STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

ORANGE COUNTY CLASSROOM TEACHERS ASSCIATION, INC., Charging Party, v. SCHOOL DISTRICT OF ORANGE COUNTY, FLORIDA, Respondent.	Case No. CA-2018-052 HEARING OFFICER'S RECOMMENDED ORDER

Tobe M. Lev, Orlando, attorney for Charging Party.

John C. Palmerini, Orlando, attorney for Respondent.

RIX, Hearing Officer.

On November 28, 2018, the Orange County Classroom Teachers Association, Inc. (Union) filed an unfair labor practice charge alleging that the School District of Orange County, Florida (School District) violated section 447.501(1)(a) and (c), Florida Statutes (2018),[1] by repudiating a settlement agreement. On November 30, the Commission's General Counsel issued a Notice of Sufficiency, and the Commission appointed the undersigned as hearing officer.

On February 7 and 13, 2019, after due notice, an evidentiary hearing was held between Tallahassee and Orlando by telephone conference. The parties were afforded the opportunity to appear, present evidence and argument, examine and cross-examine

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[1]References to the Florida Statutes are to the 2018 edition unless indicated otherwise.

witnesses, and fully participate in the hearing. Union Exhibits 1 through 19, 21 through 23, 26, 27, 29, 32, 33, and 35 through 38 were admitted into the record. School District Exhibits 1 through 5, 7, 9 through 13, and 15 through 18 were admitted into the record.

At the close of the hearing, the parties were advised of their right to file written briefs, proposed findings of fact, or proposed orders within fifteen days from the close of the hearing. Following a ten-day extension of time for filing, the parties timely filed post-hearing documents containing proposed findings of fact, which I have duly considered in preparing this recommended order. A transcript of the hearing was filed with the Commission.[2]

ISSUES

1. Whether the School District violated section 447.501(1)(a) and (c), Florida Statutes, by repudiating a settlement agreement between the School District and the Union?

2. Whether either party is entitled to an award of attorney's fees and costs of litigation?

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[2]References to the record are made to facilitate review by the Commission, but are not necessarily the only record support for any finding of fact. The transcript of the evidentiary hearing will be designated "T" with the appropriate page number(s). The Union's Exhibits will be designated "CP" followed by the relevant exhibit number(s). The School District's Exhibits will be designated "R" followed by the relevant exhibit number(s).

FINDINGS OF FACT

Based upon the testimony, stipulations,[3] exhibits, and the record as a whole, I make the following findings of fact:

Background

1. The School District is a public employer within the meaning of section 447.203(2), Florida Statutes. (Stipulation; T 12) There are approximately 200 schools in the School District. (T 314, 480) The Union is an employee organization within the meaning of section 447.203(11), Florida Statutes, and the certified bargaining agent for the School District's certified non-administrative personnel pursuant to Certification 27. (Stipulation; T 12)

2. The School District and the Union are parties to a collective bargaining agreement (CBA) effective July 24, 2018, through June 30, 2021. (Stipulation; T 12) The prior CBA between the parties expired on June 30, 2018. The parties ratified a new collective bargaining agreement on July 24, 2018.

3. LeighAnn Blackmore is the School District's director of labor relations and its chief negotiator. (T 415) Jason Batura is the School District's director of professional standards. (T 366, 416) Wendy Doromal is the Union's president and chief negotiator. (T 20-21)

[3]At the hearing, the parties entered into several stipulations, which I have incorporated into my findings of fact for purposes of clarity and stylistic preference.

4. In October 2017, the School District initiated "District Professional Learning Communities" or DPLC. (T 20, 312, 314, 441) DPLC is a three-year initiative to teach literacy strategies to students. (T 21, 102, 315, 342) The goal is to help improve literacy and student performance on the statewide English language assessments required by the state. (T 210, 315-16, 326, 341-42)

5. To carry out the initiative, the teachers and administrators selected teams of DPLC leaders. (T 21) DPLC teams are composed of school principals and volunteer teachers who attend district-wide training meetings four or five times a year at central locations and work on literacy strategies. (T 54, 178, 245, 312-14) Each school has approximately five to eight teachers per team. (T 346, 481) Following the district meetings, DPLC team members return to their respective schools to share the techniques learned at DPLC training sessions with the other teachers. (T 21, 326; CP 21, p. 54)

6. During the 2017-2018 school year, DPLC focused on "close reading" whereby students learned how to repeatedly read a text to improve their comprehension. (T 21, 315, 353)[4] During the 2018-2019 school year, DPLC's focus is on close reading

[4]"Close reading" is a well-established strategy to help students understand complex text. (T 21, 317, 489) Under this strategy, text is broken apart into multiple readings, which leads to better comprehension. (T 71, 317) The first time the student reads the passage is to get the gist of the passage. (T 317-18) The second time they read the passage is for deeper meaning and comprehension. (T 319) Teachers will then ask text-dependent questions, which are questions about the passage that start basic and then get harder so students can infer meaning from what they are reading. (T 320) Reading passages to obtain the meaning so a student can answer questions is a strategy which has been employed by School District teachers for a long time. (T 21, 319-20, 489)

and text dependent questions. (T 320, 353) These are questions created by teachers to assist students in further understanding what they are reading while taking the reader into account. (T 320-21) During the upcoming 2019-2020 school year, DPLC's focus will be on "academic discourse" whereby students may better "dialogue" with each other over the texts that they have read. (T 315, 353)

7. The school-based Professional Learning Community (PLC) is a collaborative group of teachers organized by grade levels, content, and subject areas. (T 90-91) These groups are organized to collaborate on their practices, conduct research, and utilize data-based decision-making with the goal of improving overall student achievement. (T 90-91; R 16) These school-based PLCs are otherwise known as common planning. (R 1, p. 60; T 325, 476) Under Article XIV, Section B(3)(h), of the CBA, the schools are required to provide a common planning time once a week for instruction. (R 1, p. 60; T 423, 487) This planning time is strictly planning time that the teacher may use as he or she sees fit. (T 477) DPLC and PLC are two separate and distinct programs with similar goals. (T 44, 76) They are not interchangeable. (T 44, 76, 330-31)

The Impact of DPLC on Teachers

8. The School District's implementation of DPLC caused several problems for School District's teachers, which resulted in complaints to the Union. (T 19-20, 27, 479) In early 2018, Union President Doromal received numerous emails, phone calls, texts, and office visits from teachers across the school district concerning the impact of DPLC. (T 19-20, 27, 479) There were complaints that some teachers who volunteered to

participate in DPLC were not reimbursed for their gas or mileage for travel time to DPLC meetings. (T 22) There were complaints that teachers were required to participate in DPLC training at their schools and the training was sometimes held during the week, which required more work hours than the contractually specified common planning time. (T 23) Doromal also received complaints that DPLC training required teachers to do homework after the workday because they did not have time to carry out their normal teaching responsibilities. (T 23) There were complaints that teachers were being told that they were required to observe their peers as part of DPLC. (T 24) Overall, the manner in which DPLC was implemented at the school level adversely affected the teachers' ability to focus on and carry out their own lesson plans. (T 24)

9. Doromal also received complaints regarding teachers who were having to take in students from the classrooms of teachers who attended DPLC training sessions. In some cases there were an insufficient number of substitutes to cover DPLC teachers' classes during district-wide training, so classes were sometimes split and students placed in other classrooms. (T 25-26) There were instances where teachers had to take in an entire classroom of another teacher's students into their assigned classes. (T 26) There were also complaints that teachers lost their planning periods because they had to accept students from other classes. (T 26) In essence, the complaints were that DPLC training affected the teachers' lesson planning and their ability to prepare students for state-wide mandated testing. (T 24)[5]

[5]Stephanie Schnettler testified that she had received students from other classes and sometimes these students are disruptive to the learning environment. Some students do not adhere to her rules, or they skip classes and their whereabouts on

10. The implementation of DPLC at the schools raised the question of whether it was voluntary or mandatory. On February 8, Doromal sent an email to Director of Labor Relations Blackmore regarding the complaints she had received related to DPLC. (CP 38; T 480-84) She notified Blackmore that teachers reported that they were mandated to participate in peer observation, they were told to complete tasks during their planning time, and they were being assigned homework which resulted in them working beyond their contracted workday without pay. (T 480-84; CP 38)

11. Former Deputy Superintendent Dr. Jesus Jara and District Director of Evaluation Systems Stephanie Wyka took action to clarify how DPLC was to be implemented in response to the Union's complaints. (T 419, 480-84) Dr. Jara asked Doromal for the names of the schools in her email. She provided the information to him. (T 482-84; CP 38) In one instance, he called a principal and told her that peer observation is voluntary. (T 482-84; CP 38)

12. On February 19, 2018, Wyka sent an email to Doromal stating:

> Peer observations through the DPLC process is voluntary, not required. It was a strategy that was shared with participants to provide another opportunity for professional learning. We have restated that this process is voluntary with all facilitators of DPLC sessions to help clarify this message.
>
> I have reached out to the school you shared with me last week to address this and the principal was to address the issue with his staff and explain that this process is voluntary.

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campus are unknown, and on some occasions there are not enough seats to accommodate the students placed in her class. On one occasion she already had twenty-six students in her class and she did not have enough chairs for the fourteen additional students placed in her class. She also testified that she is unsure whether she is required to "chase down" students who are not her students. (CP 23; T 107-10)

> As any issues have been reported to us of schools that are assigning "homework" (like professional reading) for DPLC sessions have arose, we have reached out to the school and supported them in identifying contractual time for this process to take place. If you hear of any schools where this is a cause for concern, please do not hesitate to let us know so that we can address the concern. We have stated at DPLC principal facilitator training sessions that this process should take place during the duty day.
>
> Please let us know if you need anything else.

(CP 38)

13. Because the problems persisted, on March 16, the Union's former Executive Director, Michelle VanderLey, sent Blackmore and Dr. Jara a letter demanding that the District:

> [c]ease and desist in the practice of mandated guided visits, with the exception of those included for the purpose of a Professional Improvement Plan. Cease and desist from the practice of the DPLC teams visiting classrooms, specifically, allowing teachers from the same school, or visiting schools, to come in other teacher's classrooms as a "team" to assess 'student's actions,' teachers' actions and environment as related to the use of close reading strategies. Such visits are intrusive and disruptive to the learning environment. This is increasing the teachers work load. This practice is against the Collective Bargaining Agreement.
>
> Cease and desist from assigning "homework" outside of the contractual day for the purpose of discussing articles that the DPLC has studied regarding close reading to be discussed at DPLC meetings, which take away from planning time.
>
> These actions impact the working conditions of the instructional personnel. These implemented actions without being negotiated constitute an Unfair Labor Practice.

(R 3; T 419, 441)

14. On March 22, Blackmore sent a letter to VanderLey in response to the cease and desist letter. Blackmore cited Article VII, Section I, of the CBA which states that "Both parties agree that interruptions of the instructional period are sometimes necessary, but the administrator will attempt to keep such interruptions to a minimum. However, no visitations to a teacher's class except by school system personnel shall be allowed until the teacher has been notified of the visit and purpose in advance." (R 1, p. 30) Blackmore further stated that the CBA already contained provisions concerning teacher professional development. (R 4; T 420-22, 449) Blackmore also responded that the School District has the management right pursuant to section 447.209, Florida Statutes, and Article XXI of the CBA to assign reading which will be discussed at future meetings. (R 4)

The Union's Grievance

15. In order to address the dispute between the parties, Doromal and VanderLey drafted a class action grievance, which was filed on May 9 at the third step with Director of Professional Standards Jason Batura concerning the School District's implementation of DPLC. (R 5; T 20-21, 27-28, 84, 118-19, 368)

16. Director Batura's office is responsible for handling grievances, and Batura is authorized to enter into settlement agreements on the School District's behalf. (T 366, 383, 387) He routinely resolves grievances at the third step, reviews contract language in the parties' CBA in resolving grievances, and signs settlement agreements. (T 387-90)

17. The grievance alleged that:

> The district has initiated DPLC's [sic] that was presented as a school based professional development training for classroom teachers in close reading techniques. However the practice expanded to peer observations, requirements of homework and use of personal vehicles to travel to other schools and training sites.
>
> The requirement of teachers to use their personal vehicles to go to other schools and observe their peers has several adverse effects to their working conditions and the terms and conditions of their Collective Bargaining Agreement. This includes:
>
> 1. Teachers incur a cost through tolls, mileage and the use of their personal vehicle.
> 2. Instructional time is interrupted by the splitting of classes.
> 3. The observation of peers is not a voluntary process under the DPLC system.
> 4. Interruptions of the classroom are not kept to a minimum.
> 5. Teachers evaluating teachers.
> 6. Preparation beyond the 7.5 hour day.
> 7. Added work load.

(R 5; T 21)

18. The grievance further asserted that the School District was in violation of Article I – Recognition, alleging a failure to negotiate the effects of DPLC with the Union; Article VI, Section Y – Working Conditions, alleging teachers were required to use their personal vehicles to travel to other schools and training sites, thereby incurring financial costs as well as a time constraint; Article VII, Section 1 – Teacher Rights and Responsibilities, alleging that teacher's instructional time is being interrupted and that such interruptions were not being kept to a minimum; Article X, Section D 10 - Evaluation, alleging that peers were being mandated to evaluate other peers, that

teachers had been told their evaluated scores would not be the same if they chose not to participate in DPLC, and that substitute coverage required in some cases the splitting of classrooms to other teachers; Article XII Section A 1 – Discipline, alleging that teachers were losing money and instructional time, and being threatened with unequal evaluations because of DPLC's peer observations; Article XIV, Section A, Section C – Duty Day, alleging that teachers were having to work beyond their duty day to prepare for peer walkthroughs, create charts, and do "homework," and that substitutes were not being provided for those teachers who had to travel to other schools to do peer observations, resulting in their classrooms being split amongst other teachers; and Article XXI – Management Rights, alleging that management exceeded its rights when it forced teachers to participate in peer observations, and by changing the terms and conditions of the contract. (R 5; T 118)

The Settlement Agreement

19. The Union and the School District attempted to settle the grievance. Batura corresponded with VanderLey and Doromal and met with them on two or three occasions regarding the grievance. (T 28, 31, 45, 119-22, 368, 373) They discussed the splitting of classes when no substitutes were provided; the forced participation of teachers in DPLC in their schools and homework assignments; the requirement that close reading activities be scheduled on particular days; requirements that teachers annotate lesson plans, provide data comparisons, and do other things which, according to the Union, "snowballed into extreme additional tasks for the teachers." (T 31, 119-20) They also discussed observations by teachers of other teachers; mileage and tolls paid

by teachers on DPLC teams; and teachers being evaluated on "Domain 4" of their teachers' evaluations for compliance with DPLC requirements. (T 28-31, 121-22)

20. The parties were able to settle their differences and work out a settlement agreement. Batura told Doromal and VanderLey that he would "run it by legal for their take" and meet again with them. (VanderLey's testimony; T 122) On June 23, Batura drafted a settlement agreement and met with School District Attorney John Palmerini to discuss the settlement agreement. (T 390-91, 492)

21. On June 28, Batura presented the settlement agreement to Doromal and VanderLey, they proposed changes to the draft, and the parties worked out the terms of the agreement. (CP 2-4; T 56-58, 118, 126-27, 367, 370) Batura signed and dated the agreement on July 17 on behalf of the School District. (T 30, 58, 123, 127; CP 5A) Doromal signed the agreement on behalf of the Union. (CP 5A)[6]

22. Shortly thereafter, Doromal discovered a mistake in the text of the agreement. The language "will not be required to be observed or to be observed by their peers" was supposed to have read "will not be required to observe their peers or to be observed by their peers." (T 30, 123-24; CP 4) Doromal and VanderLey met with Batura on July 30, and he corrected the settlement agreement. (T 30, 34-35, 124; CP 5B) They signed the corrected version of the agreement that day. (T 30, 37; CP 5B) Batura left

[6]I have not credited Batura's testimony that he and Doromal overlooked some of the contract provisions when they discussed the settlement agreement. (T 386) Batura testified that he consulted with the School District's attorney before executing the agreement. (T 391) I have also not accepted VanderLey's testimony that the settlement agreement would last in perpetuity. (T 132-33) This is because DPLC is a three-year program and, more importantly, her testimony is inconsistent with Article II, J. of the CBA.

the June 28 date on the settlement agreement even though the agreement was actually re-signed by the parties on July 30. (T 34, 36; CP 5B) The amended settlement agreement states:

> Settlement Agreement as of June 28, 2018:
>
> The parties disagree about the merits of the dispute. Notwithstanding the dispute, and in an effort to settle the grievance short of an arbitration hearing in this matter, the parties agree as follows:
>
> Participations by teachers in DPLC is purely voluntary. If there are no volunteers, the school site shall not be required to participate in the DPLC. No teacher will be penalized in Domain 4 of their evaluation for failure to voluntarily participate in DPLC.
>
> Teachers who choose not to participate in DPLC will not be required to observe their peers or to be observed by their peers. If the teacher voluntarily chooses to participate in the DPLC, then they must perform all functions required of the DPLC, including observing peers when necessary.
>
> With respect to splitting of classes, if a teacher is a participant in a DPLC and is going to be off the work site, and there is no substitute available to cover the teacher's class, then the teacher will not be released to go off-site for the DPLC and there will be no splitting of that teacher's classes among other teachers.
>
> With respect to mileage and tolls incurred by teachers traveling to DPLC, such mileage and tolls will be reimbursed to teachers prospectively as delineated in School Board Policy DKC. In accordance with School Board Policy DKC, Section 1(c), to the extent the teacher's supervisor determines the teacher's first work location of the day is not their primary work location, the first work location becomes the teacher's primary work site for the day. Travel will then be reimbursed for travel to the next work site that day but travel will not be reimbursed from the teacher's home to the first work location.
>
> Grievant and Employer agree that this Settlement Agreement will not be used as precedent in any other matter between Orange County Classroom Teachers Association and the Orange County School Board except as stated herein[.]

> This agreement is limited to the above pending grievances and has no effect or bearing on any other pending matter between the Orange County School Board and the Grievant.

(CP 5B)[7]

The School District's Repudiation of the Settlement Agreement

23. On August 2, Blackmore learned of the settlement agreement. (T 449) The 2018-2019 school year started on August 13, following a one-week preplanning period. (T 13) During the preplanning period, Doromal began receiving complaints from teachers that they were being required to watch several hours of DPLC training videos or attend DPLC training sessions during their paid preplanning time. (T 80; CP 6) This interfered with their team planning time and resulted in the loss of preplanning hours necessary for preparing classrooms, writing lessons, and contacting parents. (T 80; CP 6)

24. On August 7, Doromal sent an email to Blackmore conveying the teachers' concerns about being required to sit through hours of DPLC training. (T 81; CP 6)

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[7]I have resolved the conflicting testimony regarding the discussions that preceded the settlement agreement by crediting Doromal and VanderLey's testimony over Batura's testimony largely because Batura's testimony is inconsistent with the agreement he drafted and then amended at Doromal and VanderLey's request. (CP 5A and 5B) According to Batura, the entire settlement "agreement was based on DPLC, which is the off-site district learning." (T 374-78, 383-85, 392-404) However, Batura's testimony is inconsistent with the Step 3 grievance he reviewed. (T 368-69, 373; R 5) More specifically, the portions of the settlement agreement stating that "[t]eachers who choose not to participate in DPLC will not be required to observe their peers or to be observed by their peers" related to observations within classrooms rather than off-site DPLC volunteers. (CP 5B) In addition, the provision regarding splitting of classes was in response to teachers who were forced to accept students from the classes of the teachers who participated in off-site DPLC training. (CP 5B) I also do not credit Batura's testimony that Blackmore's memorandum dated August 13, 2018, is an accurate explanation of what the settlement agreement was about. (T 384; R 16)

Blackmore contacted Doromal and VanderLey and requested a meeting regarding the settlement agreement, and on August 13, Blackmore and Batura met with Doromal and VanderLey. (Stipulation; R 16; T 12, 39, 81, 435-37)

25. On August 20, Blackmore sent a memo to the Union regarding their August 13 meeting and the settlement agreement.[8] (R 16) Blackmore stated in the memo that "school-based Professional Learning Community" (PLC) was not the same thing as the "DPLC team," but rather "separate and distinct entities with separate and distinct purposes." She maintained that participation in PLC was required by the CBA in Article XIV, Section B(3)(h), which she alleged required time to be provided to PLC groups to meet during the week to engage in "common planning for instruction." Blackmore concluded, "Since the parties never discussed teachers opting out of receiving strategies learned from the District PLC, it is apparent that there was never a meeting of the minds between the District and the Union on the settlement agreement." (R 16)

26. The School District refused to honor the settlement agreement. (CP 9, 11, 13, 17-18, 21-23, 26-27, 35; T 90, 92-95, 103-05, 108, 138-39, 140-43, 154-55, 159, 162-66, 178, 182, 184, 187, 193-94, 206, 209, 213, 217, 221, 226-27, 234-35, 238-39, 245, 248, 257-58, 261-62, 269-74, 466-67)

[8]Blackmore's testimony that she sent the memorandum to the Union on August 20 is credited over Doromal and VanderLey's testimony that she gave the memorandum to them on August 13, because the memorandum refers to "our meeting on August 13, 2018." (R 16; T 40, 82, 434-35)

27. On November 16, Blackmore sent another memo to Doromal explicitly repudiating the settlement agreement. (T 82, 438-39; R 17) Blackmore asserted that the Union's interpretation of the settlement agreement would interfere with or modify Article XIV, Section B(3)(h), of the CBA which states that "schools shall provide a common planning time once a week for instruction." The memo also stated that teachers could not "contractually opt out of PLCs as they are required under Article XIV, Section B(3)(h)." The School District added that, according to *Dade County Association of Fire Fighters, Local 1403 v. Metropolitan Dade County*, 17 FPER ¶ 22277 (1991), the School District could disavow and repudiate a settlement agreement when the involved representatives did not have the authority to collectively bargain and the document was not submitted for ratification pursuant to section 447.309, Florida Statutes. (R 17)[9]

The Impact of the DPLC on the Teachers

28. The School District's repudiation of the settlement agreement and continued implementation of DPLC at schools have had adverse impact on the teachers' working conditions. The term "voluntold" has been used to describe the School District's implementation of DPLC. (T 88-90) Teachers are either required or are pressured to participate in DPLC at their schools. (CP 22-23; T 90, 93-95, 103-05, 108, 138-39, 140-143, 154, 178, 184, 187, 193-94, 206, 209, 217, 221, 226, 234-35, 238-39, 245, 257-58, 261, 269-74) Teachers who objected to mandatory DPLC were told it was not voluntary. (T 95, 182)

[9]For the reasons more fully expressed on my analysis, I do not credit Blackmore's testimony that the School District repudiated the settlement agreement on the basis that there was no meeting of the minds. (T 438-39)

29. Teachers were instructed in DPLC when they attended contractually required PLC and staff meetings and forced to participate in mandatory DPLC training whether they wanted to or not. (T 139, 209, 245, 291, 466-67) Schools often made no distinction between so-called school-based PLC and DPLC. They provided handouts and calendars to teachers that referred to DPLC or used PLC and DPLC interchangeably. (T 90, 92-93, 154-55, 159, 162-63, 165-66, 187, 213, 227, 248, 262, 269; CP 9, 11, 13, 17-18, 21, 26-27, 35)

30. The School District's implementation of DPLC included "ghosting" whereby DPLC team members or other teachers inspected classrooms to ensure that the teacher had posted the required materials on the classroom walls showing compliance with the DPLC initiative. (T 88, 104-05, 108, 113-14, 138, 149, 163, 172-73, 194-95, 217, 235, 259, 265, 270-71, 275, 469)

31. Teachers who observed another teacher's class typically left a notice stating "You've Been Ghosted!" (CP 10; T 194, 275-76) The "ghosting" notice contains the following check list of Classroom Environment Indicators: developmentally appropriate expectations and exercises for how students chunk and annotate context; academic vocabulary is displayed; student work indicates chunking and annotating; and indications that all students are engaged with complex text at or above grade level. (CP 10; T 470) A list of specific evidence observed included anchor charts, vocabulary charts, student work samples, demonstrating annotating and chunking, word wells related to the close reading lesson, and desks grouped. (CP 10; T 470)

32. The teachers are also assigned homework to prepare for the next DPLC meeting, must set up their classrooms in the appropriate manner, and must prepare lesson plans that implement the DPLC initiative. (T 92, 114, 155, 183-84, 194-96, 199, 209, 221-23, 235, 239, 246, 253, 257-58, 271, 274) In addition, teachers have daily planning time during which they must grade papers, prepare curriculum, prepare remediation strategies, prepare make-up work for students who have been absent, make parent contacts, write lesson plans, answer emails, and perform other varied tasks. (T 199) Because of the added work load from DPLC, teachers are taking an increased amount of work home with them. (T 199, 246, 253, 274)[10]

33. Teachers who do not comply with DPLC requirements are at risk of being downgraded on "Domain 4" of their evaluations. (T 43, 236-37)

CBA Provisions

34. Article II J., Negotiations Procedures, states:

> During the term of this Contract the Association and the Board recognize that events may arise which require a mutual interpretation or modification of this Contract that does not constitute a substantive change in employees' salaries or benefits. Under these circumstances, the parties are authorized to enter into a settlement agreement or memorandum of understanding expressing these interpretations or modifications. If such are entered into during the term of this Contract, they will remain in effect until expiration of the Contract, until superseded by the Contract, or until mutually withdrawn by the parties.

(CP 1, p. 5)

[10]Based on this evidence, I do not credit Abbe's testimony that ghost visits involve teachers going into each other's classrooms to get ideas regarding what they are doing and how they have set up their structures and processes in their classroom. (T 349)

35. Article VII A., Teacher Rights and Responsibilities, states:

> Teachers shall have freedom in the implementation of the adopted curriculum, including the right to select materials and engage in classroom discussions as they relate to the subject matter being taught and the level of the student. The administrator has the right and obligation to question, consult, and direct whenever necessary.

(CP 1, p. 28)

36. Article VII I., Teacher Rights and Responsibilities, states:

> Both parties agree that interruptions of the instructional period are sometimes necessary, but the administrator will attempt to keep such interruptions to a minimum. However, no visitations to a teacher's class except by school system personnel shall be allowed until the teacher has been notified of the visit and purpose in advance. If the visitor(s) might be subjected to a safety hazard, access shall not be permitted without approval of the administrator and notification of the teacher in advance of the visit.

(CP 1, p. 30)

37. Article XIV, Duty Day, states:

> B. As part of an ongoing program of school improvement, and in recognition of individual schools' needs to be given increased responsibility for site-based decision making, the parties agree to the following relating to the employee duty day:
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> 1. The duly elected faculty Advisory Committee and the administrator, with input from the school staff may mutually agree on scheduling arrangements for teachers to include, teaching load(s), student contact time, planning time, duty time, extended-duty assignments, compensatory time, coverage of classes in lieu of using substitutes, scheduling of elementary teachers, the use of flexible time blocks, common planning time, end of course testing schedules, scheduling of special area teachers and the implementation of any mandated school wide programs which affect any of the provisions found in this article. At the end of each school year, each

teacher may submit scheduling preferences for elementary special area teachers to this process for consideration.

2. Such agreements shall be conditioned upon a majority vote of support by secret ballot of those voting from the faculty, reduced to writing and distributed to each teacher at the school. The agreement(s) shall remain in effect until the end of the school year. The FAC shall conduct the election. The faculty shall receive notice of the election in writing at least two duty days prior to the voting. The voting period shall extend for up to two duty days. The most senior Association Representative shall be present at ballot counting. If there is no Association Representative, the administrator shall contact the Association President/designee prior to the ballot counting so that s/he may be present to observe.

(CP 1, p. 59)

38. Article XV E., Work Year, states:

Attendance at in-service activities off the school campus shall be voluntary except when attendance at such activities is necessary for the implementation of a required program.

(CP 1, p. 65)[11]

39. Article XXI, Management Rights, states:

The Board, on its own behalf and on behalf of the District, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Florida and the United States except as modified by the specific terms and provisions of this Contract.

(CP 1, p. 92)

[11]The parties stipulated that the School District's affirmative defense relates to this portion of Article XV E. (T 409)

ANALYSIS AND DISCUSSION

The Union alleges that the School District violated section 447.501(1)(a) and (c), Florida Statutes, by repudiating a settlement agreement the parties executed on July 30, 2018, to resolve a Step 3 class action grievance that the Union filed on May 9, 2018.[12] The Commission has held that it is unlawful for an employer to repudiate a grievance settlement agreement and that the certified bargaining agent has standing to file an unfair labor practice charge. *See Local 291 of the Transport Workers Union of America v. Miami-Dade County Board of County Commissioners*, 43 FPER ¶ 138 (2016); *Central Florida Police Benevolent Association v. Orange County Board of County Commissioners*, 19 FPER ¶ 24214 (1993); *Sharp v. City of Melbourne*, 18 FPER ¶ 23092 (1992). The School District does not dispute that it repudiated the settlement agreement on November 16, 2018. Thus, the Union requests that the Commission direct the School District to cease and desist from its refusal to comply with the settlement agreement and require the School District to post a notice and pay the Union's reasonable attorney's fees and costs.

The School District raises three main arguments in response to the Union's charge. First, it argues that there was no meeting of the minds on the essential terms of the settlement agreement, and as a result it was not required to perform under the settlement agreement. Second, it argues that the settlement agreement modified existing contract language without ratification and, therefore, is unenforceable under

[12]The settlement agreement was initially signed on July 17, 2018, but was modified on July 30 to incorporate changes requested by the Union. (CP 5A and 5B)

existing Commission case law. Third, the School District argues that even if a binding settlement agreement is found to exist, the School District did not violate that settlement agreement because the Union has failed to prove that the acronym "DPLC" is ambiguous.

The School District's First and Third Arguments

I will begin by addressing the School District's first and third arguments together because they relate to the question of whether a binding settlement agreement exists. I accept the School District's contention that the law of contracts is applied to resolve issues regarding the formation of a binding settlement agreement and that there must be a meeting of the minds on the essential terms of the settlement agreement. *Knowling v. Manavoglu*, 73 So. 3d 301 (Fla. 5th DCA 2011); *Sam Rogers Properties, Inc. v. Chmura*, 61 So. 3d 432 (Fla. 2d DCA 2011). The School District is also correct insofar as it asserts that the settlement agreement must be analyzed under contractual interpretation principles and that, under these contractual principles, the best evidence of the parties' intentions is the plain language of the agreement being construed. *International Brotherhood of Firemen and Oilers, Local No. 1220 v. City of St. Petersburg,* 6 FPER ¶ 11219 at 327 (1980), *aff'd*, 398 So. 2d 980 (Fla. 2d DCA 1981). Thus, if the settlement agreement's language is clear and unambiguous, there is no need to resort to extrinsic evidence to interpret the meaning of the settlement agreement. *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52 (Fla. 1st DCA 2005).

As the School District correctly states, I must discern the intent of the parties from the language they used in the finalized settlement agreement. Here, the School District's

entire third argument is based on an incorrect premise. According to the School District, the term "DPLC" is not ambiguous. The School District contends that it refers only to the four-or-five times a year meetings occurring off campus.

In resolving this, I need look no further than the terms of the settlement agreement, which addresses only DPLC. (CP 5B) The first sentence of the second paragraph of the settlement agreement expressly states that "[p]articipations by teachers in DPLC is purely voluntary." Although the settlement agreement uses the acronym "DPLC" rather than "District Professional Learning Communities," I infer from the context of the settlement agreement that the parties were aware that the acronym means District Professional Learning Communities.

The use of the term "participations" indicates that there is more than one way in which a teacher can participate in DPLC, but the phrase "is purely voluntary" evinces the parties' intent that such participation is restricted to voluntary participation. The subsequent language in the settlement agreement describes how DPLC is to be applied. Thus, I am not persuaded by the School District's argument that DPLC only refers to the four or five yearly meetings occurring off campus. I note that Batura drafted the settlement agreement and consulted with the School District's attorney before executing the agreement. If the School District intended to include language limiting DPLC to off-campus meetings, I infer that Batura would have negotiated this language into the settlement agreement, or he would not have signed it on the School District's behalf. I note also that Batura had a second opportunity to modify the settlement agreement to conform to the argument the School District now advances. When Doromal discovered a

mistake in the settlement agreement pertaining to the observation of peers, Doromal and VanderLey met with Batura on July 30, and he corrected the settlement agreement. (T 30, 123-24; CP 4) This presented Batura with another opportunity to assert that DPLC pertains only to off-campus meetings. There is no record evidence that he objected to the Union's proposed changes to the amended agreement. (T 30, 34-37, 124; CP 3 through 5B)

The School District's argument is also refuted by the paragraphs of the settlement agreement pertaining to peer observation (paragraph three) and splitting of classes (paragraph four), which do not relate to off-site participation in DPLC. Paragraph three of the settlement agreement addresses peer observation, which occurs at the school. Paragraph four addresses what will happen when a teacher who is participating in DPLC is going to be off the work site and there is no substitute to cover that teacher's class. These paragraphs specifically address the problems at the schools that were the subject of the grievance that resulted in the settlement agreement, rather than off-site participation in DPLC as the School District contends. It is clear from the context of the settlement agreement that DPLC unambiguously means "District Professional Learning Communities" and it does not refer to the off-campus meetings.

The School District's first argument that there was no meeting of the minds is also without merit. As my findings of fact demonstrate, I have not credited Batura's testimony regarding his discussions with Doromal and VanderLey during the settlement negotiations. Batura acknowledged during the hearing that the Union filed the class action grievance with him on May 9, 2018, and the settlement agreement was based on

the parties' efforts to resolve the grievance. (R 5; T 368-69) Thus, Batura was fully aware that the grievance specifically alleged that the School District had initiated DPLC that was presented as a school-based professional development training for classroom teachers in close reading techniques. The grievance alleged that practice had been expanded to include the requirement of homework and use of personal vehicles to travel to other schools and training sites. The grievance also alleged that teachers were required to use their personal vehicles to go to other schools and observe their peers, instructional time was interrupted by the splitting of classes, the observation of peers was not a voluntary process under the DPLC system, classroom interruptions were not kept to a minimum, and teacher preparation was beyond the seven-and-a-half hour workday. (R 5)

Moreover, as stated above, the provisions of the settlement agreement regarding peer observation (paragraph three) and splitting of classes (paragraph four) did not relate to the off-campus meetings because these were problems affecting classroom teachers in their respective schools. Doromal and VanderLey's credited testimony shows that Batura was fully aware that they were not simply negotiating an agreement regarding off-site DPLC meetings. (T 28-31, 121-22)

The School District also contends evidence demonstrating that disputes arose as soon as the parties began implementing the settlement agreement demonstrates that there was no meeting of the minds. According to Blackmore, teachers were refusing to participate in professional learning communities at the school level based on the settlement agreement. (T 436) I have not credited the School District's witnesses that

the disputes raised by the Union shortly after the execution of the settlement agreement establish that the parties did not have a meeting of the minds when they executed the settlement agreement. (R 16; T 383, 385, 425, 431-33, 437) Rather, the disputes arose because the School District failed to adhere to the terms of the settlement agreement. As my findings demonstrate, there is overwhelming evidence in this case showing that the teachers were objecting to being required to participate in DPLC in contravention of the settlement agreement, which plainly stated that the teachers' participation in DPLC is "purely voluntary." (CP 5B) In sum, I find that there is no persuasive evidence supporting the School District's first contention that the amended settlement agreement that the parties agreed to on July 30, 2018, did not reflect their intent. (CP 5B)

The School District's Second Argument

In its second argument, the School District contends that the settlement agreement is unenforceable because it modifies the existing CBA between the parties. Specifically, it alleges that the settlement agreement violates CBA Article XIV, Section B(1) and Section B(2); Article XV, Section E; and Article XXI and Article VII, Section A. The School District relies on the Commission's decisions in *Metropolitan Dade County*, 17 FPER ¶ 22277, and *Carroll v. City of Tampa*, 18 FPER ¶ 23164 (1992) in support of this argument.

In *Metropolitan Dade County*, 17 FPER ¶ 22277, the Commission held that a public employer or union could disavow a purported settlement of a grievance which, in actuality, represents an alteration to the bargaining agreement when either of the

involved representatives do not maintain the authority to collectively bargain and the document is not submitted to ratification pursuant to section 447.309, Florida Statutes. In *Metropolitan Dade County*, the parties' CBA contained a provision regarding incentive pay that determined when a bargaining unit employee could receive a one-step pay increase. Because of an arbitrator's ruling against the county concerning an employee's claim for educational incentive pay, the fire chief and the union president met and entered into a written settlement agreement to resolve a number of pending grievances concerning educational incentive pay eligibility. There was no evidence that any county official higher than the fire chief knew about the written settlement agreement. The settlement agreement changed how the department would award the education incentive pay. Thereafter, the county's senior labor relations specialist informed the fire department that the settlement agreement was invalid because it substantially modified the CBA.

The hearing officer recommended dismissal of the union's unfair labor practice charge concluding that the settlement agreement transcended the fire chief's authority to negotiate a settlement of the grievances. He found that the settlement agreement represented more than an interpretation of contractual language, and served to modify the CBA.

The Commission agreed, ruling that in the absence of mutual assent[13] or perhaps contractual authorization, Florida's statutory scheme does not allow substantive changes

[13]The reference to the word "assert" in the order is an apparent scrivener's error.

to be made to bargaining agreements under the guise of grievance resolution.[14] The Commission stated that the test for determining whether a settlement agreement represents a resolution of grievances or instead constitutes collective bargaining is dependent upon a factual determination of whether the settlement agreement merely construes an existing contract. If so, then it is a grievance settlement. However, if the agreement purports to modify, clarify, alter, or place conditions upon the contract, then it is a de facto amendment to the CBA.

In *City of Tampa*, 18 FPER ¶ 23164, the Commission similarly held that a public employer and a union engaged in unlawful interference by agreeing, under a letter of understanding, to amend a contractual provision governing seniority for layoff purposes without submitting the letter of understanding to the bargaining unit employees for ratification. The CBA defined classification seniority as "the total length of continuous service in each individual classification of police officer, corporal, detective, school resource officer, police aircraft pilot, sergeant, chief pilot, or flight sergeant." While the parties were negotiating a new CBA, the city's chief negotiator and the union president signed a letter of understanding which provided that "classification seniority is the total

[14]In footnote two of *Metropolitan Dade County*, the Commission distinguished what it meant in referencing "contractual authorization," citing its prior discussion in *In re City of Boynton Beach*, 7 FPER ¶ 12090 at 222 (1981). In *In re City of Boynton Beach*, the Commission ruled that although the parties to collective bargaining negotiations may agree to submit unresolved mandatory subjects of bargaining to binding interest arbitration in lieu of the impasse procedures prescribed by section 447.403, Florida Statutes, a dispute over whether to include an interest arbitration clause in a collective agreement may not itself be submitted to binding arbitration. *Id.* at 224. The Commission's decision in *In re City of Boynton Beach*, is inapplicable to the instant case.

length of continuous service in each pay grade." Following the reasoning in *Metropolitan Dade County*, the Commission agreed with the hearing officer that the letter of understanding substantively amended the CBA and should have been submitted to the bargaining unit members and public employer for ratification.

However, neither case is applicable here because both cases are distinguishable. Here, the CBA expressly authorizes the parties to enter into settlement agreements that mutually interpret or modify the CBA as long as the modification does not constitute a substantive change in employee' salaries or benefits. Article II J. states:

> During the term of this Contract the Association and the Board recognize that events may arise which require a mutual interpretation or modification of this Contract that does not constitute a substantive change in employees' salaries or benefits. Under these circumstances, the parties are authorized to enter into a settlement agreement or memorandum of understanding expressing these interpretations or modifications. If such are entered into during the term of this Contract, they will remain in effect until expiration of the Contract, until superseded by the Contract, or until mutually withdrawn by the parties.

(CP 1, p. 5)[15]

In addition, the record evidence establishes that Batura, unlike the fire chief in *Metropolitan Dade County*, is authorized by the School District to enter into settlement agreements on the School District's behalf. (T 366, 383, 387) He routinely resolves grievances at the third step, reviews contract language in the parties' CBA in resolving grievances, and signs settlement agreements. (T 387-90) Batura testified that he

[15]Blackmore testified that for many years in situations where a settlement agreement was designed to clarify contract terms, the agreement would cite to the particular article being clarified. (T 458-59) However, this requirement is not specified in the CBA and there is no credible evidence showing that such a citation is required.

reviewed the CBA articles cited in the Union's grievance, he drafted the settlement agreement and then met with School District Attorney John Palmerini, and they discussed the settlement agreement before Batura signed it. (T 390-91, 492) I infer from this evidence that if Batura did not have the authority to bind the School District to the settlement agreement, or if the settlement agreement appeared to contravene provisions in the CBA, Batura would not have moved forward with executing the settlement agreement. As the settlement agreement does not constitute a substantive change in the employees' salaries or benefits, it is permissible under the CBA. (CP 1, p. 5)

In the event that the Commission disagrees with my interpretation of Article II J, I turn to whether the settlement agreement modifies, or conflicts with, or alters the CBA. Preliminarily, I note that DPLC is a three-year initiative to teach literacy strategies to students. The goal is to help improve literacy and student performance on the statewide English language assessments required by the state. The CBA does not contain a provision that specifically covers the School District's three-year DPLC initiative. Thus, on its face the settlement agreement does not modify or change contractual language regarding DPLC. In other words, since the parties have not negotiated provisions specific to DPLC into the CBA, the settlement agreement cannot modify or change any DPLC provision.

However, the School District contends that the settlement agreement violates the CBA because it reaches into other CBA provisions and modifies those provisions,

specifically Article XIV, Section B(1) and Section B(2); Article XV, Section E; and Article XXI and Article VII, Section A.

First, the School District argues that the settlement agreement conflicts with Article XIV, Section B(1) and Section B(2) of the CBA, which allows for a school administrator and the Faculty Advisory Committee, after a vote of the faculty, to mutually agree on scheduling arrangements for teachers to include coverages of classes in lieu of using substitutes. The relevant portion of the settlement agreement states:

> With respect to splitting of classes, if a teacher is a participant in a DPLC and is going to be off the work site, and there is no substitute available to cover the teacher's class, then the teacher will not be released to go off-site for the DPLC and there will be no splitting of that teacher's classes among other teachers.

(CP 5B) According to the School District, this portion of the settlement agreement modifies Article XIV, Section B(1) and B(2) in schools where the faculty advisory committee and an administrator have voted to split classes in lieu of using substitutes. The School District essentially contends that the settlement agreement purports to disregard that vote as far as participation in off-site centrally located DPLC meetings are concerned.

This argument lacks merit because this portion of the settlement agreement does not impede a faculty advisory committee and administrator's decision to split classes at a school in lieu of using substitutes pursuant to Article XIV, Section B(1) and Section B(2). If the faculty advisory committee and the administrator decide to use substitutes in lieu of splitting classes, then the teacher may participate in DPLC training under the settlement agreement. If the faculty advisory committee and the administrator decide to

split classes in lieu of using substitutes, then according to the settlement agreement the teacher simply will not participate in the training session. Thus, the settlement agreement does not change or modify Article XIV, Section B(1) or B(2).

Next, the School District contends that the settlement agreement violates Article XV, Section E, which states: "Attendance at in-service activities off the school campus shall be voluntary except when attendance at such activities is necessary for the implementation of a required program." (emphasis added) According to the School District, the provision in the settlement agreement stating that "[p]articipation by teachers in DPLC is purely voluntary" conflicts with Article XV, Section E. The School District also contends that a school could mandate that its teachers utilize close reading techniques when teaching students pursuant to section 447.209, Florida Statutes, and Article XXI of the CBA, the management rights article.

This contention overlooks the fact that the School District has chosen to implement the DPLC initiative as a voluntary program. Thus, the provision in the settlement agreement stating that a teacher's participation in DPLC is "purely voluntary" is consistent with the School District's implementation of DPLC, and the settlement agreement does not modify or change Article XV, Section E, which pertains to a "required program." Furthermore, the School District's argument that the settlement agreement impedes its management right under section 447.209, Florida Statutes, and Article XXI, to mandate that its teachers utilize close reading techniques is misplaced. There is nothing in the settlement agreement regarding close reading techniques.

In its final argument, the School District contends that Article VII A. gives the School District the management right to question, consult, and direct its teachers whenever necessary.[16] This provision states: "Teachers shall have freedom in the implementation of the adopted curriculum, including the right to select materials and engage in classroom discussions as they relate to the subject matter being taught and the level of the student. The administrator has the right and obligation to question, consult, and direct whenever necessary."

According to the School District, the manner in which it requires its teachers to teach reading is a management right. Specifically, the School District asserts that management has the right to direct the usage of close reading techniques whenever necessary. The School District contends that nothing in the settlement agreement prohibits the School District from requiring the usage of close reading techniques. Thus, to the extent that the settlement agreement can be read to make the usage of close reading techniques voluntary, the settlement agreement conflicts with Articles XXI and VII, Section A.

As previously stated, there is no language in the settlement agreement regarding close reading. As the School District correctly suggests the settlement agreement cannot be read to make usage of close reading voluntary. Therefore, there is no merit to the School District's argument.

[16]During the hearing, the School District clarified its affirmative defense regarding Article VII A., stating that it does not assert that a conflict exists between the settlement agreement and Article VII A. (T 410)

Based on the evidence in this case, I conclude that the School District violated section 447.501(1)(a) and (c), Florida Statutes, by repudiating a settlement agreement. For the same reason, the School District's motion to dismiss the Union's unfair labor practice charge is DENIED. (T 12-13)

Attorney's Fees and Costs of Litigation

The parties have requested awards of attorney's fees and costs of litigation pursuant to section 447.503(6)(c), Florida Statutes. (T 12-13) This provision authorizes the Commission to award reasonable fees and costs to a prevailing party when it determines such an award to be appropriate. The School District is not entitled to attorney's fees and costs because it did not prevail. The Union is eligible for an award of attorney's fees and costs because it is the prevailing party in this case. A prevailing charging party is entitled to attorney's fees and costs when the respondent knew or should have known that its conduct was unlawful. *See DeMarois v. Military Park Fire Control Tax District No. 4*, 7 FPER ¶ 12065 (1981), *aff'd*, 411 So. 2d 944 (Fla. 4th DCA 1982). Here, the School District knew or should have known that it could not lawfully repudiate the settlement agreement it negotiated and entered into with the Union to resolve the grievance. Accordingly, I recommend that the Commission award attorney's fees and costs of litigation to the Union.

CONCLUSIONS OF LAW

1. The School District violated section 447.501(1)(a) and (c), Florida Statutes, by repudiating the settlement agreement the parties executed on July 30, 2018.

2. The Union is entitled to an award of reasonable attorney's fees and costs of litigation.

3. The School District is not entitled to an award of attorney's fees and costs of litigation.

RECOMMENDATION

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

1. Cease and desist from:

   (a) Repudiating the settlement agreement it entered into with the Union on July 30, 2018;

   (b) Failing to bargain in good faith with the Union and interfering with, restraining or coercing its employees in the exercise of rights guaranteed them by Chapter 447, Part II, Florida Statutes (2018), in any like or related manner; and

   (c) In any like or related manner, interfering with, restraining, or coercing public employees in the exercise of any right guaranteed them under Chapter 447, Part II, Florida Statutes (2018).

2. Take the following affirmative action:

   (a) Rescind the action it took on November 16, 2018, in repudiating the settlement agreement and comply with the provisions of the July 30, 2018, settlement agreement;

   (b) Pay to the Union its reasonable attorney's fees and costs of litigation; and

(c) Post immediately to its employees in the manner in which the School District customarily communicates with them, the contents of the Notice to Employees attached to this order stating that the School District shall cease and desist from the action set forth in paragraph one above and that it shall take affirmative action set forth in paragraph two. The notice shall include the name of the School District's authorized representative. If the notice is by posting, copies of the enclosed Notice to Employees will be posted immediately for sixty (60) consecutive days in conspicuous locations where notices to employees are customarily posted.[17] The School District shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by other materials. Copies of the posted notice shall be signed by the School District's authorized representative prior to posting.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within **fifteen** days from the date of this order. *See* Fla. Admin. Code R. 28-106.217(1). An extension of time for filing exceptions will not be granted unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 28-106.216 and SERVED on all parties this 25th day of April, 2019.

Joey D. Rix

JOEY D. RIX
Hearing Officer

JDR/bjk

[17] *See School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancement in modern technology).

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