 2, 2017, the Florida Supreme Court issued its opinion, agreeing with the Union that a public employer may not modify a CBA in the event of a financial urgency unless it shows “that the funds are not available from any other possible reasonable source.” *Headley v. City of Miami*, 215 So. 3d 1, 8 (Fla. 2017). The Court also held that “section 447.4095 permits the unilateral implementation of changes to the CBA only after the parties have completed the impasse resolution proceedings and have failed to ratify the agreement.” *Id.* at 9. The Court quashed the First District’s decision and remanded “for proceedings consistent with this decision.” *Id.* at 10. On remand, the First District issued an order remanding the case to PERC “for further proceedings consistent with the Florida Supreme Court’s opinion.”

On remand, PERC concluded that the City failed to comply with the impasse resolution procedures of section 447.403, and that it was not statutorily authorized to unilaterally modify the collective bargaining agreement. PERC further concluded that the City engaged in an unfair labor practice² when it adopted the 2010 pension ordinance, because the City unilaterally changed wages, pensions, health insurance and other monetary items for the police union employees prior to completing the impasse resolution procedures. The order remanded the cause to a hearing officer to recommend an appropriate remedy. On July 20, 2017, the hearing officer recommended that the City be directed to rescind its modifications to the wages, health care, and pension benefits of employees represented by the Union and that PERC direct the parties to return to the status quo ante as of September 29, 2010, the day prior to the adoption of the 2010 pension ordinance.

On September 27, 2017, the Board sent a letter to the City Manager, inviting the City to engage in discussion with the Board on the issues arising out of the Florida Supreme Court’s decision and PERC’s recent orders (“the Board’s September 27 letter”).

On October 18, 2017, PERC adopted the hearing officer’s recommendations and determined that “[t]he appropriate remedy in this case requires the City to rescind the changes in wages and benefits that were legislatively imposed on September 30, reinstate the status quo ante as of September 29, 2010, and make the employees whole.” PERC directed the clerk to open a back-pay case and schedule a hearing before a hearing officer for that purpose. Importantly, the PERC order specifically provided:

This is not an appealable final order because the amount of back pay remains for determination. When the amount of back pay is resolved, the Commission will issue a final order that will allow either party to appeal the merits of this order or the amount of back pay.

(Emphasis added.)

Following this October 18, 2017 nonfinal, nonappealable order from PERC, on November 2, 2017, the Board voted to “administer the System as if the Ordinance had never been adopted in 2010 . . . correct all member records accordingly and add the liability to the City cost.” It directed the Trust Administrator to “correct all members that were affected and provide benefits as if Ordinance 13202 had never been adopted.” This “correction” of benefits did not calculate any back pay that was due, but restored the plan beneficiaries to the pension calculation that was utilized before the City’s 2010 pension ordinance.

On December 22, 2017, the City filed suit against the Board and the Trust in circuit court, seeking to enjoin the Board’s anticipated action in adjusting benefit payments and providing benefits under the pre-2010 pension ordinance. It also filed an emergency motion for temporary injunctive relief, asserting such adjusted payment of benefits would be in violation of the City’s pension code, which had not been amended by the City, which no final court order had invalidated, and which the Board and the Trust had no authority to modify, rescind or ignore.

After an evidentiary hearing, the trial court entered an order denying the City’s motion for temporary injunctive relief. The trial court also determined that, because the City failed to comply with the pre-suit conflict resolution procedures under Chapter 164, the circuit court proceedings must be abated pending compliance with those conflict resolution procedures. This appeal followed.³

ANALYSIS AND DISCUSSION

Did the trial court err in denying the City’s motion for a temporary injunction to prevent the Board from unilaterally adjusting payments and providing benefits as if the 2010 pension ordinance had never been adopted?

We apply a hybrid standard of review to the appeal of an order granting or denying a temporary injunction: “To the extent the trial court’s order is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.” *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (quoting *Fla. High Sch. Athletic Ass’n v. Rosenberg*, 117 So. 3d 825, 826 (Fla. 4th DCA 2013) (additional citations omitted)).

The Board’s position is that the *Headley* decision “invalidated” the 2010 pension ordinance, rendering it void ab initio, and thus, the Board was required to restore the plan beneficiaries to the pre-2010 pension ordinance.

Thus framed, the initial question is whether, at this procedural posture, the 2010 pension ordinance is still valid in light of *Headley*. We conclude that it is. First and foremost, nowhere in *Headley* did the Florida Supreme Court invalidate or declare void the City’s 2010 pension ordinance. Nor did the Court direct the First District or PERC to do so. Although *Headley* quashed the First District’s opinion upholding PERC’s determination that the City acted properly, the *Headley* court did not quash the 2010 pension ordinance. The *Headley* Court simply rejected the First District’s determination that the City was entitled to unilaterally amend the pension ordinance without first completing the impasse resolution proceedings, and then showing that funds were not available from any other possible reasonable source. In other words, the Florida Supreme Court rejected PERC’s and the First District’s basis for determining that the City properly enacted the 2010 pension ordinance. The First District, on remand, simply remanded to PERC for proceedings consistent with the Supreme Court’s opinion.

The Board further maintains it that had no choice but to administer the system and provide benefits as if the 2010 pension ordinance did not exist because PERC’s subsequent order on remand from the First

District Court of Appeal also rendered the 2010 pension ordinance void. Again, we disagree.

First, on remand, although PERC concluded that the 2010 pension ordinance was improvidently passed, PERC determined that the appropriate remedy is for *the City* to rescind the 2010 changes to the pension ordinance and to reinstate the pension ordinance in place before those unilateral changes were made:

The appropriate remedy in this case *requires the City* to rescind the changes in wages and benefits that were legislatively imposed on September 30, reinstate the status quo ante as of September 29, 2010, and make the employees whole.

Although, ultimately, the City may be required to rescind, modify or amend its 2010 pension ordinance to comply with any final order issued by PERC, the obligation and authority to do so rests with the City and not the Board.

Furthermore, as PERC specifically provided in its order, its determination is *neither final nor appealable*, and a final order will be forthcoming (following the back pay determination) which *will then* allow the City to appeal both the back pay issue and the merits of PERC's decision. Accordingly, because the PERC order is not yet final or appealable, the 2010 pension ordinance is still in place and the Board should have continued to administer the Trust pursuant to that ordinance until PERC issues a final order. *See* § 185.06(4), Fla. Stat. (2017) (providing "nothing herein shall empower a board of trustees to amend the provisions of a retirement plan without the approval of the municipality).

The Board's erroneous conclusion that the 2010 pension ordinance is void ab initio, and its corresponding, unauthorized, directive that the Trust Administrator "provide benefits as if Ordinance 13202 had never been adopted," and "administer the System as if the Ordinance had never been adopted in 2010," usurped the City's authority and its police power. In addition, given that the PERC proceedings are not yet complete, and the order issued by PERC on remand is nonfinal and nonappealable, the Board's action impairs the City's appellate rights.

Based upon this threshold determination, we conclude that the trial court erred in denying the City's emergency motion for temporary injunction. Under Florida law, "[a] temporary injunction should only be granted where there is a showing of (1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (2) a substantial likelihood of success on the merits, (3) that the threatened injury to petitioner outweigh any possible harm to the respondent, and (4) that the granting of the preliminary injunction will not disserve the public interest." *Miami-Dade Cty. v. Fernandez*, 905 So. 2d 213, 215 (Fla. 3d DCA 2005). However, and importantly in this case, "this showing is relaxed when an injunction is sought by a governmental entity to enforce its police powers. In such circumstances the municipality need not come forth with proof to show irreparable harm or lack of an alternate remedy." *Id.* (citing *Metro. Dade Cty. v. O'Brien*, 660 So. 2d 364, 365 (Fla. 3d DCA 1995) for the proposition that "[w]here the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed).

A municipality's enforcement of its ordinance falls within that municipality's police power. *See Manatee Cty. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012) (holding county entitled to injunction where it seeks to enforce its duly enacted ordinance); *Polk County v. Mitchell*, 931 So. 2d 922 (Fla. 2d DCA 2006).

Given our conclusion that the 2010 pension ordinance was not invalidated in *Headley*, and that the PERC order on remand was not final or appealable, the City is correct that it need not establish irreparable harm and lack of an alternate remedy in order to obtain temporary injunctive relief, as it is seeking such to protect its police power to enforce its own existing ordinances.⁴

Did the trial court err in abating the proceedings until Chapter 164's conflict resolution procedures are exhausted?

The trial court determined that abatement was required because (1) the Board initiated formal conflict resolution procedures with its September 27 letter; and (2) because, where a governmental entity files suit against another governmental entity, Florida law requires abatement until the procedural options of the Florida Governmental Conflict Resolution Act have been exhausted. §164.1041, Fla. Stat. (2017). We agree with the trial court that section 164.1041 warrants abatement.

The purpose of Chapter 164 is to:

enhance intergovernmental coordination efforts by the creation of a governmental conflict resolution procedure that can provide an equitable, expeditious, effective, and inexpensive method for resolution of conflicts between and among local and regional governmental entities.

§164.102, Fla. Stat. (2017). The Legislature has expressed its intent "that conflicts between governmental entities be resolved to the greatest extent possible without litigation." *Id.* It is undisputed that the parties in this case are all "governmental entities," as defined in chapter 164.⁵

Pursuant to section 164.1041(1):

If a governmental entity files suit against another governmental entity, court proceedings on the suit *shall be abated*, by order of the court, until the procedural options of this act have been exhausted.

(Emphasis added). That same subsection further provides:

The governing body of a governmental entity initiating conflict resolution procedures pursuant to this act shall, by motion, request the court to issue an order abating the case pursuant to this section.

Finally, section 164.1052(1) provides:

The governing body of a governmental entity shall initiate the conflict resolution procedures provided by this act through passage of a resolution by its members. The resolution shall state that it is the intention of the governing body to initiate the conflict resolution procedures provided by this act prior to initiating court proceedings or prosecuting action on a previously filed court proceeding to resolve the conflict. . . .

Chapter 164 also provides for a conflict assessment phase and joint public meetings (in the event of no resolution), followed by the governmental entities' right to pursue other legal rights. *See* §§ 164.1053, 164.1055, 164.1056, and 164.1057. It is undisputed that none of these conflict resolution procedures have been conducted between the City and the Board in this case.

The City contends that the trial court erred in abating the matter because chapter 164's dispute resolution procedures were not properly invoked by the Board. The City asserts that the Board's September 27 letter was not a resolution passed by the members of the Board's governing body as required under section 164.1052(1). Therefore, the City argues, the Board did not "initiate the conflict resolution procedures provided by this act," and may not move to abate the proceedings pursuant to section 164.1041(1).

We agree with the City that the Board's letter of September 27 does not qualify as a "resolution" as would be statutorily required to initiate dispute resolution procedures under section 164.1052(1). Instead, the Board's letter states merely that the Board is prepared to meet with the City in an open, public discussion to address the issues. Nowhere does the letter indicate, as required by section 164.1052(1), that the Board has adopted a "resolution" stating "that it is the intention of the governing body to initiate the conflict resolution procedures provided by this act." Indeed, the record reflects no such resolution having been passed by the Board.

However, we agree with the Board that despite any failure to pass a resolution, abatement was nevertheless required under section 164.1041(1), which provides: "If a governmental entity files suit

against another governmental entity, *court proceedings on the suit shall be abated, by order of the court*, until the procedural options of this act have been exhausted.” The only reasonable construction of this language requires the trial court to abate the proceedings until the parties exhaust the procedural options of Chapter 164, even if dispute resolution procedures were not initiated prior to filing suit.

The City appears to conflate the two provisions of sections 164.1041(1) (mandatory abatement) and 164.1052(1) (initiation of conflict resolution procedures). In essence, the City asserts that, unless the Board properly initiates conflict resolution procedures, it cannot move for abatement of the proceedings and the trial court cannot order abatement of the proceedings. We do not agree, and conclude that, where a governmental entity files suit against another governmental entity and the procedural options under chapter 164 have not yet been exhausted, the plain language of section 164.1041(1) requires the trial court to abate the action regardless of whether either party has initiated the conflict resolution procedures. Any other reading would produce absurd results, would permit parties to evade conflict resolution in favor of litigation, frustrating the entire legislative purpose and intent of chapter 164. The City would have us interpret the law to mean that if a governmental entity sues another governmental entity without invoking the conflict resolution procedures, the defending entity cannot seek to abate the action and invoke those procedures post-filing unless its governing body first passes a resolution. But that is not what the statute plainly states: “**If a governmental entity files suit against another governmental entity, court proceedings on the suit shall be abated, by order of the court, until the procedural options of this act have been exhausted.**” § 164.1041(1) (emphasis added).

Although the City may be correct that the conflict resolution procedures cannot *begin* until either the Board or the City passes a resolution, this does not mean that the court proceeding should continue until that happens. The court proceeding “**shall be abated . . . until the procedural options . . . have been exhausted.**” *Id.* (emphasis added).

Accordingly, because the City filed suit without the parties having first exhausted Chapter 164’s conflict resolution procedures, the trial court properly abated the action.

We affirm the trial court’s order abating the action, and reverse the trial court’s order denying the City’s motion for temporary injunction. We remand for entry of a temporary injunction in favor of the City and for further proceedings consistent with this opinion.

¹See §447.4095, Fla. Stat. (2010).

²Section 447.501, Florida Statutes (2017), entitled “Unfair labor practices” provides in pertinent part:

- (1) Public employers or their agents or representatives are prohibited from:
 - (a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part.
 - ...
 - (c) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.

³Beginning on January 15, 2018, the Board began paying restored pension benefits calculated on the pre-2010 pension ordinance.

⁴Although the Board argues that the City cannot demonstrate a likelihood of success on the merits, the Board’s argument fails to recognize that the “merits” is not the ultimate validity of the 2010 pension ordinance. Rather, the “merits” in this case is whether the Board was without authority to unilaterally calculate and pay benefits based on the pre-2010 pension ordinance. As discussed earlier, the Board does not have such unilateral authority in the absence of a final order invalidating the 2010 pension ordinance. See §§ 40-195, 40-196, City of Miami Code of Ordinances (providing that the Board must act “[i]n accordance with ordinances and other applicable law, documents and other instruments governing the retirement system” and listing the duties of the Board, none of which includes deciding whether or not to follow existing ordinances which have not been invalidated or replaced).

⁵The Board is the governing body of the governmental entity (the Trust) in this case. See § 164.1031(5).

* * *

Criminal law—Sentencing—Correction—Trial court erred in denying Rule 3.800 motion for correction of sentence of imprisonment because sentence of life in prison as HFO was illegal where defendant was convicted of second degree felony, and, as an HFO, was subject to maximum sentence of 30 years in prison—Trial court’s construction of section 775.0823, Florida Statutes (2007), equating attempted second-degree murder of a law enforcement officer to completed crime of second-degree murder, is an unreasonable construction not supported by plain reading of statutory language—Statute did not expressly or implicitly reclassify attempted second-degree murder and contains no language that could reasonably be construed as reclassifying an attempted crime to a higher degree offense by treating it as if it were completed crime

ELTON GRAVES, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 3D17-2146. L.T. Case No. 07-43499. June 6, 2018. An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Ellen Sue Venzer, Judge. Counsel: Elton Graves, in proper person. Pamela Jo Bondi, Attorney General, and Joanne Diez, Assistant Attorney General, for appellee. (Before SALTER, EMAS and LOGUE, JJ.)

(PER CURIAM.) Elton Graves appeals the denial of his motion under Florida Rule of Criminal Procedure 3.800 for the correction of a life sentence of imprisonment he contends is illegal. Finding his position well taken, we reverse and remand the case for resentencing.

I. Procedural History and Life Sentence on Count 1

In an amended information filed in February 2010, Graves was charged with four counts: (1) attempted second degree murder of a law enforcement officer engaged in the lawful performance of his duty; (2) resisting a law enforcement officer with violence; (3) attempting to deprive a law enforcement officer of the officer’s weapon; and (4) assault on a law enforcement officer. The alleged crime date was December 12, 2007. Before trial, the State dismissed count 4.

Following a jury trial, Graves was convicted of counts 1 and 2 and acquitted as to count 3. Graves was adjudicated a habitual felony offender (“HFO”). He was sentenced to life imprisonment on count 1 and ten years on count 2. At the sentencing hearing, the State and defense both represented to the trial court¹ that the maximum sentence on count 1 as an HFO was thirty years, with a ten year concurrent sentence as an HFO on count 2. The trial court recessed the sentencing hearing to allow the State and defense to consider the trial court’s reading of the applicable statutes and conclusion that the maximum sentence on count 1 was life. After that recess, the State and defense continued to agree that the maximum punishment for count 1 was 30 years.² On the second page of the sentencing scoresheet, the “maximum sentence in years” was entered in handwriting to indicate “30 as HO.” Construing section 775.0823, Florida Statutes (2007), the trial court again concluded that the maximum sentence on count 1 was life and imposed that sentence.

In Graves’ appeal from the conviction and sentence,³ the Office of the Public Defender did not raise the count 1 sentencing issue. In 2012 and 2014, Graves filed pro se post-conviction motions in the trial court alleging that his count 1 sentence was illegal. In February 2013, the trial court denied the 2012 motion, concluding that:

The trial court utilized Florida Statutes 782.04 and 775.0823 in determining the range of punishment available to the defendant at sentencing. The trial court further determined that in the instant case the Attempted Second Degree Murder of a Law Enforcement conviction was a first degree felony punishable by life when interpreting Florida Statutes 775.0823 and 782.04 together. As such, the defendant’s enhancement as a Habitual Offender lawfully made his possible sentencing range up to Life Imprisonment. As such, the trial court’s imposition of a Life Sentence in State Prison as a Habitual Offender of count One of the Information was not in error and was permissible.

The defendant did not appeal the trial court's denial of his 2012 motion. In 2014, Graves filed a second motion under rule 3.800(a) that conceded the motion was successive, but contended that the manifest injustice of the illegal life sentence merited relief. The trial court adopted the State's response that the motion was successive and, because the first order had not been appealed, it was barred as a matter of collateral estoppel. Graves' appeal to this Court was unsuccessful.⁴

The motion under rule 3.800 at issue in the present case was filed in 2017. It raised again the alleged illegality of the life sentence imposed as to count 1. The trial court denied the motion on three grounds: (1) collateral estoppel, based on the consideration and denial of his prior motions; (2) Graves' was properly adjudicated and sentenced as an HFO; and (3) Graves was given proper notice of the State's intention to seek HFO sentencing. This appeal followed.

II. Analysis

We affirm without additional comment the trial court's rulings on the propriety of notice and adjudication regarding Graves' status as an HFO. The first issue is more complex. We are not precluded from review of the legality of Graves' life sentence on count 1 despite his prior unsuccessful motions on that issue. *State v. Akins*, 69 So. 3d 261, 268 (Fla. 2011) ("Under Florida law, appellate courts have 'the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice'" (quoting *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (alteration in original))). See also *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004).

A. The Pertinent Statutes as of 2007

The statutory issue confronted by counsel for the State and for Graves at the 2010 sentencing hearing—the subject of a recess in that hearing to permit counsel to consider the trial court's analysis (which, as noted, counsel for both the State and Graves were unwilling to endorse)—arises because of four separate statutes and the history of section 775.0823.

First, section 782.04(2), Florida Statutes (2007),⁵ defines second degree murder and provides that the completed offense "constitutes a felony of the first degree, punishable for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or 775.084." Second, section 777.04(4)(c) applies to an attempted second degree murder, classifying the offense (one degree lower than the completed offense) as "a felony of the second degree, punishable as provided in s. 775.082, 775.083, or s. 775.084."

Third, section 775.084 addresses, among other things, the procedure for, and consequences of, adjudication of a defendant as an HFO. Subparagraph (4)(a)2 of that statute provides that a court may sentence an HFO, in the case of a felony of the second degree, "for a term of years not exceeding 30." Thus, under these three provisions, it is clear that Graves' maximum sentence for attempted second-degree murder would be 30 years as an HFO. However, Graves was convicted of attempted second-degree murder of a law enforcement officer, and the question presented in this case is whether, and the extent to which, his maximum sentence is impacted by section 775.0823, Florida Statutes (2007). The version of that statute applicable to Graves' 2007 crime provides in full as follows:

The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer, as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against any state attorney elected pursuant to s. 27.01 or assistant state attorney appointed under s. 27.181; or against any justice or judge of a court described in Art. V of the State Constitution, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, as follows:

(1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life

without eligibility for release.

(2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(3) For attempted felony murder as described in s. 782.051, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(4) For murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(5) For attempted murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(6) For murder in the third degree as described in s. 782.04(4), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(7) For attempted murder in the third degree as described in s. 782.04(4), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(8) For manslaughter as described in s. 782.07 during the commission of a crime, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(9) For kidnapping as described in s. 787.01, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(10) For aggravated battery as described in s. 784.045, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

(11) For aggravated assault as described in s. 784.021, a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

Section 775.0823 purports to establish "an increase and certainty of penalty" for any person convicted of a violent offense against law enforcement officers and other defined categories of individuals in the judicial, law enforcement, and corrections system. Section 775.0823(5) states "For attempted murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084."

Here is the problem. Although section 775.0823(5) addresses *attempted* second degree murder, the modifier "as described in s. 782.04(2)" relates to the *completed* crime of second degree murder, not an attempt. It appears from the sentencing transcript that the trial court believed that section 775.0823(5) was, in effect, a reclassification statute, requiring the trial court to treat defendant's conviction for attempted second-degree murder (a second-degree felony) *as if it was the completed* crime of second-degree murder (a first degree felony punishable by life). In doing so, the court concluded that the life sentence was mandated by section 775.0823 and its preamble, "to provide for an increase and certainty of penalty for any person convicted of a violent offense against any [law enforcement officer]." However, upon our de novo review of the statutory language, as well as the history of the legislative changes to that statute, we conclude that section 775.0823(5) does not authorize the trial court to "reclassify" the crime of attempted second-degree murder from a second-degree felony to a first-degree felony punishable by life by treating attempted second-degree murder as if it was a completed crime of second-degree murder.

In this particular case, we harmonize, to the extent we can, the apparent inconsistency between sections 775.0823(5) and 777.04(4)(c), by reviewing the original version of section 775.0823 and its subsequent amendments, and by applying well-established rules of statutory construction. As a result, we conclude that we cannot ignore the command of section 777.04(4)(c), which reduces Graves' base offense (second degree murder) from a felony of the first degree punishable by life to a felony of the second degree when the crime charged is merely attempted but not completed. We also cannot ignore the anomalous treatment of both an attempted second degree murder of a law enforcement officer and a completed second degree murder of a law enforcement officer as equivalent offenses for sentencing purposes under the interpretation applied by the trial court.

The trial court read section 775.0823 to mean that an “attempted second degree murder” committed upon a law enforcement officer must be treated for sentencing purposes as a “second degree murder” committed upon a law enforcement officer. The trial court concluded this was the only way to give proper meaning to that statute’s introductory language of intent: “The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer . . .” § 775.0823 (emphasis provided).

However, we do not agree with the trial court’s statutory construction, and we conclude that the confusion engendered by the above-quoted language of statutory intent stems from the statutory amendments following its original enactment.

B. Original Enactment of Section 775.0823

Section 775.0823 of the Florida Statutes was first enacted in 1989 as part of the “Law Enforcement Protection Act.” See Ch. 89-100, § 1, Laws of Fla. Section 775.0823, as originally enacted, provided in pertinent part:

Any provision of law to the contrary notwithstanding, the Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer. . . . by imposing a mandatory minimum sentence without possibility of early release through any gain-time, provisional release credits, conditional release supervision, supervised community release, transition assistance program, or parole during the mandatory minimum portion of the sentence, as follows:

(1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release shall be imposed.

(2) For murder in the second degree as described in s. 782.04(2) and (3), a sentence of imprisonment for 25 years before eligibility for release shall be imposed.

(3) For murder in the third degree as described in s. 782.04(4), a sentence of imprisonment for 15 years before eligibility for release shall be imposed.

(4) For manslaughter as described in s. 782.07 during the commission of a crime, a sentence of imprisonment for 10 years before eligibility for release shall be imposed.

(5) For kidnapping as described in s. 787.01, a sentence of imprisonment for 15 years before eligibility for release shall be imposed.

(6) For aggravated battery as described in 784.045, a sentence of imprisonment for 3 years before eligibility for release shall be imposed.

(7) For aggravated assault as described in s. 784.021, a sentence of imprisonment for 1 year before eligibility for release shall be imposed.

Any person convicted of an offense under this section is ineligible to receive provisional release credits during any portion of his sentence. Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

(Emphasis provided.)

As even a cursory reading reveals, the statute as originally enacted did indeed “provide for an increase and certainty of penalty” for certain offenses committed against law enforcement officers, by (1) establishing mandatory minimum penalties and (2) eliminating eligibility for provisional release credits for any person convicted and sentenced under this section.

C. The 1993 Amendment

This statute was amended on several occasions in the intervening years. For our purposes, however, the first pertinent amendment occurred in 1993, following Florida’s adoption of sentencing guidelines. See Ch. 93-406, § 16, Laws of Fla. Consistent with the adoption of sentencing guidelines, the Legislature amended section

775.0823 in two important ways, by: (1) removing all mandatory minimum sentences provided in the original 1989 version of the statute; and (2) requiring that all sentences for violation of this section be imposed “pursuant to the sentencing guidelines.” Additionally and importantly, the Legislature in 1993 also amended the sentencing guidelines provisions (section 921.0014) and created a sentencing guidelines worksheet. In doing so, the Legislature added a so-called “Law Enforcement Multiplier.” See Ch. 93-406, § 12, Laws of Fla. This multiplier significantly increased the number of sentencing points to be assessed against a defendant convicted of a violent offense against a law enforcement officer:

Law enforcement protection: If the primary offense is a violation of the Law Enforcement Protection Act under s. 775.0823(2), (3), (4), or (5), then the subtotal sentence points are multiplied by 2.0. If the primary offense is a violation of s. 775.087(2)(a)2. or s. 775.0875(1), or of the Law Enforcement Protection Act under s. 775.0823(6) or (7), then the subtotal sentence points are multiplied by 1.5.

§ 921.0014 (emphasis provided).⁶

As a result of the implementation of sentencing guidelines and the creation of the “Law Enforcement Multiplier,” mandatory minimum sentences were no longer part of the framework of section 775.0823, and the Legislature therefore removed that portion of the introductory language of the 1989 version of the statute addressing mandatory minimum sentencing, but chose to retain the general intent language. Below is the 1993 amended version of section 775.0823, with the deleted language bracketed and underscored for ease of reference:

Any provision of law to the contrary notwithstanding, the Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer . . . [by imposing a mandatory minimum sentence without possibility of early release through any gain time, provisional release credits, conditional release supervision, supervised community release, transition assistance program, or parole during the mandatory minimum portion of the sentence,] as follows:

(1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release [shall be imposed].

(2) For murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to the sentencing guidelines [of imprisonment for 25 years before eligibility for release shall be imposed].

(3) For murder in the third degree as described in s. 782.04(4), a sentence pursuant to the sentencing guidelines [of imprisonment for 15 years before eligibility for release shall be imposed].

(4) For manslaughter as described in s. 782.07 during the commission of a crime, a sentence pursuant to the sentencing guidelines [of imprisonment for 10 years before eligibility for release shall be imposed].

(5) For kidnapping as described in s. 787.01, a sentence pursuant to the sentencing guidelines [of imprisonment for 15 years before eligibility for release shall be imposed].

(6) For aggravated battery as described in s. 784.045, a sentence pursuant to the sentencing guidelines [of imprisonment for 3 years before eligibility for release shall be imposed].

(7) For aggravated assault as described in s. 784.021, a sentence pursuant to the sentencing guidelines [of imprisonment for 1 year before eligibility for release shall be imposed].

[Any person convicted of an offense under this section is ineligible to receive provisional release credits during any portion of his sentence.] Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

D. The 2001 Amendment

Section 775.0823 has been further amended over the years, to comport with corresponding changes to the sentencing guidelines, and

to add certain offenses subject to sentencing under this statute. In 2001, however, the Legislature eliminated reference to the sentencing guidelines (and the later-enacted Criminal Punishment Code) and simply declared that (other than first-degree murder) all sentences for a violation of this section shall be imposed “pursuant to s. 775.082, s. 775.083, or s. 775.084” of the Florida Statutes. The 2001 version (the version applicable on December 12, 2007, the date of Graves’ crime) reads in full as shown in section II.A. of this opinion, with this introductory phrase:

The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer. . . .

We highlighted and underscored that introduction, as it was contained in the original 1989 version of the statute and has somehow survived all of the subsequent amendments. However, it can best be characterized as vestigial, given that the statute no longer contains the mandatory minimum provisions or prohibition against early release or provisional release credits, which served to implement the 1989 version’s expressed legislative intent. In other words, and notwithstanding its introductory language, the only “increase and certainty of penalty” that exists for offenses under section 775.0823 is the “Law Enforcement Multiplier” provided in section 921.0014 (2001) and Florida Rule of Criminal Procedure 3.704(20).

E. This Case

The trial court in the present case, in an understandable effort to give meaning to the statutory language “increase and certainty of penalty,” construed the statutory language as requiring the trial court to treat *attempted* second-degree murder of a law enforcement officer (a second degree felony punishable by up to 15 years in prison (up to 30 years in the case of an HFO)) as if it was a *completed* second-degree murder (a first degree felony punishable by up to life). This was error. The statute did not, in any of its iterations, expressly or implicitly reclassify an attempted second-degree murder in this fashion.

The Legislature certainly knows what language to use in reclassifying an offense to a higher degree. *See, e.g.*, § 874.04, Fla. Stat. (2018) (“Upon a finding by the factfinder that the defendant committed the charged offense for the purpose of benefiting, promoting, or furthering the interests of a criminal gang,” the penalty may be enhanced; section 2(b) of that statute specifies that “A felony of the second degree may be punished as if it were a felony of the first degree.”). Similarly, *see* § 775.087, Fla. Stat. (2018) (“Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.”).

But section 775.0823 contains no equivalent language that could reasonably be construed as reclassifying an attempted crime to a higher degree offense by treating it as if it were a completed crime. The “increase and certainty of penalty” language is a holdover from the originally-enacted version of the statute, and the only rational conclusion, based on the statute’s history as described herein, is that the continued presence appears to be an oversight in the legislative amendatory process.⁷

It is of course “well settled that legislative intent is the polestar that guides a court’s statutory construction analysis[.]” *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004), and our starting point is the actual language used by the legislature.

We also recognize it is “the general rule, construing statutes, ‘that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected, if an interpretation can be found which will give it effect.’” *Quarantello v. Leroy*, 977 So. 2d 648, 652

(Fla. 5th DCA 2008) (citing *Goode v. State*, 39 So. 461, 463 (Fla. 1905)) (additional citations omitted).

We cannot ignore the expression of legislative intent that has been carried over from its original enactment in 1989 to the 2007 version applicable to the case before us. However, neither can we ignore the very obvious fact that the intervening amendments removed those provisions which fulfilled and implemented that intent to create an “increase and certainty of penalty.” Stated simply, the 2007 version, while still containing that language of intent, no longer contains any provision to effectuate that intent. Even if we were to find that the language relied upon by the trial court was ambiguous and susceptible to differing reasonable interpretations, we would apply, as a canon of last resort, the rule of lenity provided in section 775.021(1): “The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”

We conclude that the trial court’s construction of the statute, equating attempted second-degree murder or a law enforcement officer to the completed crime of second-degree murder, is an unreasonable construction not supported by a plain reading of the statutory language. Instead, the only reasonable construction, consistent with the plain language and the statute’s amendatory history, is that the reference to “attempted murder in the second degree as described in s.782.04(2)” is merely a reference to the only statutory provision where the offense of second degree murder and its constituent elements is set forth. Had the Legislature intended that the crime of attempted second degree murder of a law enforcement officer (or any other enumerated attempted offense under section 775.0823) be treated for sentencing purposes as a completed offense, it surely would have said so.⁸ The statute, which contains the same expression of legislative intent as that in the original version enacted in 1989, no longer contains the accompanying provisions that implemented such intent. In the absence of any statutory language which actually provides for an increase or certainty in penalty, we find that Graves was convicted of a second degree felony and, as an HFO, was subject to a maximum sentence of 30 years in prison. The sentence of life in prison as an HFO was therefore illegal.

Noting the difficulty encountered by the State and defense counsel, as well as the trial judge, with this conflict in the criminal code provisions described in this opinion, we direct the Clerk to forward a copy of this opinion to the Chief of Legislative Affairs, Office of the State Courts Administrator, to be considered in the annual statutory clarification process.

Based on the foregoing, we reverse the order denying Graves’ motion and remand for a resentencing, at which Graves is entitled to be present, consistent with this opinion.

¹The Judge who heard the 2017 motion under rule 3.800 was a successor to the Judge who tried the case and sentenced Graves.

²The State advised the trial court after the recess that there was a “loophole in the statute.”

³*Graves v. State*, 77 So. 3d 1269 (Fla. 3d DCA 2011) (per curiam affirmed).

⁴*Graves v. State*, 150 So. 3d 1154 (Fla. 3d DCA 2014) (per curiam affirmed).

⁵Each of the statutory sections cited in this portion of the opinion is as in effect at the time of the offense, December 2007.

⁶Again, a multiplier of 2.0 was used on Graves’ sentencing scoresheet in the present case.

⁷A review of the legislative history and staff analysis of the amendments to section 775.0823 provides no additional guidance or insight.

⁸Adopting the trial court’s construction of section 775.0823 would lead to this unreasonable result: a conviction for attempted first-degree murder of a law enforcement officer under section 775.0823(2) would be treated as a conviction for first-degree murder and reclassified to a capital felony punishable by death (*see* sections 782.04(1); 775.082(1)(a)-(b)). However, a statute that subjects a defendant convicted of a nonhomicide to the death penalty has been held unconstitutional. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the Eighth Amendment prohibits imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim).