On July 16, 2018, United Faculty of Florida (UFF) filed an unfair labor practice (ULP) charge alleging that the Florida Polytechnic University Board of Trustees (University) violated section 447.501(1)(a), (b), and (c), Florida Statutes (2018), by eliminating two bargaining unit positions without bargaining over the impact of that decision, and laying off Kate Bernard and Casey Fox in retaliation for their having engaged in protected concerted activity. The UFF filed a second ULP charge on August 20, alleging that the University violated section 447.501(1)(a) and (b), Florida Statutes, by deciding to non-renew the teaching contracts of Professors Christina Drake and Christopher Coughlin in retaliation for their protected concerted activity. Both charges were found to be sufficient. In its answers to the charges, the University denied
having committed unfair labor practices as alleged. The Commission granted the UFF’s unopposed motion to consolidate the two cases.

A hearing officer was appointed and a hearing was scheduled. After a procedural history unnecessary to recite here, a formal hearing was held in Lakeland on January 24 and 25, 2019.

The hearing officer issued her recommended order on April 25, concluding that the University violated section 447.501(1)(a), (b), and (c), Florida Statutes, by eliminating two bargaining unit classifications and terminating the employment of Kate Bernard and Casey Fox, without bargaining and in retaliation for their having engaged in protected concerted activity. The hearing officer further concluded the University violated section 447.501(1)(a) and (b), Florida Statutes, by non-renewing the teaching contract of Christina Drake in retaliation for her protected concerted activities on behalf of bargaining unit members. The hearing officer awarded attorney’s fees and costs to the UFF.

On May 10, the University filed twenty-six exceptions. We granted a seven-day extension for the UFF to file responses to the University’s exceptions. On May 28, the UFF filed its responses to the University’s exceptions. A transcript of the hearing was filed with the Commission.² At the request of the University, oral argument was held by the parties on July 9.

²References to the transcript are designated as “T” followed by the appropriate page number(s). The UFF’s exhibits are designated as “CP-Ex” followed by the appropriate exhibit number(s). The University’s exhibits are designated as “R-Ex” followed by the appropriate exhibit number(s). Citations to the hearing officer’s recommended order are designated “HORO” followed by the appropriate page number.
Background

Prior to addressing the University's exceptions, we will review the pertinent facts.

Since Florida Polytechnic University's inception in 2014, Randy Avent has been its president. Prior to joining the University, Avent had never been a manager or administrator in a unionized setting.

Provost Terry Parker was hired in 2016. Parker has bachelor's, master's, and doctorate degrees in mechanical engineering (ME). As executive vice president, he supervises the University's vice provosts and department chairs. Prior to joining the University, Parker had never been a manager or administrator in a unionized setting.

In 2016, the UFF began organizing a union at the University. On July 18, 2016, the Commission directed an election to be held in a bargaining unit of full-time University employees in the lower division classifications of professor, assistant professor, associate professor, assistant librarian, wellness counselor, and academic program coordinator. Avent and Parker were publicly opposed to unionizing University faculty as they believed a union would be divisive and not in the best interest of the University. Avent said, in a letter to faculty, “I don’t believe unions are either innovative or agile, and I can only wonder where this institution would be today if a union had been involved from the outset.” Parker said that he would prefer to work without a union in place. The University organized and funded a campaign to oppose the election, costing about $60,000.

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3 United Faculty of Florida v. Florida Polytechnic University Board of Trustees, 43 FPER ¶ 53 (2016).
Following a secret ballot election, the Commission certified the UFF as the exclusive bargaining representative for the above described unit on October 27, 2016.\textsuperscript{4} The University and the UFF began negotiating a collective bargaining agreement in 2017.

On or about February 22, 2018, a "concerned Poly employee" mailed an anonymous letter to each member of the University's board of trustees. The letter raised several allegations of a poor working environment, excessive salaries, and construction delays.

The University's administration was not happy about the way issues were raised in the anonymous letter. In a local news article about the letter, Avent was quoted as saying he was concerned about the "group" responsible for the letter, which was perceived to be the UFF or certain faculty.

The University tasked its auditing and compliance officer, David Blanton, with investigating the allegations raised in the letter. Blanton interviewed everyone named in the letter that was still employed with the University. None of these individuals admitted having knowledge that the letter was sent to the trustees or said they agreed to be included in the letter.

Around the time that the anonymous letter surfaced, the UFF was conducting a climate survey. More than fifty percent of the faculty responded to the survey. Two-thirds indicated that they did not feel comfortable expressing dissenting views about administration policy without fear of reprisal.

\textsuperscript{4}United Faculty of Florida v. Florida Polytechnic University Board of Trustees, 43 FPER ¶ 135 (2016).
There were also complaints made that the University was denying faculty their right to union representation at meetings perceived to be disciplinary in nature. On one occasion, ME Professor Hessam Mirgolbabaei appeared for a meeting with his department chair, Mary Vollaro, accompanied by a union representative and Vollaro postponed the meeting. The UFF addressed these concerns with the University's administration.

One of the mechanical engineering department's newer professors, Melissa Morris, voiced several concerns about her teaching load and expectations. On June 6, during a meeting with Parker and Vollaro, Morris was instructed that she should only "speak up" to her department chair and that she should not bring union representatives to meetings or she would risk disciplinary action or other consequences. Morris was told repeatedly not to speak up or make complaints.

**Assistant Librarian and Wellness Counselor Layoffs**

At the time the bargaining unit was certified, the University employed one full-time assistant librarian, Kate Bernard. The University also employed one full-time wellness counselor, Casey Fox, for the entire campus. Both Bernard and Fox reported to Kathryn Miller, vice provost for academic support services and director of libraries.

As the assistant librarian, Bernard worked with Miller to implement library programming, conduct trainings, manage library access services and usage statistics, and coordinate the Academic Success Center. The minimum qualifications for the position include a master's degree in library science and strong teaching and technical skills.

Bernard and Fox were actively engaged in negotiating the parties' initial collective bargaining agreement. Bernard was very outspoken during bargaining. University
officials questioned the participation of Bernard and Fox on the bargaining team, and they were required to report to Miller when they would be absent from work to attend bargaining sessions. Miller reported this information to Parker.

A point of contention during the bargaining process was the type of benefits the University should afford the assistant librarian and the wellness counselor vis-à-vis other teaching faculty. From Parker's perspective, these two classifications should receive less attention in negotiations than the teaching faculty in the unit because they were non-instructional employees.

In October 2017, Miller proposed adding a case manager to the staffing structure, or alternatively, using an outside vendor, BayCare, to provide mental health services on campus.

On May 5, 2018, Miller proposed a new plan to Parker to revamp the staffing in her department. By the summer of 2018, she desired to add four positions (an associate director case management, an associate director library, and two success coaches) and eliminate three positions (wellness coordinator, assistant librarian, and assistant director academic support services). Specifically, she envisioned the associate director library position would oversee the University's digital library and the Florida Industrial and Phosphate Research Institute (FIPRI) library. She recommended that the persons in the existing positions would be eligible to apply for one of the new roles.

On June 21, 2018, the University and the UFF had a bargaining session where a UFF representative spoke of his concerns over recent staff terminations. Bernard and Fox attended that session. Churchill, the UFF's chief negotiator, also was present.
Also on June 21, Miller asked to meet with Bernard, but did not indicate the nature of the meeting. Bernard asked if she needed a union representative to accompany her, and Miller replied that it was unnecessary. During the meeting, Miller gave Bernard a letter stating that she was being laid off, effective immediately, because the University had decided to “eliminate [her] position of Assistant Librarian.” Her last day of employment with the University was July 20, 2018.

On Churchill’s drive home from the bargaining session, she received a text from the University’s chief negotiator, Mark Bonfanti, requesting that she call him. The text arrived within an hour of Bernard receiving her layoff letter.

On June 26, around 10:00 a.m., Miller gave Fox a letter stating that she was being laid off, effective immediately, because the University had decided to “eliminate [her] position of Wellness Counselor.” Her last day of employment with the University was July 25, 2018.

Upon receiving the notice, Fox told Churchill that she had been laid off. Bonfanti had confirmed with Churchill the University’s decision via text message around 8:30 a.m. that day.

Shortly after the meeting with Fox, Miller sent an email to the student body informing them of the planned changes to academic support services, including plans to hire an associate director of campus wellness management and the availability of BayCare and other services to assist students with mental health issues. Avent later forwarded that email to all staff. There was no mention in the email that Fox was no longer employed with the University or available to meet with students.
That afternoon, at 2:22 p.m., Parker emailed the department chairs an update on staff changes in the academic affairs department. The email stated, in relevant part:

"[W]e have eliminated the Assistant Librarian position and will put in place a Director of Libraries. [W]e have eliminated the mental counselor position and will put in place a Case manager (along with an enhanced set of counseling services using BayCare)."

Both Bernard's and Fox's letters contained the following justification:

[W]e identified areas in the University where positions as defined do not align with the current needs of the University. Throughout the last several years, the University rapidly grew and with that growth, comes necessary change. Part of this change includes the elimination of roles and job functions, and although each position is individually important, they are no longer justifiable.

Neither Bernard nor Fox ever received unsatisfactory evaluations. Parker ultimately authorized the layoffs of Bernard and Fox. The University never communicated to the UFF during negotiations its decision to eliminate Bernard and Fox's positions or to lay them off as a result thereof.

It was unclear at that time of the layoffs whether the University had a grievance procedure in place for employees in the bargaining unit. There was a procedure for "university employees who are not governed by a collective bargaining agreement."

As of July 1, 2018, the University contracted with BayCare to provide a full complement of wellness services. The University administration believed this model connects students to specialized, professional clinical services more efficiently and effectively.

Between July 4 and July 12, the University posted advertisements for a "university librarian" and an "associate director of campus wellness management." According to the
position description, the university librarian position is responsible for the operation of the University's digital collections and manages the FIPRI library. According to the position description, the wellness management position is a non-clinical position that is responsible for case management, crisis intervention, and referral services. Both positions report to Miller.

Sometime after Fox's layoff, one student withdrew from the University and another committed suicide in early August 2018. The Tampa Bay Times published an article on August 4 about the student suicide and quoted Professor Christina Drake as saying, "We have a campus makeup that is a ticking time bomb [for mental health issues]."

On August 2, following the filing of the UFF's unfair labor practice charge, Bonfanti emailed Churchill to explain that "the University has not eliminated the positions, but instead is choosing not to fill them at this time." Bonfanti also asked Churchill to notify him if the UFF desired to engage in impact bargaining over the University's decision.

The UFF's legal counsel responded on August 7 to explain the adverse impacts of the University's decision and to express a willingness to engage in impact bargaining. The UFF also noted that the two newly-created positions appeared to share a community of interest with the other classifications in the bargaining unit and requested that the University consent to those positions being included in the unit.

The University and the UFF met on September 12 to discuss, among other things, the UFF's concerns over the decision to terminate Bernard and Fox. The University agreed to provide the UFF adequate notice of decisions that could implicate impact bargaining.
Ultimately, the parties finalized their initial CBA in January 2019. The CBA contains approximately seven references to the wellness counselor and assistant librarian as "academic professionals" and includes a provision governing advance notice to the UFF of any unit member layoffs.

Prior to Bernard and Fox's layoffs, the University organizational chart contained the assistant librarian and wellness counselor positions as well as others considered "vacant." Subsequently, the University removed those positions from its organizational chart and added the position of associate director of campus wellness management.

As of January 25, 2019, the University did not employ either an assistant librarian or a wellness counselor nor had it sought to fill those positions. With Miller as its sole librarian, the University receives assistance from a librarian at FIPRI.

**Mechanical Engineering Department**

During its initial accreditation process, the University decided to reorganize the "Mechanical and Industrial Engineering Department" into the Mechanical Engineering Department. ME, in general, includes the study of materials.

The University's ME degree offers two concentrations in materials science, also known as electives: nanotechnology and materials in advanced manufacturing. There are four required courses for each concentration. From the beginning, the University had a large focus on nanotechnology and invested heavily in laboratories and equipment.

Within the ME department, the University employed approximately ten faculty, seven of whom had at least one degree in ME.

Vollaro became chair of the ME department in 2018; as chair, she supervises all ME professors. Vollaro was the academic program coordinator from 2016 to 2017 before
that position evolved into department chair. As of January 2019,\(^5\) department chairs are excluded from the bargaining unit; prior to that time, Vollaro was a member of the bargaining unit and UFF. Vollaro has a bachelor's degree in ME and master's and doctoral degrees in materials science.

The four materials science faculty in the ME department include Christina Drake, Christopher Coughlin, and Richard Matyi, as well as Huseyin Icar, who subsequently resigned. Each of these individuals has a doctoral degree and collectively they have teaching experience ranging from one to twenty-five years, among other qualifications.

Matyi is an associate professor with more than twenty years of teaching experience. He has bachelor and doctoral degrees in materials science and engineering and a master's degree in polymeric. Matyi was the academic program coordinator from 2015 to 2016. He presently serves as president of the UFF chapter at the University and is very outspoken on matters involving the faculty.

Coughlin was an assistant professor, with approximately seven years of teaching experience and a doctorate degree in polymer science. He served as chair of the UFF's contract enforcement committee, wherein he represented unit members as needed in investigatory or disciplinary meetings. In this role, he expressed concern to the University's administration about its handling of Mirgolbabaei's request for a union representative at a meeting with Vollaro. Coughlin never had any performance issues and received favorable evaluations. He resigned from the University in December 2018.

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\(^5\)United Faculty of Florida v. Florida Polytechnic University Board of Trustees, 45 FPER ¶ 245 (2019).
Christina Drake, an assistant professor, was hired in 2014. She earned her bachelor's, master's, and doctoral degrees in materials science and engineering. Prior to joining the University, Drake did not have academic teaching experience. Drake was nominated for a teaching award by her students and received service awards from the faculty governing body. She never had any performance issues and has taught core ME courses, among others, with favorable student evaluations.

Drake was the academic program coordinator from 2014 to 2015. She served on the University's board of trustees from 2014-2016.

After relinquishing her trustee duties, Drake became the UFF's membership and communications chair in the fall of 2017 and presently serves as the grievance and contract enforcement chair. Both positions are part of the UFF's executive council. Drake also was involved in collecting showing of interest cards during the Union's organizational campaign.

Drake and Coughlin are the only professors in the ME department to have received external funding for engineering research.

On May 23, 2018, Drake, Matyi, and other faculty provided public comments at the University's board of trustees meeting. Those comments addressed concerns about the educational environment and results of the faculty climate survey. It was apparent to those in attendance that the University's administration was not "thrilled" with UFF leaders speaking at the trustees meeting.

Drake also sent correspondences expressing her concerns about fears of retaliation to individual members of the University's board of trustees, including Jim Dewey and Gary Tyson.
On June 28, Drake delivered remarks on behalf of the UFF to the Board of Governors for the State University System. Drake’s remarks included concerns about human resource matters, such as the wellness counselor and assistant librarian terminations, which she opined were motivated by a desire to suppress potential whistleblowers and retaliate for union activity.

In a July 12 letter to Blanton, the University’s inspector general, Drake expressed concerns about a “hostile work environment” at the University and identified fourteen individuals whom she believed had been laid off or fired due to “restructuring” and retaliation. Blanton looked into the matter but was unable to substantiate any of Drake’s concerns.

Drake also sent a letter of concern to Marshall Criser, Chancellor of the State University System of Florida, on the day of the student suicide in early August 2018. Parker convened a meeting with Dewey and Avent to discuss Drake’s email to the Chancellor, which had frustrated both Parker and Avent. Avent lost his temper during the meeting because he believed Drake had misrepresented facts in her email. Avent commented that he had “had enough of it” and would “put a stop to it.” Dewey thought “it” meant certain individuals, Drake “for sure[,]” and “[m]aybe others.”

Faculty Non-Renewals

In 2018, the University was in the midst of programmatic review of its computer engineering, electrical engineering, and mechanical programs through the Accreditation Board for Education and Technology (ABET). ABET is an independent entity that accredits post-secondary education programs in applied science and natural science,
computing, engineering and engineering technology. In preparation for ABET accreditation, the University reviewed its programmatic and course offerings and faculty credentials, among other things.

The administration believed that the materials science faculty were "poorly positioned" to cover core courses in the ME program. Avent commented that the University had a large number of material scientists in its ME department. Therefore, the University shifted its focus to reducing its "overabundance" of materials science faculty.

On May 11, Vollaro met with the ME Curriculum Advisory Board, which later provided minor input on the program’s overall objectives; no comments were made about the materials science concentration in particular. Faculty in the ME department were not aware that the advisory board was convened or apprised of its recommendations.

On June 16, Parker sent an email to the University’s general counsel identifying several faculty whom he was considering non-renewing. In the ME department, those faculty included Coughlin, Drake, and Matyi.

Parker also conferred with the University’s vice provost of assessment and instruction, Tom Dvorske, on the credentials of ME faculty, in particular, Matyi, Coughlin, and Drake. Dvorske emailed Parker on July 30 with his conclusions that none of these professors had "any prior experience teaching in an ABET accredited mechanical engineering program."

Parker prepared a memo, dated July 27, and addressed to Avent, that explained his recommendations for faculty retention and non-renewals across various departments. Specifically, he recommended that the University not offer new contracts to six faculty members, including four ME professors.
In the ME department, Parker recommended non-renewing Drake, Coughlin, Matyi, and Huseyn Ucar because they "are not appropriately credentialed to deliver the core courses in a ME degree program and are not aligned with the ABET requirements for faculty." Parker also noted plans to add concentrations in aerospace and biomedical engineering; reconfigure the manufacturing and materials processes concentration to target more manufacturing; and evolve the nanotechnology concentration into a more broadly applicable materials science concentration. Doing so would effectively eliminate some materials-related upper-level courses that Drake, Coughlin, and Matyi taught and developed in preparation for ABET accreditation.

Attached to the memo was a faculty teaching chart that Parker and Vollaro developed, based on their personal knowledge, to illustrate the overall course offering for a period of time and the credentials of existing ME faculty relative to those courses. The chart identifies the teaching capabilities of faculty based on their degrees, experience, and teaching history.

Not all faculty members were identified in the chart as credentialed to teach every ME course, as Parker and Vollaro relied on currency and expertise in a particular field in determining the best fit for each course, particularly upper-level courses. Additionally, some errors were made in completing the chart. For example, while Drake previously taught some core ME courses with favorable student evaluations, she was not marked as "credentialed" for all of them.

Vollaro believed that all faculty in her department should be able to teach freshmen and sophomore level courses. Though Vollaro has a doctorate degree in
materials science, the chart reflects that she is more credentialed to teach ME courses than Drake, Matyi, and Coughlin.

On August 2, Parker and Avent discussed the memo. Avent agreed that the University would be better served if it could "capture [the material science] positions with real mechanical engineers or engineers that were specifically mechanical" and revamp the ME program into a "straight mechanical engineering program."

Parker and Avent also concluded that one of the six proposed non-renewals should be retained: Matyi, the most highly credentialed materials science professor. This was to ensure "sufficient teaching capacity for the existing materials science courses."

On August 5, 2018, Parker revised the memo to reflect recommendations of non-renewals in the ME department for Drake, Coughlin, and Ucar. The chart was not revised.

On August 15, Parker informed Coughlin and Drake in writing that their contracts would not be renewed. The timing of the notice was delayed due to the student suicide. Both Coughlin and Drake were subject to annual contracts that were set to expire August 15, 2019. Drake was never told that she was not adequately credentialed to teach certain courses in the ME department or not aligned with ABET requirements for faculty.

On August 20, Parker sent an email to faculty explaining the University’s decisions regarding faculty retention and non-renewals. He explained that the decisions were reached with input from the department chairs or division director and review of each
faculty member’s support of a broad range of core course delivery in the various departments.

The University hired three new ME faculty for the 2018-2019 academic year, two of whom have terminal degrees in ME and the other in aerospace engineering.

Neither Parker, Vollaro, nor any faculty member has proposed specific changes to the ME curriculum or offered plans to reorganize or reduce ME courses and concentrations, as recommended in the August 5 memorandum.

ABET issued its audit of the University’s programs following a second site visit in October 2018. The report identifies certain shortcomings, identified as concerns and weaknesses. As to the ME program, the ABET team stated: “While the current faculty numbers and competencies are adequate,” additional faculty will be required to accommodate future enrollment growth in the program. The ABET team was not informed that Drake and Coughlin’s teaching contracts would not be renewed after the 2018-2019 academic year.

We turn now to the University’s exceptions. Preliminarily, we note that many of the University’s exceptions take issue with the hearing officer’s findings of fact and credibility resolutions. It is axiomatic that the Commission may not disturb any of the hearing officer’s factual findings unless we first determine from a review of the entire record, including the transcript, that the challenged findings are not supported by competent substantial evidence. § 120.57(1)(l), Fla. Stat. We are mindful that it is the hearing officer’s function “to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact.” Boyd v. Department of Revenue, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996). If
competent substantial evidence in the record supports the findings of fact, the Commission may not reject them, substitute its findings, or make new findings. *Id.*

In contrast, when a party excepts to a conclusion of law, the Commission has the "principal responsibility of interpreting the statutory provisions consistent with the legislature's intent and objectives." *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So. 2d 987, 989 (Fla. 1985). We will substitute our conclusions of law for those of the hearing officer in those cases where we find our resolution of those issues is as reasonable or more reasonable than that of the hearing officer. *See, e.g., Broward Teachers Union, Local 1975, Florida Education Association, American Federation of Teachers, National Education Association, American Federation of Labor/Congress of Industrial Organizations v. School District of Broward County, Florida*, 45 FP*E R ¶ 141 (2018). In resolving exceptions to conclusions of law, we consider the statute at issue, policy considerations, and whether the hearing officer's analysis is consistent with pertinent judicial and Commission precedent.

Many of the exceptions argue that the hearing officer improperly relied on hearsay evidence. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. In administrative proceedings hearsay evidence is admissible for the purpose of supplementing or explaining other evidence. However, the hearing officer may not rely exclusively on hearsay evidence to make any findings of fact, unless that hearsay evidence is admissible over objection in a civil action. § 120.57(1)(c), Fla. Stat. At the hearing, the hearing officer noted as much when she stated she would determine whether hearsay evidence could be used in her
recommended order. (T. 43) As we note a number of times below, any written or oral statement made by the adverse party is admissible as an exception to the hearsay rule as an admission by a party-opponent when it is offered against the adverse party. § 90.803(18), Fla. Stat. See Castaneda ex. rel. Cardona v. Redlands Christian Migrant Association, 884 So. 2d 1087, 1090-92 (Fla. 4th DCA 2004).

Finally, while a number of the University's exceptions ask the Commission to make additional findings of fact, it is improper for an agency to make supplemental findings of fact on an issue when a presiding officer made no findings. See Florida Power and Light Co. v. State, 693 So. 2d 1025, 1026 (Fla. 1st DCA 1997). Assuming the hearing officer erred in not making certain findings of fact, the proper remedy for the Commission would be to remand to the hearing officer for additional fact finding when a fact that is material to the ultimate determination has been omitted and it appears to have been overlooked by the hearing officer. Curtis v. West Palm Beach Association of Fire Fighters, I.A.F.F., Local 727, 39 FPER ¶ 194 at 374 (2012). See also Inverness Convalescent Center v. Department of Health and Rehabilitative Services, 512 So. 2d 1011, 1015 (Fla. 1st DCA 1987).

6 The University has also provided a list of fourteen "omitted" findings of fact reflecting "undisputed facts...properly established at the hearing[.]" Based on our examination of the record, we disagree that these findings represent "undisputed facts." § 120.57, Fla. Stat. Instead, many of these "omitted" findings of fact reflect factual arguments raised before the hearing officer and in the University's exceptions. The University has not numerated these "omitted" findings of fact as exceptions, nor does the University suggest remand to the hearing officer is necessary for additional findings of fact. Accordingly, to the extent this list of "omitted" findings of fact suggests that the University is excepting to anything other than what is contained in its numerated exceptions and supporting argument, any such exception is denied. See Coral Gables Walter F. Stathers Memorial Lodge 7, Fraternal Order of Police v. City of Coral Gables, 32 FPER ¶ 188 (2006).
Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1346 (Fla. 1st DCA 1987). However, as set forth below, we find no error on the part of the hearing officer warranting remand for additional findings of fact.

Exception One

The University takes exception to the hearing officer’s findings of fact seven and eight, relating to President Avent’s and Provost Parker’s statements regarding unionization at the University, and the amount the University spent on legal fees during the union campaign. These two paragraphs include several discrete findings: 1) the administrators admitted during the hearing that they wished the UFF did not represent university faculty; 2) the administrators personally engaged in direct campaigning against the UFF during its organizing campaign; and 3) the University spent about $60,000 opposing the UFF during its organizing campaign. However, upon review of the record, including the transcript, we conclude that all the challenged findings are supported by competent substantial evidence. (T. 30-32, 89, 259-61, 290-91, 371; CP-Exs. 1-2; R-Ex. 63)

Section 447.501(3), Florida Statutes, expressly preserves a public employer’s right to engage in non-coercive communication with its employees:

Notwithstanding the provisions of subsections (1) and (2), the parties' rights of free speech shall not be infringed, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair employment practice or of any other violation of this part, if such expression contains no promise of benefits or threat of reprisal or force.

Under this statute, an employer has the right to communicate with its employees in non-coercive terms. See Gadsden Classroom Teachers' Association, FTP, NEA v. The School Board of Gadsden County, Florida, 9 FPER ¶14202 at 371-72 (1983). Based
upon this statute the University also argues in exception one that, as a matter of law, neither the employer opinions regarding unionization nor the amount spent on legal fees during the union campaign may serve as evidence of animus.

As a threshold matter, we note that the University has waived its argument by failing to timely assert it as an objection to the exhibits or testimony that informed the hearing officer’s findings. In fact, the hearing officer’s findings are supported by a University witness’s own testimony and exhibit. The University itself introduced evidence of anti-union bias by university administrators through the testimony of Parker. (T. 371; R-Ex. 63)

Parker’s testimony presented the hearing officer with a University administrator admitting on the stand he had an anti-union animus. Parker’s admission that he holds an anti-union bias is direct and relevant evidence. The University’s construction of section 447.501(3), Florida Statutes, would have the absurd and irrational result of requiring hearing officers to ignore direct evidence of animus.

The University further argues that a public employer under the free speech proviso in section 447.501(3), Florida Statutes, may lawfully state its views concerning employee organizations seeking to represent its employees, provided that the public employer’s statements do not contain a promise of benefits or a threat of reprisal or force. See, e.g., Communications Workers of America, Local 3178 v. City of Miami Beach, 38 FPER ¶ 252 (2012); Jess Parrish Memorial Hospital v. Florida Public Employees Relations Commission, 364 So. 2d 777 (Fla. 1st DCA 1978).
While the University's argument is generally correct, in determining a manager's anti-union animus, we have not held that a hearing officer may never consider statements by a manager evidencing animus unless those statements independently constitute an unfair labor practice because they contain an unlawful promise or threat. The University's narrow construction of section 447.501(3), Florida Statutes, is contrary to Commission precedent finding anti-union animus to be a highly relevant factor in retaliation cases. *Pasco County School Board v. Florida Public Employees Relations Commission*, 353 So. 2d 108, 119 (Fla. 1st DCA 1978) ("A discharge of an employee, followed closely on the heels of an employer's display of anti-union animus, supports a finding of an unfair labor practice.").

Our jurisprudence distinguishes between finding that management statements either constitute or are direct evidence of an unfair labor practice, as opposed to evidence of anti-union animus. Hearing officers have frequently considered management's negative statements toward the union, not to conclude that the negative statements are unlawful, but to conclude that they establish animus. See, e.g., *International Union of Police Associations, Local 6090 v. City of Groveland*, 41 FPER ¶ 316 (2015); *Diaz v. City of Plantation*, 35 FPER ¶ 116 (2009). The existence of administrator animus is a question of fact for the hearing officer to decide. *Big Bend Police Benevolent Association v. City of Calloway*, 19 FPER ¶ 24190 (1993). Accordingly, we reject the University's construction of section 447.501(3), Florida Statutes.7

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7The University repeats its argument regarding the proper construction of section 447.501(3), Florida Statutes, in exceptions eighteen and nineteen. We reject the University's position in those exceptions as well.
Section 447.503(1), Florida Statutes, requires a “clear and concise statement” of the facts alleged to constitute an unfair labor practice. The University next alleges the UFF’s unfair labor practice charges fail to recite “any statements of animus attributed to the employer and place these statements in context.” The University cites *McMillion v. Jackson County School District*, 20 FPER ¶ 25298 (1994), where the General Counsel stated: “it is crucial that statements of animus and threats attributed to the employer be placed in context and be repeated in the charge as nearly verbatim as possible when a charge asserts that an employee was dismissed for unlawful discriminatory reasons.” 20 FPER at 485. However, placing the statement quoted by the University in context, the General Counsel in *McMillion* was rejecting a vague charge that the Petitioner had been “harassed” and “intimidated.” Thus the General Counsel’s statement in *McMillion* merely reflected the broader due process concern that an unfair labor practice charge be factually detailed and specific. The General Counsel stated charges which contain allegations that are vague, general, or conclusional will not be found sufficient, repeating a familiar quote from *United Faculty of Florida v. Board of Regents*, 8 FPER ¶ 13187 at 338 (1982), where the Commission stated: “While a charge need not set forth every detail of the alleged illegal conduct, it must be sufficiently detailed to indicate who were the individuals involved, what happened, and when and where it happened.” *McMillion*, 20 FPER at 484. Accordingly the University’s argument that the charges in the instant case needed to repeat “any” alleged statements of anti-union animus by the employer is

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8Paragraph 10 of the charge in Case No. CA-2018-034 states: “The University’s President, Randy Avent, and its Provost, Terry Parker, have repeatedly expressed hostility toward UFF.”
without merit. Indeed, the University's position that, in effect, every statement demonstrating animus on the part of university administrators must be catalogued and quoted in the charge is difficult to reconcile with the statutory requirement for a "concise statement." § 447.503(1), Fla. Stat.⁹

The University next alleges "as a matter of law" the statements of animus "occurred well outside of any statutorily limited time period." See § 447.503(6)(b), Fla. Stat. Parker testified regarding a letter he sent on September 21, 2016, to faculty members stating he did not believe "that a union is helpful." (T. 371; R-Ex. 63) However, it is well-settled that the Commission may consider events outside of the six month limitation period as evidence to determine whether the events which occurred within the six month period constitute an unfair labor practice. Diaz v. City of Plantation, 35 FPER 116 at 237 (2009); DaCosta v. Public Employees Relations Commission, 443 So. 2d 1036 (Fla. 1st DCA 1983), rev'g DaCosta v. Miami Association of Fire Fighters, Local 587, 8 FPER ¶ 13048 (1981), dismissed, 450 So. 2d 487 (Fla. 1984). Therefore, these statements may be considered evidence even if they occurred outside of the six month time period.

The University also argues that the fact that an employer resented an employee's protected conduct does not "automatically translate into harassment." Alachua County Police Benevolent Association v. City of Starke, 15 FPER ¶ 20020 at 36 (1988). However, the hearing officer's findings of fact seven and eight provide relevant context for other inquiries besides animus. The findings that Avent and Parker were personally

⁹The University repeats this argument regarding statements of animus in exception eighteen. We reject it there as well.
involved in the University’s opposition to the UFF organizing drive in 2016 supports the inference that Avent and Parker would have known that Drake was engaged in protected activity, spearheading the union campaign, and supports the inference that Avent and Parker would have both been personally involved in the labor-management conflicts that culminated in 2018. Moreover, these findings helped the hearing officer to make credibility determinations because of the inconsistent testimony of Avent and Parker.

Section 447.501(3), Florida Statutes, only applies to “arguments or opinions” and does not impede a hearing officer from making findings regarding an administrator’s actions, as in this case. It was relevant that Avent and Parker personally and directly involved themselves in the University’s anti-union organizing campaign, that they engaged in direct communications with bargaining unit members, and that the University spent great efforts and funds opposing the UFF. Finally, these findings provided the hearing officer with a basis to judge whether explanations given for actions were pretextual.

For the foregoing reasons, the University’s exception one is denied.

Exceptions Two, Five, Ten, Twelve, Thirteen, and Fourteen

In exceptions two, five, ten, twelve, thirteen, and fourteen, the University challenges findings of fact fourteen, twenty-one, thirty-five, fifty-seven, fifty-eight, and sixty-two. Upon review of the record, including the transcript, we conclude that all the challenged findings are supported by competent substantial evidence. § 120.57(1), Fla. Stat. (T. 38, 46, 62-63, 77-78, 263, 270-71, 299, 308-09, 504, 509-10; R-Ex. 56; CP-Ex. 17) Thus, exceptions two, five, ten, twelve, thirteen, and fourteen are denied.
Exception Three

The University next takes exception to findings of fact number fifteen and sixteen on a number of grounds, including the assertion that the findings are based on hearsay and are not based on competent substantial evidence. Despite this challenge, the hearing officer's finding of fact fifteen is supported by competent substantial evidence. (T. 40-41, 92-94, 519-20; CP-Exs. 5-6, 10, p. 4)

Similarly, the statements in finding of fact sixteen were based on the personal knowledge of Melissa Morris. Morris referenced statements by Vollaro and Parker (T. 473, 475, 491, 494), but these statements were not objected to and would have been admissible over objection as party-admissions. § 90.803(18)(d), Fla. Stat.

The University argues the UFF did not present any admissible evidence that Mirgolbabaei had the right to have the presence or assistance of a union representative at the meeting with Vollaro, nor did the UFF provide any evidence that Vollaro could have known Mirgolbabaei held this belief.

Notably, the hearing officer in finding of fact sixteen did not find that the University engaged in an unfair labor practice because of its conduct toward Mirgolbabaei and

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10 As in exception one, the University again argues that some factual findings are beyond the scope of the six month statute of limitations period in section 447.503(6)(b), Florida Statutes. As noted above, it is well-settled that the Commission may consider events outside of the six month limitation period as evidence to determine whether the events which occurred within the six month period constitute an unfair labor practice. 

11 The hearing officer declined to credit Vollaro's testimony that she "never discouraged anyone from coming to a meeting with her with a union rep." (T. 519)
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Melissa Morris. Still, based upon the interactions with Mirgolbabaei and Morris, the hearing officer would have been entitled to find that Parker and Vollaro had a disdain for Weingarten rights and conspired against union members who asserted Weingarten rights. (T. 473-75, 517-20)

In their text messages, Parker told Vollaro that the union leaders in mechanical engineering were not “holding appropriate standards” when they helped Mirgolbabaei assert his right to union representation, or, as Parker put it, “protecting a poor performer.” (CP-Ex. 10, p. 6) In the same text chain, after Mirgolbabaei asserted his Weingarten rights, Parker and Vollaro conspired to make Mirgolbabaei “look stupid” in the hopes he would become insubordinate:

Parker, CP-Ex. 10, p. 7 (4/24/18): “I will send and copy as many people that I can justify...we need to tag team him a bit and make him look stupid.”

Vollaro, CP-Ex. 10, p. 7 (4/24/18): “Ok sounds like a plan!”

Parker, CP-Ex. 10, p. 9 (5/5/18): “Force the meeting with hessam...Hope that hessam becomes insubordinate.”

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12 See NLRB v. Weingarten, Inc., 420 U.S. 251 (1975). In interpreting federal labor law, the United States Supreme Court held in Weingarten that an employee represented by a union has a statutory right, upon timely request, to union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action against him. Id. Similarly, the Commission has determined that the equivalent Florida statute, which is modeled upon the federal statute, also encompasses a similar “Weingarten right.” See § 447.301(3), Fla. Stat.; Seitz v. Duval County School Board, 4 FPER ¶ 4154 (1978), rev’d in part on other grounds, 366 So. 2d 119 (Fla. 1st DCA 1979). Thus, public employees are guaranteed the right to union representation in an investigatory or disciplinary interview if the employee has a reasonable belief that disciplinary action may result from the interview. See Lewis v. City of Clearwater, 6 FPER ¶ 11222 at 332 (1980), aff’d, 404 So. 2d 1156 (Fla. 2d DCA 1981).
Finally, the University argues the hearing officer improperly prevented the University from cross-examining Melissa Morris. We have examined the transcript and find no merit to the argument. The direct examination of Morris was very limited in scope. Morris testified about one meeting with Parker and Vollaro when they warned her not to "speak up" to anyone other than Vollaro and not to bring a union representative to any meetings, and testified this was not the first time Vollaro had warned her against speaking up. (T. 473-75) By contrast, the cross-examination of Morris was broad in scope. Besides questions regarding the meeting with Vollaro and Parker and the circumstances that led to the meeting (T. 477, 491-93), the cross-examination of Morris delved into unfulfilled promises made when she was hired, including her ability to do research (T. 478-79), a lack of resources that delayed Morris from obtaining her professional license (T. 483-84), changes in course structure (T. 485-86), conflicts regarding grant funding (T. 486-87), and teaching assignments (T. 488-89).

When the UFF objected to the questioning of Morris based upon counsel's tone, relevance, and the scope of cross-examination, the hearing officer recognized "there's some digging here," but overruled the UFF's objection and allowed the questioning to continue. (T. 481-82) After extensive questioning on numerous subjects, the UFF objected again on the basis of relevancy and scope of cross-examination. (T. 489) The hearing officer allowed the questioning to continue, while stating: "I'm acknowledging the objection because I'm sort of feeling the same way, but I'm going to allow the testimony.... So I'm going to allow the questioning, but if we could sort of bring it to a point that matters really soon, I'd appreciate that." (T. 490-91) The University's counsel
then briefly returned to the subject of Morris' testimony on direct examination, then rested. (T. 493)

Absent substantial evidence of abuse of discretion by the hearing officer, the Commission will not overturn a hearing officer's evidentiary rulings. See Apopka Professional Firefighters Association, IAFF, Local 4277 v. City of Apopka, 35 FPER ¶ 107 (2009). We find no abuse of discretion by the hearing officer. Instead, the University was given extensive leeway to examine a number of collateral issues, the UFF's objections based on relevancy and scope were denied, and the University was permitted to finish its questioning.

For the foregoing reasons, the University's exception three is denied.

Exception Four

The University excepts to the hearing officer's finding of fact twenty that Bernard and Fox actively participated in collective bargaining; that the two were required to report to their supervisor when they would attend to bargaining; and that their supervisor, Miller, passed this information on to Parker. The University asserts these findings are based on hearsay and not based on competent substantial evidence.

The University argues the hearing officer improperly relied upon Churchill's testimony regarding statements made by the University's General Counsel, Regina Delulio, to find that the University questioned the participation of Bernard and Fox on the collective bargaining team. The statements, however, are admissible as party admissions. § 90.803(18), Fla. Stat.
Finding twenty is also supported by competent substantial evidence because it is based on Churchill’s personal knowledge. The Commission has held that witness testimony based on personal knowledge is competent substantial evidence. *United Correctional Officers Federation, Inc. v. Miami-Dade County Board of County Commissioners*, 44 FPER ¶ 172 (2017). Churchill testified based on her own personal knowledge that Bernard and Fox actively participated in bargaining. (T. 30, 33, 44, 64-65, 78-79) Churchill also testified based on her personal knowledge that the University’s bargaining team questioned Bernard’s and Fox’s participation on the UFF’s bargaining team. Churchill noted “[University General Counsel Regina Delulio] would not call [Bernard and Fox] faculty…. [S]he would call them staff.” (T 42) Later, Churchill testified the University dismissed extending benefits to the assistant librarian and the wellness counselor. “And Gina, generally, or maybe Mark, would say we’re talking about the faculty.” (T. 45)

Churchill also testified that Bernard and Fox were required to notify their supervisor, Miller, before attending bargaining sessions. (T. 42, 44) Miller admitted in her testimony that she required Bernard and Fox to notify her before attending bargaining sessions and authenticated a text message from her to Parker, notifying Parker that Bernard and Fox would be attending bargaining on June 21. (T. 229-30; CP-Ex. 39) The text messages between Miller and Parker were admissible as party admissions. Moreover, Miller admitted the finding through her testimony. § 90.803(18), Fla. Stat. (T. 229-30)
The University argues there is no evidence in the record that the University ever questioned the membership of Bernard or Fox on the collective bargaining team. However, Churchill, the UFF's chief negotiator, testified: "Even from the first day, the University's bargaining team seemed taken aback that the wellness counselor and assistant librarian were on the bargaining team." (T. 42)

The University further excepts to this finding because the hearing officer did not make a finding regarding the reason for requiring Bernard and Fox to notify their supervisor of any work absences (not just collective bargaining). The University argues the Commission should make a finding of fact that the University required Bernard and Fox to notify their supervisor of all absences related to attending collective bargaining meetings, not in retaliation for participating in collective bargaining, but because their positions required set hours and locations and those employees were the only employees providing their respective services to the University's students. (Respondent's Exceptions, pp. 9-10)

However, we cannot disturb a hearing officer's credibility findings. Dixon v. Department of Juvenile Justice, 15 FCSR ¶ 31, 32 (2000). The hearing officer was not required to credit the University's arguments stated above for why it needed Bernard and Fox to notify Miller before attending bargaining. The hearing officer was entitled to find, as she did, that Avent, Parker, Vollaro, and Miller were not credible. (HORO ¶ 16, n.4; ¶ 30, n.5; ¶ 40, n.6; ¶ 62, n.8) Moreover, it is improper for an agency to make supplemental findings of fact on an issue when a presiding officer made no findings. See Florida Power and Light Co. v. State, 693 So. 2d 1025, 1026 (Fla. 1st DCA 1997).

For the foregoing reasons, the University's exception four is denied.
Exceptions Six, Seven, Eight, Nine and Seventeen

We combine our discussion of exceptions six, seven, eight and nine, because they deal with similar evidence and issues regarding findings of fact twenty-four, twenty-seven, and thirty-four. We also address exception seventeen, which challenges the hearing officer's conclusion of law paragraph two, based on the same evidence and issues.

In exception six, the University takes exception to the hearing officer's finding of fact twenty-four regarding the circumstances of Bernard's layoff. In exception seven, the University takes exception to the hearing officer's finding of fact twenty-seven regarding the circumstances of Fox's layoff. The University argues these findings are not based on competent substantial evidence.

With respect to exception six, most of the circumstances described in finding of fact twenty-four are supported by the June 21, 2018, letter that Miller provided Bernard, which stated that "it is necessary to eliminate your position of Assistant Librarian" and notified Bernard that her layoff was effective immediately although, "in an effort to ease [her] transition," the University would pay her 30 more days." (CP-Ex. 14)" The letter was admitted without objection. (T. 21) The letter was prepared on University letterhead and Miller admitted she signed the letter and delivered it to Bernard. (T. 217) To the extent the letter is hearsay, it is a party admission. § 90.803(18)(d), Fla. Stat.

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13 The letter to Bernard states: "[T]his letter serves as your notification of the layoff and is effective today, June 21, 2018, and your last day of employment with Florida Polytechnic University will be July 20, 2018." (CP-Ex. 14)
With respect to exception seven, Fox received a June 26, 2018, letter from Miller with language similar to the one provided to Bernard. Most of the circumstances described in finding of fact twenty-seven are supported by the letter. (CP-Ex. 15)  

In both exception six and exception seven, the University argues the hearing officer erred in findings of fact twenty-four and twenty-seven in finding that the layoffs of Bernard and Fox were "effective immediately." The University strains credulity to argue that each letter's reference to "effective today" meant only that the notification of layoff was effective immediately, not the layoff itself. The hearing officer was entitled to interpret each letter in its more obvious sense and to find that both Bernard and Fox were laid off immediately.  

We find no error in the hearing officer's interpretation of these letters.

Miller's letters to Bernard and Fox informed both of them that they were being laid off because their positions were being "eliminated." (CP-Exs. 14-15) Notwithstanding, the University argues in exception nine there is no competent substantial evidence it eliminated the classifications of assistant librarian and wellness counselor. However, the hearing officer's order explains why the University's claim is thoroughly contradicted by

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14 The letter to Fox states, in pertinent part: "[T]his letter serves as your notification of the layoff and is effective today, June 26, 2018, and your last day of employment with Florida Polytechnic University will be July 25, 2018." (CP-Ex. 15)

15 We do agree with the University that there is no competent substantial evidence for language in findings of fact twenty-four or twenty-seven that Bernard or Fox were directed to back their belongings and escorted from the building. The hearing officer relied upon the testimony of Churchill (T. 48, 51), but in this instance Churchill's testimony does actually appear to constitute hearsay based upon Churchill's conversations with Bernard and Fox. Nonetheless, the hearing officer's ultimate conclusions do not depend on this part of her finding.
competent substantial evidence (HORO, pp. 22-23; R-Ex. 27, 36-37; T. 219-20; CP-Ex. 31) While Parker and Miller each testified that the University did not eliminate the counselor and librarian positions (T. 66, 217, 244, 440, 465; R. Ex. 75, pp. 12, 95), the hearing officer was entitled to weigh the conflicting evidence and make credibility determinations and come to a contrary finding.

The University also argues in exception eight that the hearing officer erred in not finding that it provided the UFF with proper advance notice of the layoffs of Bernard and Fox. Here, the University relies on its argument that each letter’s reference to “effective today” meant only that the notification of layoff was effective immediately, not the layoff itself. (CP-Exs. 14-15) Once again, we reject this argument.

We find the hearing officer did address the University’s notice to the UFF regarding the elimination of the librarian and counselor positions, although adversely to the University’s position, in finding of fact thirty-four, where she found the University never communicated to the UFF during negotiations its decision to eliminate the positions of Bernard and Fox or to lay them off as a result thereof. The University’s argument in exception nine that the hearing officer’s finding of fact thirty-four is not supported by competent substantial evidence is without merit. (T. 48, 53)

In exception seventeen, the University takes exception to the hearing officer’s conclusion of law two, where she concludes the University committed an unfair labor practice in violation of section 447.501(1)(c), Florida Statutes, by failing to provide the UFF with reasonable notice and an opportunity to engage in meaningful negotiations over its decision to eliminate two bargaining unit classifications. The University insists it
provided both notice and a reasonable opportunity to negotiate the impact of its decision before the date when the decision became effective.\textsuperscript{16}

The hearing officer recited the well-established law:

\begin{quote}
[T]he "ability to abolish bargaining unit positions is subject to a public employer's duty to 'impact' bargain about the effects of these changes on the bargaining unit's wages, hours, and other terms and conditions of employment." See, e.g., IAFF, Local 2416 v. City of Cocoa, 14 FPER ¶ 19311 at 689-90 (1988), aff'd, 545 So. 2d 1371 (Fla. 1st DCA 1989) (impact bargaining obligation discussed in context of management decision concerning the number of employees working). Further, a public employer may not implement a decision concerning a non-mandatory subject, prior to initiating negotiations, if the decision has an impact on wages, hours, or terms and conditions of employment. \textit{Id.; Duval Teachers United v. School Board of Duval County}, 6 FPER ¶ 11271 at 402-03 (1980).
\end{quote}

HORO at pp. 23-24.

We agree with the hearing officer's determination that the University did not provide the UFF with proper notice before eliminating the librarian and counselor positions, although it had ample opportunity to do so. The hearing officer correctly relied on \textit{Coastal Florida Police Benevolent Association v. Brevard County Sheriff's Office}, 30 FPER ¶ 297 (2004) and \textit{Southwest Florida Professional Fire Fighters, Local 1826, IAFF v. Ft. Myers Beach Fire Control District}, 23 FPER ¶ 28209 (1997). In both of those cases, the Commission found that an employer violated section 447.501(1)(c), Florida Statutes, by implementing a management right decision without notifying the union before

\textsuperscript{16}The University here renews its argument that the reference in the letters to Bernard and Fox to "effective today" meant only the notification of layoff was effective immediately, not the layoff itself, and that the University therefore properly notified the bargaining agent thirty days before the positions were to be vacated. (CP-Exs. 14-15) For the reasons expressed earlier, we reject this argument.
implementing the decision and providing it with an opportunity to request impact bargaining. The hearing officer's application of these cases to the facts present here was correct.

The hearing officer found that the UFF was not provided with notice and a significant opportunity to bargain prior to implementation of the decision based on facts supported by competent substantial evidence. The Commission is precluded from modifying a legal conclusion based on disagreement with a hearing officer's supported factual findings. *His Kids Daycare v. Florida Unemployment Appeals Commission*, 904 So. 2d 477, 480 (Fla. 1st DCA 2005) (an agency cannot circumvent the requirements of section 120.57(1), Florida Statutes, by characterizing findings of fact as legal conclusions); *Gross v. Department of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002).

For the foregoing reasons, the University's exceptions six and seven are granted in part and denied in part. The University's exceptions eight, nine and seventeen are denied.

**Exception Eleven**

The University next takes exception to the hearing officer's finding of fact number forty-two. The University argues the finding of fact can be read to indicate Churchill expressed her view the parties could not meaningfully "bargain something after it's happened" at an impact bargaining meeting on September 12, when Churchill actually made the statement during the hearing. (T. 70) The finding does not indicate precisely when Churchill made this statement that bargaining after-the-fact was ineffective. However, the timing of this statement is irrelevant. Therefore, the University's exception eleven is denied.
Exception Fifteen

The University excepts to the hearing officer’s finding of fact sixty-nine that, when listing individuals in the Mechanical Engineering department recommended for non-renewal of their contracts, stated: “Ucar also had performance issues as the basis for his nonrenewal.” HORO ¶ 69, n. 9.

The parties agree there is no record evidence to prove that Ucar had performance issues. Accordingly, the University’s exception fifteen is granted. However, granting this exception does not affect the outcome of this case.

Exception Sixteen

The University challenges the hearing officer’s findings of fact seventy-four, seventy-five, and seventy-six. While this “shotgun” approach to making exceptions is not authorized by section 120.74(1)(k), Florida Statutes, the University states these three findings “rely upon a facially inaccurate timeline during which the University made the non-renewal decisions.” (Respondent’s Exceptions, p. 20) The University also argues

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17 Agencies are precluded from granting exceptions that would add supplemental findings of fact advancing an alternative narrative. *Florida Power and Light Company v. State*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997). The University in this exception and in exception nineteen renews the argument made in its proposed recommended order that it made the decision to non-renew Drake and Coughlin by June 16, 2018, i.e., prior to Drake’s protected activity of speaking to the Board of Trustees on June 28, 2018. (T. 91) The hearing officer, however, was entitled to weigh the evidence and her timeline is supported by competent substantial evidence. On June 16, Parker identified several faculty he was considering for non-renewal, and this list included three UFF leaders and other faculty with performance issues. (HORO ¶ 66) Parker then prepared a memo dated July 27, formalizing the justifications for his recommended non-renewals. (HORO, ¶ 68) Parker and Avent met on August 2 and agreed to implement Parker’s recommendations with some modifications. (HORO, ¶ 74) Parker then prepared a second memo dated August 5. (HORO, ¶ 75)
these findings misrepresent testimony and are therefore not based on competent substantial evidence.

The University argues the timing of the statements in finding of fact seventy-four misrepresents Avent's testimony because the discussion on August 2 did not include a decision to fill the materials science positions in the Mechanical Engineering department with mechanical engineers (HORO 20, ¶ 74), but, rather, Avent testified there had been many prior discussions on this subject. (T. 276) However, the record supports the findings that Parker and Avent met on August 2 (CP-Ex. 20), and that Avent wanted to eliminate the "four material scientists" and "capture those positions with real mechanical engineers." (T. 276) The phrase "straight mechanical engineering program" was used by Avent to describe his ambitions for the department before August 2 (T. 275), but also reasonably reflected the outcome of the August 2 meeting.

The hearing officer's finding of fact seventy-five indicated Parker and Avent concluded two of the faculty previously identified for non-renewal should be retained, but the parties agree concerning the University's proposed correction to finding of fact seventy-five: Parker and Avent concluded that only one of the faculty previously identified for non-renewal, Richard Matyi, should be retained, based upon his academic background and expertise to teach more courses. (T. 277, 319; CP-Ex. 24)

The University next alleges that the hearing officer's finding of fact seventy-six that Parker revised his memo on August 5 "to reflect recommendations on non-renewals in the ME department for Drake, Coughlin and Ucar" is not based on competent substantial
evidence. However, Parker's memo was revised on August 5, such that Matyi's contract was renewed and Drake, Coughlin, and Ucar were recommended for non-renewal. (T. 319) Compare CP-Exs. 23 and 24.

For the reasons above, the University's exception sixteen is denied as to findings of fact seventy-four and seventy-six and granted as to finding of fact seventy-five.\(^{18}\)

**Exception Eighteen**

The University next takes exception to the hearing officer's conclusion of law three, which states the University violated section 447.501(1)(a) and (b), Florida Statutes, by laying off Bernard and Fox in retaliation for their protected concerted activity.

In *Pasco County School Board v. Public Employees Relations Commission*, 353 So. 2d 108 (Fla. 1st DCA 1977), the court announced the test to determine whether an adverse employment action constitutes an unfair labor practice. *Pasco* provides:

In order to determine whether the evidence sustains a charge alleging an unfair labor practice, when it is grounded upon an asserted violation of protected activity, the following general principles should be considered by the hearing officer and by PERC:

1) In any such proceeding the burden is upon the claimant to present proof by a preponderance of the evidence that (a) his conduct was protected and (b) his conduct was a substantial or motivating factor in the decision taken against him by the employer.

2) If the hearing officer determines the decision of the employer was motivated by a non-permissible reason, the burden shifts to the employer to show by a preponderance of the evidence.

\(^{18}\)The hearing officer's ultimate conclusions do not depend on finding of fact twenty-five.
evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway.

Id. at 117 (footnotes omitted).

The hearing officer found that Bernard and Fox were active participants on the UFF's bargaining team; that University officials questioned their participation on the bargaining team and treated them differently than other bargaining team members; that spending too much time bargaining over their benefits was a point of contention, so much so that Parker made the unusual act of attending a bargaining session himself and used that opportunity to criticize the UFF for wasting too much time on those two positions; that Bernard and Fox never received any unsatisfactory evaluations; that the University eliminated the counselor and librarian positions without notifying the UFF in advance, despite being in the middle of bargaining; that the elimination of these positions caused a "gap in the delivery of services" that adversely affected the University; that the University's administrators equivocated about not having eliminated these positions; and that the University had no other "legitimate purpose" for eliminating its sole counselor and librarian positions.

There is competent substantial record evidence of anti-union animus including: 1) the University's reaction to the anonymous letter complaining about working conditions; 2) evidence that the University's faculty feared retaliation; 3) Parker and Vollaro's interactions with MirgoLababaei and Morris; 4) the administrators' negative reaction to UFF leaders speaking at the May 2018 board of trustees meeting; 5) the University's elimination of the librarian and counselor positions and the non-renewal of
Drake, all around the same time and all without any legitimate purpose; and 6) Avent's exclamation that he's "had enough of it" and was going to "put a stop to it!" As explained earlier, none of these actions are privileged under section 447.501(3), Florida Statutes, and any one of these findings alone would support the hearing officer's ultimate conclusion.¹⁹

We agree with the hearing officer's application of the facts here to conclude that Bernard and Fox engaged in protected concerted activity, their activity was a substantial or motivating factor in the University's decision to lay them off, and that the University would not have made the decision in the absence of protected activity. Therefore, the University's exception eighteen is denied.

Exception Nineteen

The University next takes exception to conclusion of law four, which states the University committed an unfair labor practice in violation of sections 447.501(1)(a) and (b), Florida Statutes, by non-renewing Drake's teaching contract in retaliation for her protected activities on behalf of bargaining unit members.

The hearing officer's finding that the University non-renewed Drake's employment contract in retaliation for her protected activities is supported by competent substantial evidence. Each of the findings addressed in exception eighteen supporting the retaliation findings against Bernard and Fox also support the finding of retaliation against Drake.

¹⁹The University also attempts to re-argue that it would have taken the same decision to layoff Bernard and Fox regardless of their protected activities in an attempt to meet the second prong of the Pasco test, but that is a factual finding that the hearing officer considered and rejected. HORO, pp. 28-30. We agree with this analysis.
The hearing officer found Parker's stated reasons for non-renewing Drake were pretextual. We agree with the hearing officer on these points.

For the reasons above, the University's exception nineteen is denied.

Exception Twenty

The University next takes exception to conclusion of law five, which states an award of attorney's fees and costs of litigation in favor of the UFF is appropriate. A prevailing charging party is entitled to an award of fees and costs of litigation if the employer knew or should have known that its conduct was unlawful. Coastal Florida Police Benevolent Association v. Brevard County Sheriff's Office, 30 FPER ¶ 297 (2004)
The University argues the award is inappropriate. However, this exception assumes we have determined that the hearing officer erred, which we have not. Accordingly, the University's exception twenty is denied.

Exception Twenty-One

The University next takes exception to the hearing officer's recommendation that the University offer to reinstate Bernard and Fox to their previous positions and provide back pay and any other benefits to which they would be entitled if they had not been laid off and that Drake's August 15, 2018, non-renewal letter be rescinded. (HORO 38, ¶ 2b)
The University argues such a remedy is only appropriate where the Commission finds that an unfair labor practice has been committed. § 447.503(6)(a), Fla. Stat. Here, we have found an unfair labor practice.

Addressing a violation of section 447.501(1)(b), Florida Statutes, the Commission has stated: "The standard make whole remedy in a discrimination case is to order the employer to reinstate the employee and provide back pay with interest from the date of
the discharge, and any other benefits to which the employee would be entitled but for the unlawful dismissal.” *International Union of Police Associations, Local 6090 v. City of Groveland*, 41 FPER at 629. Addressing a violation of section 447.501(1)(c), Florida Statutes, the Commission stated: “The Commission has traditionally required employers found culpable of an unlawful unilateral change to return to the status quo and make whole the employees damaged by the change.” *Southwest Florida Fire Fighters, Local 1826 v. Ft. Myers Beach Fire Control District*, 23 FPER ¶ 28209 at 321 (1997).

The hearing officer’s recommendation that we apply these traditional remedies was correct.

The University also argues that the recommendation to rescind the University’s August 15, 2018, letter to Drake suggests “an equitable remedy of reformation which the Commission is not authorized to provide.” However, the Commission has rejected a similar argument that rescinding Drake’s August 15, 2018, non-renewal letter would be inappropriate because Drake held an annual contract which could have been non-renewed for any reason. In *Broward County Classroom Teachers Association v. School Board of Broward County*, 7 FPER ¶ 12106 at 243 (1981), the Commission stated:

> The School Board also argues that no reason be given for non-renewal of a probationary (annual contract) teacher. While this may be generally true, non-renewal based upon an employee’s engaging in activity protected by Chapter 447, Part II, Florida Statutes (1979), is prohibited by section 447.501(1)(a) and (b), and, therefore, may be remedied by the Commission. *Pasco County v. PERC*, 353 So. 2d 108 (Fla. 1st DCA 1977). We are required to fashion a remedy which restores Cheeley to the position he would have been in but for the unfair labor practice committed by Respondent.

Accordingly, the University’s exception twenty-one is denied.
Exception Twenty-Two

The University takes exception to the hearing officer’s failure to make any conclusions of law relating to Coughlin. The University argues the unfair labor practice charge as it relates to Coughlin should be dismissed in its entirety because the UFF essentially withdrew this portion of the charge. We agree.

Accordingly, the UFF did not prevail on the charge related to Coughlin. The University’s exception twenty-two is granted and the charge in Case No. CA-2018-034 as it relates to Coughlin is dismissed.

Exception Twenty-Three

The University excepts to the hearing officer’s failure to rule on its motion to compel. The University claims the “failure” of the hearing officer to rule on this motion “requires reversal.” We disagree based upon our review of the record.

At the start of the hearing on January 24, the hearing officer asked if there were any outstanding motions. The University’s counsel stated the University had an open motion to compel (T. 18), but made no other mention of the motion nor any claim of prejudice during the two-day hearing. The University also did not address the denial through any post-hearing filing. Thus, the University waived any argument by failing to raise it at the hearing.

Moreover, nothing in the Administrative Procedures Act or the Florida Rules of Civil Procedure requires the hearing officer to render a written order denying the motion to compel. In the absence of a written order granting the motion, it was in effect denied. Because there is no rule requiring a hearing officer to expressly rule on each discovery
motion, her recommended order cannot be said to be a departure from the essential requirements of law. § 120.57(1), Fla. Stat.

Accordingly, the University’s exception twenty-three is denied.

Exception Twenty-Four

The University takes exception to the hearing officer’s denial of its third motion for continuance. The University’s motion argued a continuance was needed because the UFF improperly delayed depositions and the scheduling of depositions. The UFF opposed this motion. The hearing officer held a telephone conference to resolve all outstanding discovery disputes.

After the conference, the hearing officer issued an order denying the University’s motions but noted she would entertain an oral motion to continue at the evidentiary hearing “if it was necessary to avoid prejudicing either party’s ability to fully participate in the hearing.” (January 14, 2019, Order Denying Emergency Motion to Continue Hearing)

Like discovery motions, a motion to continue is also subject to the hearing officer’s discretion. See Fla. Admin. Code R. 28-206.210 (“The presiding officer may grant a continuance of a hearing for good cause shown.”). A continuance of a scheduled hearing may be granted only upon a clear showing of good cause based upon events which arose after the hearing was scheduled. Government Supervisors Association of Florida v. Metro-Dade Public Health Trust/Jackson Memorial Hospital and Metropolitan Dade County, 16 FPER ¶ 21270 (1990).

Florida courts have held that a ruling on a motion to continue should not be reversed unless the ruling amounts to an abuse of discretion. Shands Teaching Hospital & Clinics, Inc. v. Dunn, 977 So. 2d 594, 600 (Fla. 1st DCA 2007). The Commission has

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held that denying a motion will only constitute an abuse of discretion if the moving party would be prejudiced by the denial in either presenting evidence at the hearing or in responding to the evidence of the opposing party. Mallor v. Department of Transportation, 24 FPER ¶ 29512 (1998).

Here, the University had ample opportunity during the hearing to renew its motion for a continuance if it felt prejudiced. Two days of hearing passed without any such oral motions being made (despite the hearing officer’s clear willingness to entertain such a motion), nor was a concern of prejudice raised in University’s proposed order. Moreover, the reasoning behind this third motion was identical to the second which was also denied.

For the foregoing reasons, the Commission finds that the hearing officer did not abuse her discretion. The University’s exception does not establish that any factual findings arose from a proceeding that did not comply with the essential requirements of law. § 120.57(1), Fla. Stat. Thus, exception twenty-four is denied.

Exception Twenty-Five

The University next challenges the hearing officer’s “repeated” reliance upon the “hearsay testimony” of Candi Churchill, the UFF’s chief negotiator. We note that this final order includes no less than nine exceptions where the testimony of Churchill was arguably at issue. With respect to the majority of these instances, we found Churchill’s testimony not to be hearsay at all, but rather based upon Churchill’s direct knowledge involving her activities as the UFF’s chief negotiator. As we noted above in exception four, the Commission has held that witness testimony based on personal knowledge is
The University argues that Churchill signed as the affiant to the charges in these cases, but some of the testimony at trial arguably contradicted language in these charges. The University further asserts Churchill demonstrated she did not have personal knowledge of some matters alleged in the charges. However, none of the hearing officer's findings of fact rely on the language in the charges.

"The bias or interest of a witness is a matter properly argued to the hearing officer and not the Commission because such testimony, if credited, is still competent substantial evidence that supports a factual finding." *Williams v. AFSCME Florida Council 79, 27 FPER ¶ 32124 at 275 (2001).* Thus, exception twenty-five is denied.

**Exception Twenty-Six**

In its final exception, the University challenges the hearing officer's "lack of disclosure" regarding her prior representation of UFF in 2006. The University argues the hearing officer's "failure" to make appropriate disclosure "has caused the University to question her impartiality in this case." The University argues it has been prejudiced by not being made aware of this relationship, and as a result, was not permitted to potentially file the appropriate motion to disqualify the hearing officer prior to the evidentiary hearing and issuance of the hearing officer's recommended order.

"Therefore, the judicial proceeding and evidentiary hearing is subject to scrutiny." *Id.*

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20 The University speculates: "Candi Churchill has been employed at the United Faculty of Florida continuously since 2002. The University is disturbed that the [h]earing [o]fficer may have, without disclosure, previously represented Ms. Churchill, along with the UFF." (Exceptions, p. 50, n.11)
The University requests the Commission consider the judicial canons, and, upon granting this exception, render the evidentiary hearing and recommended order invalid, and assign a new hearing officer to this matter for a de novo evidentiary hearing.

The disqualification of agency personnel is addressed by section 120.665, Florida Statutes, which states:

> Notwithstanding the provisions of § 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified.

Rodriguez v. Broward County Board of County Commissioners, 35 FPER ¶ 256 at 545 (2009). Courts have repeatedly recognized in the context of judicial disqualification that a motion is “untimely when delayed until after the moving party has suffered an adverse ruling unless good cause for the delay is shown.” Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986).

The University fails to explain why it waited until it suffered an adverse recommended order before filing this challenge. The University did not file a motion for disqualification immediately after the recommended order was issued. Instead, it raised this matter as an “exception” fifteen days later. The basis for this “exception” was not hidden. The hearing officer’s public biography showed that one of the hearing officer’s

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21The University offers no authority for the proposition that the Code of Judicial Conduct applies to administrative hearing officers. In fact, the Code of Judicial Conduct is limited to Article V, Florida Constitution judges. See Code Jud. Conduct, Definitions.

The bar for disqualifying a judge is lower than the bar for disqualifying an agency officer, but even under the judicial standard, formerly representing a party in an unrelated matter is not grounds for disqualification. The parties both cite Judicial Ethics Advisory Committee, Opinion No. 2005-05, interpreting Canon 3E(1). An inquiring judge had for fifteen to twenty years represented a college and a hospital in defense of medical malpractice claims. The opinion states that a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of qualification, even if the judge believes there is no real basis for disqualification. A majority of the committee concluded that the judge was required to disclose the long-standing relationship when the college and hospital appear in matters before the judge: “These former clients had a long-standing relationship with the judge which involved litigation. The nature of the representation would have consumed much of the judge’s time as a lawyer, and would have had a significant financial impact on the judge’s prior law firm.”

The parties also cite *Perona v. Fort Pierce/Port St. Lucie Tribune*, 763 So. 2d 1188 (Fla. 4th DCA 2000), where the court declined to quash an order denying a motion to disqualify, where the judge represented a party twice within the past ten years on unrelated matters.

Assuming for argument’s sake the Code of Judicial Conduct applied to our hearing officers, neither Judicial Ethics Advisory Committee, Opinion No. 2005-05 nor the *Perona*
decision support the conclusion that the hearing officer had any disclosure obligations in this case: The University's exception alleges that the hearing officer formerly represented the Union in one case in 2006: United Faculty of Florida vs. Florida Agricultural and Mechanical University Board of Trustees, Case No. CA-2006-023. The charge was filed on March 20, 2006. The hearing officer entered a notice of appearance on behalf of the charging party on October 19, 2006. The charge was withdrawn on November 3, 2006, in connection with a settlement agreement. We conclude the University's exception provides no basis for concluding that this sole appearance in 2006 required disclosure of her prior employment or made the hearing officer biased, prejudiced, or personally interested in the outcome of this proceeding in 2019.

Accordingly, the University's exception twenty-six is denied.

Upon consideration, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law, except as modified herein by our granting of exceptions fifteen and twenty-two, and our granting in part and denying in part, of exceptions six, seven, and sixteen. Accordingly, we adopt the hearing officer's findings of fact. § 120.57(1)(l), Fla. Stat. We agree with the hearing officer's analysis of the dispositive legal issues, her conclusions of law, and her recommendations. The hearing officer's recommended order as modified, is incorporated into this order and the UFF's unfair labor practice charges are SUSTAINED. § 120.57(1)(l), Fla. Stat.

Having concluded that the University unlawfully laid off Bernard and Fox, the University must reinstate them to their former positions with back pay and benefits, less
any compensation and earnings which they would not have received had they not been laid off. The back pay award shall include interest at the lawful rate. The Commission’s Clerk is directed to open a back pay case and schedule a hearing.

The UFF is directed to file its attorney’s fees and cost proposal within thirty days from the date of this order. The Commission’s Clerk is directed to open an attorney’s fees case and schedule a hearing.

Upon the foregoing and having reviewed the entire record in this case, pursuant to section 447.503(6), Florida Statutes, the Commission orders the University to:

1) Cease and desist from:
   a. Unilaterally eliminating classifications within the bargaining unit without affording the UFF advance notice and an opportunity to bargain the impact of its decision;
   b. Discouraging membership in any employee organization by non-renewing the contracts of employees or otherwise terminating employees in retaliation for their having engaged in protected concerted activity; and
   c. In any like or related manner, interfering with, restraining, or coercing its public employees in the exercise of any right guaranteed them under Chapter 447, Part II.

2) Take the following affirmative action:
   a. Reinstate the classifications of assistant librarian and wellness counselor;
   b. Reinstate Bernard and Fox to their previous positions and provide back pay and any other benefits to which they would be entitled if they had not been laid off;
   c. Rescind Drake’s August 15, 2018, non-renewal letter;
d. Post immediately in the manner in which the University customarily communicates with its employees, the attached Notice to Employees; and

e. Pay to the UFF its reasonable attorney's fees and costs incurred in litigating this case.

This is not an appealable final order because the amount of back pay remains to be determined. See Department of Corrections v. Schwarz, et al, 134 So. 3d 1002 (Fla. 1st DCA 2012). When back pay is resolved, the Commission will issue a final order that will allow either party to appeal the merits of the unfair labor practice charge, the amount of back pay, and any other remedies included in the Commission's final order.

It is so ordered.
POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on July 24, 2019.

BY: Rebecca Neal
Deputy Clerk

22The University can satisfy this requirement by e-mailing the Notice to Employees to bargaining unit members or by posting the Notice to Employees on its website. See School District of Orange County v. Orange County Classroom Teachers Association, 146 So. 3d 1203 (Fla. 4th DCA 2014) (commenting on the practicability of posting requirements given advancements in modern technology.
NOTICE TO EMPLOYEES

Case No. CA-2018-029 and Case No. CA-2018-034

POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION
AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT unilaterally eliminate classifications within a bargaining unit without affording the United Faculty of Florida advance notice and an opportunity to bargain the impact of the University's decision.

WE WILL NOT discourage membership in any employee organization by non-renewing the contracts of employees or otherwise terminating employees in retaliation for their having engaged in protected concerted activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of any right guaranteed them under Chapter 447, Part II.

WE WILL reinstate the classifications of assistant librarian and wellness counselor.

WE WILL reinstate Kate Bernard and Casey Fox to their previous positions and provide back pay and any other benefits to which they would have been entitled had they not been laid off.

WE WILL rescind Susan Drake's August 15, 2018, non-renewal letter.

WE WILL pay the United Faculty of Florida its reasonable attorney's fees and costs.

Florida Polytechnic University Board of Trustees

DATE BY TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)