

Florida Special Magistrate Hearing Process

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The information below was presented by Michael Whelan and Kenneth Starr in a program entitled “Structure and Process: Running an Effective Impasse Resolution Dispute Procedure” at the 50th Annual Florida Public Employment Labor Relations Forum held in Orlando, Florida, on October 17, 2024.

Program Description: The special magistrate process is an integral component of dispute resolution in public sector labor relations. Hear insights on conducting an orderly hearing, including the order of presentation, objections, recording, prehearing conferences, and other prehearing and hearing matters.

Individual introductions by Kenneth Starr and Michael Whelan

1. Brief overview of presentation

2. Selecting a Special Magistrate

- This is an important decision that should not be left to chance.
- Research the backgrounds of the Special Magistrates by reviewing their biographical summaries on the Florida Public Employment Commission’s (“Commission”) website at <https://perc.myflorida.com/Impasse/roster.aspx>; reviewing their previous decisions—many of which are also on the Commission website; and asking for input from colleagues.
- The parties may agree on an individual to serve as a Special Magistrate as long as the Commission Chair finds the individual is qualified pursuant to Rule 60CC-3.003. If both parties feel strongly about appointing that individual, it is likely they will be appointed, especially if they have the requisite experience, education, skill in written expression, and neutrality.
- Typically, the parties select a Special Magistrate from a panel of seven members of the roster provided by the Commission.

3. Prehearing Matters

- Submission of Issues at Impasse: within 10 days of selection of Special Magistrate.

- **Scheduling the hearing:** In keeping with its legislative mandate for expeditious resolution of impasses, the Commission asks Special Magistrates to schedule hearings as “[e]xpeditiously as possible, preferably within 20 days, unless the parties agree otherwise.” Typically, it is the parties who are the main drivers of the schedule, although Special Magistrates should make their best efforts to move things along.
- **Narrow the issues:** The Commission also recommends that the Special Magistrate conduct a prehearing conference to “narrow the disputed issues requiring the presentation of evidence and to reach stipulations as to agreed-upon facts and documentary evidence.”
- **Other topics:** In addition to addressing the matters recommended by the Commission, a number of other topics may be broached by the Special Magistrate of the parties, with the goal of having an efficient hearing that provides both parties with a full and fair opportunity to present their cases. Among the other matters that may be discussed are:
 - (1) the time, date, and location of the hearing, or whether the parties want to have a virtual (e.g., Zoom) hearing;
 - (2) disclosure of issues at impasse, if not done so already pursuant to Rule 60CC-3.005;
 - (3) arrangements for presentation of exhibits, such as how they will be marked, number of copies, and whether they will be exchanged before the hearing;
 - (4) whether witness subpoenas will be requested;
 - (5) address outstanding motions, objections, or other requests for rulings.

4. The Hearing—Part I, beginning the hearing

- **Introductions:** The Special Magistrate should take control of the hearing early to attempt to avoid unnecessary disruption and delay. A heavy-handed approach is not normally productive in this setting, so the best way to get the parties off on the right track is to demonstrate competence and show the parties that you are genuinely interested in their presentations. One way to do this is for the Special Magistrate to welcome the parties, make his or her introduction, and ask the parties to state their appearances and introduce their representatives and witness. It may also be useful to circulate pre-printed appearance sheets to both parties that asks for their name and role in the process or position title—which may be helpful when drafting a recommended decision—and begin a brief prehearing conference before getting into the substantive parts of the hearing.

- Prehearing conference: During the prehearing conference, explain that the hearing will be conducted in an orderly manner, similar to a court proceeding, but less formal—as the rules of evidence and trial procedure do not apply. Because of this, and the fact that the advocates for the parties may not be attorneys, it may also be useful for the Special Magistrate to provide a brief introduction to how the hearing will proceed. That is, explain that the parties will have the opportunity to make an opening statement, call witnesses—who will be subject to direct and cross examination—and to provide closing arguments in some form.
- Objections: It may be helpful for the Special Magistrate to explain his or her approach to objections prior to any evidence being taken so that time is not wasted arguing over the admissibility of evidence. One approach is to remind the parties that the rules of evidence do not apply and that most, if not all, documents and testimony will be received into evidence, but that objections challenging the reliability or trustworthiness of evidence may be made if they are helpful to understand the weight of the evidence.
- Confirm issues in dispute: Before the hearing begins it is important to determine the issues in dispute and the parties’ positions on those issues.
- Burden of proof: One of topics usually broached before the actual hearing begins is which party has the “burden of proof”—which would include the burden of production (i.e., which party will go first) and the burden of persuasion. Regarding the burden of production, the parties may have already made that decision among themselves. If not, there is a common belief that the party that declared impasse should proceed first. Another alternative is to have the party that proposed the issue proceed first on that issue. This alternative works well, except when both parties have opened on the same issue. In any event, in the absence of agreement between the parties, the Special Magistrate will decide which party proceeds first. As far as the burden of persuasion is concerned, the preponderance of the evidence standard is usually applied. That is, the party which presents the most persuasive evidence in support of its position will prevail.
- Order of presentation: Some parties will want to proceed issue-by-issue, and others may want to proceed by giving their entire presentation. These methods or others are fine—especially if the parties agree—but if they do not, the Special Magistrate will have to decide the order of presentation. A good basis for making this decision is the Special Magistrate’s preference. For example, some Special Magistrates may find it more efficient to have all the evidence on an issue in one part of the record while they are preparing their recommended decisions—especially if there is a transcript.

After both sides have had the opportunity to present their “case in chief” the Special Magistrate may permit rebuttal and surrebuttal.

- **Stipulations:** The Commission encourages the parties to reach stipulations, but they often do not do so. There may be an opportunity to reach stipulations on issues that may not be controversial such as the description of the parties. It may also be helpful to inquire into whether the parties agree on the identity of comparable employers.
- **Housekeeping:** In the interest of moving forward expeditiously, the Special Magistrate may wish to ask the parties how many witnesses will be testifying, whether any of them will be appearing virtually, and how much time they anticipate for their presentations. Even though the hearings are conducted in public, the Special Magistrate should announce if he or she is making a recording or—if there is a court reporter—inquiring into whether a copy will be made available to the parties and the Special Magistrate. Finally, before getting to the substance of the hearing, the Special Magistrate may want to ask the parties whether they have any questions or comments about the hearing and to address common matters such as whether they want to take breaks for lunch or other reasons.

5. The Hearing—Part II, the body of the hearing

- **Opening statements:** Most parties want to give opening statements but, in any event, before hearing the evidence, it is important for the Special Magistrate to hear from the parties about the issues they believe are open and their respective positions on those issues.
- **Appearance at the hearing:** Any person “directly involved in the proceedings” has the right to appear at the proceedings and the Special Magistrate has the authority to issue subpoenas to compel the appearance of persons on his or her own motion or at the request of the parties.
- **Witnesses:** Any party and the Special Magistrate may call, examine, and cross-examine witnesses.
- **Exhibits:** Any party and the Special Magistrate may offer documentary and other evidence into the record.
- **Swearing of witnesses:** The Special Magistrate is empowered to administer oaths and witnesses must be placed under oath. This applies to advocates who wish to present evidence.

- Evidence: Relevant evidence will address the statutory factors in Section 447.405. The first two such factors address comparisons of the annual income of the public employees in question and with that of employees in the local operating area performing similar work and those in similar governmental employers of comparable size. The parties may agree on the identity of similarly skilled employees or employers but, if not, the Special Magistrate is tasked with making that judgment, and the burden is on the parties to provide evidence that the employees or employers they have selected for comparison are similar to the those at issue. Typically, most of these comparisons involve other public employers rather than private employers in the operating area who have employees performing similar work. The evidence introduced by the parties regarding these factors is often contradictory and confusing—a frequent phrase is “the other side is comparing apples with oranges.” It will be up to the Special Magistrate to figure it out, so the Special Magistrate should make full use of his or her authority to ask questions of witnesses presenting this information.

Another consideration is the significance of the comparisons made. Sometimes the parties will agree—or a party will claim—that its legislative body has proclaimed its intention to fall within a given range of comparable employers, such as “we want to be competitive, so we want to be in the upper half of the range of comparable employers.” Many times, there is no such explicit expression by the public employer, so the parties will present various arguments addressing why their respective position is just or unjust. Unfortunately, neither the statute or the regulation address how to assess where an employer should place within the range of comparative employers, so the Special Magistrate is tasked with determining a suitable position within an established range. Sometimes this determination is relatively easy, such as when the subject employees fall below or above the range. Most frequently, this determination is not that easy. In those instances, the other statutory factors come into play, especially the employer’s “availability of funds.”

Not surprisingly, the parties’ positions on the ability to fund increases are often in stark contrast and the numbers presented are often fraught with confusion. They may also use expert witnesses to present evidence in support of their respective positions. To understand these arguments, the Special Magistrate must be versed in the sources of government revenue, including millage rates and property tax assessments. Some other common issues in assessing this factor are related to the types of reserve funds and how they operate; the accuracy of financial reports, and the status of such reports—are they early estimates, midterm reports, final, or audited—and

whether revenue from certain sources is recurring or one-time payments, such as some form of government assistance. Again, the Special Magistrate must weigh through this material and make determinations of its significance, so it is important to ask questions and attempt to understand the evidence as much as possible during the hearing.

The final two statutory factors are more ambiguous. The first is “the interest and welfare of the public.” The task of the parties when addressing this factor is to convince the Special Magistrate that its proposals are better suited to addressing the interest and welfare of the public than the other parties’ proposals. The remaining factor involves comparison of the “peculiarities of employment” in regard to other trades or profession with respect to several specified. Regarding this factor, the parties are tasked with explaining why a particular proposal addresses a need for the positions at issue.

Finally, the list of five enumerated factors is not exclusive, as the statute requires the Special Magistrate to consider those factors “among others.” This places a burden on a party seeking to introduce persuasive evidence that the additional factor is relevant but—if the party is able to do so—the evidence should be admitted and considered if it is helpful in making the recommended decision.

6. The Hearing—Part III, ending the hearing

- Concluding the evidentiary part of the hearing: After both parties have finished presenting their cases, including any rebuttal, the Special Magistrate may ask questions and then should ask the parties if they have anything else to present. After that, the Special Magistrate should confirm with the parties that the evidentiary part of the hearing is closed.
- Closing submissions: Typically, the parties will want to provide some type of closing after the evidence has been submitted. It is a good practice to permit the parties to close in the manner they want, even if they do not agree on the type of closing. The parties may present an oral closing if they wish and—provided that at last one party has requested to submit a written memorandum before the close of the hearing—the Special Magistrate may permit the parties to do so. Such permission is usually granted because it may benefit the Special Magistrate in the preparation of the recommended decision. In this regard, it may be helpful for the Special Magistrate to ask parties seeking to submit a post-hearing memorandum to put them in the form of a proposed recommended decision. The hearing is formally

concluded upon receipt by the Special Magistrate of post-hearing submissions.

- Time for submission of written closings: This is at the discretion of the Special Magistrate but, typically the parties will request 30 days or—if a transcript is made and requested—30 days from the parties’ receipt of the transcript. Parties frequently move for extensions of time to complete their briefs. Such motions are usually granted if they are unopposed or there is no reason to believe a party is intentionally attempting to delay the process.

References:

2024 Florida Statutes

Section 447.403 Resolution of impasses.

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(3) The special magistrate shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on any and all unresolved contract issues. The hearings shall be held at times, dates, and places to be established by the special magistrate in accordance with rules promulgated by the commission. The special magistrate shall be empowered to administer oaths and issue subpoenas on behalf of the parties to the dispute or on his or her own behalf. Within 15 calendar days after the close of the final hearing, the special magistrate shall transmit his or her recommended decision to the commission and to the representatives of both parties by registered mail, return receipt requested. Such recommended decision shall be discussed by the parties, and each recommendation of the special magistrate shall be deemed approved by both parties unless specifically rejected by either party by written notice filed with the commission within 20 calendar days after the date the party received the special magistrate’s recommended decision. The written notice shall include a statement of the cause for each rejection and shall be served upon the other party.

Section 447.405 Factors to be considered by the special magistrate.

The special magistrate shall conduct the hearings and render recommended decisions with the objective of achieving a prompt, peaceful, and just settlement of disputes between the public employee organizations and the public employers. The factors, among others, to be given weight by the special magistrate in arriving at a recommended decision shall include:

(1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.

- (2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.
- (3) The interest and welfare of the public.
- (4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:
 - (a) Hazards of employment.
 - (b) Physical qualifications.
 - (c) Educational qualifications.
 - (d) Intellectual qualifications.
 - (e) Job training and skills.
 - (f) Retirement plans.
 - (g) Sick leave.
 - (h) Job security.
- (5) Availability of funds.

Florida Administrative Code

60CC-3.005 Issues Before Special Magistrate.

Within ten (10) days after the date of appointment of a special magistrate, each party shall serve upon the special magistrate a written list of issues at impasse, simultaneously serving a copy of the list upon each other party.

Rule 60CC-3.006 Proceeding Before Special Magistrate.

(1) Upon appointment by the Commission, through the Chairman, the special magistrate shall set, and notify all parties of, the time and place of the hearing(s). In appropriate circumstances, the special magistrate may, after conferring with the mediator, defer conducting hearings, pending satisfactory resolution of the impasse, for a reasonable length of time.

(2) All motions, objections, or other requests for ruling shall be made to the special magistrate either in writing, with copies thereof being simultaneously served upon all other parties to the hearing and proof of such service being given to the special magistrate, or orally during a hearing. The special magistrate shall permit such response to a motion, objection or other request for ruling as he believes is reasonable and just.

(3) Any party directly involved in the proceedings shall have the right to appear at the hearing in person, by counsel, or by other representative, and any such party and the special magistrate may call, examine, and cross-examine witnesses, and offer documentary and other evidence for introduction into the record. Witnesses shall be examined orally under oath. Stipulations of fact may be introduced in evidence with respect to any issue. Compliance with the rules of evidence shall not be required.

(4) The special magistrate may issue subpoenas when requested by a party, or upon his own motion.

(5) In the event of any misconduct at any hearing before a special magistrate, the special magistrate shall submit an affidavit describing such misconduct for action by the Commission.

(6) The special magistrate may permit the submission of a written memorandum in support of a party's position after the close of the hearing upon such conditions as he may reasonably impose, provided that the request for permission to file such post-hearing memorandum was made before the close of the hearing.