

POLICE AND FIRE PENSION FUND

ONE WEST ADAMS STREET, SUITE 100

JACKSONVILLE, FLORIDA 32202-3616

"We Serve... and We Protect"



Phone: (904) 255-7373

Fax: (904) 353-8837

John Keane
Executive Director -
Administrator

September 27, 2012

Honorable John Crescimbeni, Chair
City Council Finance Committee
117 West Duval Street, 4th Floor
Jacksonville, FL 32202

RE: Legal Opinion: Authority of the Board of Trustees of the Police and Fire Pension Fund to Establish the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan.

Dear Council Member Crescimbeni:

Thank you again for attending the Special Police and Fire Pension Fund Board Workshop on August 15th and presenting a copy of the Memorandum dated August 10, 2012, from Cindy A. Laquidara, General Counsel on the subject of our Senior Staff Voluntary Retirement Plan. A copy of the Memorandum is attached.

The Board directed our Fund Counsel to review this Memorandum and issue a formal Legal Opinion on the authority of the Board to establish the Senior Staff Voluntary Retirement Plan.

A copy of the Legal Opinion dated September 25, 2012, prepared by Fund General Counsel Robert D. Klausner is also attached.

Please let me know if you have any additional questions.

Very truly yours,

John Keane
Executive Director-Administrator

Enclosed Memorandum of August 10, 2012
 Legal Opinion of September 25, 2012

cc: Council President Bishop
 City Council Members
 Mayor Alvin Brown
 Karen Bowling, Chief Administrative Officer
 Chris Hand, Chief of Staff
 Cindy LaQuidara, Office of the General Counsel
 C. Ronald Belton, Chief Financial Officer
 Carla Miller, Ethics Officer
 Kirk Sherman, Council Auditor
 Board Members

**OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 630-1728**

MEMORANDUM

TO: Honorable John Crescimbeni, Chair, Finance Committee, City Council

FROM: Cindy A. Laquidara, General Counsel

RE: **Authority of Board of Trustees of Police and Fire Pension Fund to Establish the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan**

DATE: August 10, 2012

You have asked for a legal opinion as to whether the Board of Trustees of the Jacksonville Police and Fire Pension Fund (“Board”) was authorized to create the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan (“Senior Staff Plan”).

As you know, the City’s Director of Ethics Compliance and Oversight (“Director”) is gathering documents from and making inquiries to the Board, as to the details of the creation and maintenance of the Senior Staff Plan. I am not yet privy to the information that will be received and made public and available by the Director, and caution you that this opinion will be updated subject to an analysis of that information and any additional research necessitated, if any, by such information.

1. Question Asked.

Was the Board of Trustees of the Jacksonville Police and Fire Pension Fund authorized to create the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan?

2. Short Answer.

The Board of Trustees of the Jacksonville Police and Fire Pension Fund was not authorized to create the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan.

Discussion.

- A. Article 16 (Retirement and Pension Benefits) of the Charter establishes the pension system of the Consolidated Government, and does not authorize any agency other than the Council to amend existing plans or create new plans.**

The pension plans of the Consolidated Government are identified in Article 16 (Retirement and Pension Benefits) of the Charter. Article 16 provides in Section 16.01 that all officers and employees of the Consolidated Government shall be members of either the 1937 police and fire pension fund or the 1937 general employee pension fund. Article 16 provides for no other pension plans.

Section 16.01 of the Charter authorizes the Council to amend the pension system to provide for separate classifications. Nothing in Article 16 authorizes any other agency (especially an agency with no taxing or rate making power) to create a pension fund or classification for employees employed by that agency.

- B. Article 22 (Jacksonville Police and Fire Pension Board of Trustees) establishes the Board for the purpose of administering the Police and Fire Pension Fund, not to create pension plans.**

Article 22 (Jacksonville Police and Fire Pension Board of Trustees) establishes the Board of Trustees to administer the Police and Fire Pension Fund. Its Section 22.10 “declaration of purpose” calls for the Board to “... be considered a governmental unit responsible for the management of an irrevocable trust ...”. Its purpose is to manage an irrevocable trust funded by the City Council, not to create a new trust for separately identified employees to be funded by the City Council. Managing a trust is a limited authorization of power, and does not carry with it the exercise of additional powers beyond that necessary for managing the body of the trust.

While Section 22.04(e) authorizes the employment and fixing of compensation of staff, there is nothing within the powers section that suggests that the administrators of this fund have authority to *create* a new pension fund within the already authorized 1937 Police and Fire Pension Fund and thus to modify a plan created by ordinance, and Charter.

Section 22.07 (Amendatory power) confirms the limited power of the Board:

“(a) ... nothing herein shall empower the board to amend the provisions of the pension plan without the approval of the Jacksonville City Council.”

(c) The benefit plan administered by the board shall be as established by ordinance or charter provision, or by special act or general law of the Legislature ...”

(All underlining added)

It is clear from Section 22.07 that it is the City Council, the taxing authority of the Consolidated Government and insurer of the fund, that is solely empowered to create and amend pension plan benefits for employees. It is also clear that incorporating the Senior Staff Plan within the 1937 Police and Fire Pension Fund is an unauthorized amendment of the 1937 Police and Fire Pension plan.

3. Conclusion

Based on the foregoing, it is my conclusion that there was no authority for the Police and Fire Pension Board of Trustees to create the Senior Staff Plan within the 1937 Police and Fire Pension Plan.

I look forward to discussing this issue at greater length with the Council after my review of documentation and further research is complete. Such discussion will address, among other things, the future of the Senior Staff Plan. In the interim, please do not hesitate to contact me if you have any other concerns.

CC: Council President
Mayor
Chairman, Police and Fire Pension Fund
Executive Director, Police and Fire Pension Fund
Director, Office of Ethics, Compliance, and Oversight



A PARTNER-BASED PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Writer's e-mail: bob@robertdklausner.com

September 25, 2012

Board of Trustees
Jacksonville Police and Fire Pension Fund
1 West Adams Street
Jacksonville, Florida 32202

Re: Senior Staff Voluntary Pension
Our File 900342

Dear Trustees:

This letter is in response to your request for a legal opinion concerning the ability of the Board of Trustees to establish a retirement program for employees of the Board. For the reasons which follow, the Florida Legislature has fully empowered the Board to create such a plan.

Authority of the Board

The Board's powers and duties are set forth in Article 22 of the City Charter, as well as Chapters 112, 175 and 185, Florida Statutes. The provisions of Article 22 are themselves a combination of special acts of the Florida Legislature. Your attention is directed to Section 22.04 which grants the Board broad powers, including the ability to fix the compensation of its Administrator. The enumeration of powers is not intended to be exclusive and any determination by the Board made in good faith is final, binding and conclusive on all parties, including the City. Moreover, Section 22.11 repeals any law in conflict with 22.04, which would include any asserted conflict with Article 16 of the Charter. The interrelationship between Articles 16 and 22 is discussed later in this opinion

10059 NORTHWEST 1ST COURT, PLANTATION, FLORIDA 33324

PHONE: (954) 916-1202 • FAX: (954) 916-1232
www.robertdklausner.com



Is a Retirement Benefit “Compensation?”

Beginning with the decision of *Voorhees v. City of Miami*, 199 So. 313 (Fla. 1940), the Florida Supreme Court has recognized that a retirement benefit is deferred compensation to an employee for services rendered:

Such benefits are being gradually extended. Laws so providing are sustained as valid and constitutional, on the ground that pensions are in the nature of compensation for services previously rendered and for which pay was withheld to induce long continued and faithful service.

Since that seminal decision, the Florida appellate courts (both the Supreme Court and the various district courts of appeal) have uniformly held the same view. *See, e.g., State ex. rel. Watson v. Lee*, 24 So. 2d 798 (Fla. 1946); *State ex. rel. Greene v. Gray*, 87 So. 2d 504 (Fla. 1956); *City of Jacksonville Beach v. State ex. rel. O’Donald*, 151 So. 2d 430 (Fla. 1963); *Grady v. Division of Retirement*, 387 So.2d 419 (Fla. 1st DCA 1980); *Board of Trustees v. Town of Lake Park*, 966 So. 2d 448 (Fla. 4th DCA 2007).

In interpreting a statute (such as the City Charter), words are given their plain and ordinary meaning. *School Board v. Survivors Charter School*, 3 So. 2d 1220 (Fla. 2009). In light of 70 years of jurisprudence, the word "compensation" unquestionably includes a retirement benefit.

Article 16 of the City Charter is Not Applicable

Article 16 refers to the establishment of retirement plans for employees of the City. Chapters 120 and 121 of the Ordinance Code specifically define eligible participants as employees of the City and specified agencies. The Fund is not listed as an eligible agency.

Similarly, the Fund is not eligible for membership in the Florida Retirement System. The Jacksonville Seaport and Jacksonville Airport employees are members of FRS, as both of those agencies were created as "agencies of Duval County." This office, at the request of the General Counsel, secured the proper placement of airport and seaport employees in FRS after they were erroneously enrolled in the City Retirement System.

Likewise, the members of the Jacksonville City Council and the Mayor are participants in FRS, as they are "county" officers. This office, at the request of the General Counsel, obtained an opinion from the Attorney General of Florida securing membership of the City

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Council, Mayor, and other constitutional officers in FRS' elected officer class. *See*, AGO 2003-46.

However, the staff of the Police and Fire Retirement Fund who are enrolled in the Senior Staff Voluntary Pension were not, and are not, City employees (there is only one active participant in the Plan. The other two participants are a retiree and a surviving spouse). The Police and Fire Pension Fund has a separate employer identification number with the Internal Revenue Service than does the City¹. Unlike the City, the Fund is a Social Security contributing employer. The senior staff are (or were) employees of the Fund, not the City².

The Fund is not the only independent agency with its own retirement plan. The JEA is a partner in the St. Johns River Power Park (SJRPP). Its public employees (some employees are deemed employees of Florida Power and Light and are enrolled in FPL's retirement plan) are members of the SJRPP plan which was created by and maintained by the JEA. The Jacksonville Transportation Authority maintains a similar arrangement through Jax Transit Management. None of those plans was created under Article 16 of the Charter as none of the affected employees is a City employee. Interestingly, the City Council adopted a major rewrite of the general retirement plan in 2005. It conferred substantial time connection rights on members of various agencies, but chose not to open membership to staff of the Police and Fire Pension Fund. As the existence of the Senior Staff voluntary pension plan was a matter of public record for more than 5 years at that time, it is a reasonable conclusion that the Council saw no need to open the City retirement system membership to persons already covered by an alternate plan.

The City Council's Authority under Article 16 is inapplicable to the Police and Fire Retirement System because its senior staff were not, and are not, City employees. The Florida Legislature, in empowering the Police and Fire Pension Board as a body politic with the power to compensate its own employees, and repealing any Charter provision in conflict, unquestionably enabled the Board to establish the Senior Staff Voluntary Pension Plan.

¹ The Senior Staff Voluntary Pension Plan is governed by the same IRS provisions that otherwise govern a plan providing benefits to governmental employees. Benefits payable by the plan are subject to the limits in the Tax Code.

² The Board and the City have a financial services agreement. Under that agreement, the Board and not the City performs payroll services for senior staff.

Only the Florida Legislature has Amendatory Authority over the Board of Trustees

The Board itself may not amend the terms of the Police and Fire Pension Plan benefits payable to police officers and firefighters. That is a prerogative of the Council.³ The powers of the Board, however, were created by and can only be amended by the Florida Legislature. A City ordinance may not supersede a state statute. *See Thomas v. State*, 614 So. 2d 468 (Fla. 1993)

Even without the special act creating the Board, the general law provisions of chapters 175 and 185 provide ample power to the Board to determine the nature and amount of the compensation of their employees. Chapters 175 and 185 empower the Board of Trustees to be the sole judge of the plan provisions, subject only to judicial review. *See* Section 175.061 and 185.05, Florida Statutes. As the agency charged with administering the Fund, the Board's interpretation is accorded great weight and will not be overturned unless clearly erroneous. *See Dept. of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815 (Fla. 1983).

The Board's Decision to Establish the Senior Staff Voluntary Pension was Made in Good Faith

According to the City Charter, all decisions of the Board made in good faith are "final, binding, and conclusive" on all parties, including the City. As evidenced by the extensive documents provided to the Ethics Office, the Board carefully considered a number of alternative retirement plans for its senior staff. An actuarial analysis was performed during the process. Chapter 112, Part VII exempts certain types of retirement plans from the reporting and periodic actuarial valuations of the statute. The operative provision of the statute is as follows:

112.625 Definitions.—As used in this act:

- (1) "Retirement system or plan" means any employee pension benefit plan supported in whole or in part by public funds, provided such plan is not:

³ Such changes are also implicated by the Board's settlement agreement with the City and collective bargaining. That agreement and the collective bargaining laws are not the subject of this opinion.

- (a) An employee benefit plan described in s. 4(a) of the Employee Retirement Income Security Act of 1974, which is not exempt under s. 4(b)(1) of such act;
- (b) A plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;
- (c) A coverage agreement entered into pursuant to s. 218 of the Social Security Act;
- (d) An individual retirement account or an individual retirement annuity within the meaning of s. 408, or a retirement bond within the meaning of s. 409, of the Internal Revenue Code of 1954;
- (e) A plan described in s. 401(d) of the Internal Revenue Code of 1954; or
- (f) An individual account consisting of an annuity contract described in s. 403(b) of the Internal Revenue Code of 1954.

The above requirements of Chapter 112, Florida Statutes, actually exempted the Senior Staff Plan, which was maintained as an unfunded plan until an eligible participant retired. See Section 112.625(1)(b), Florida Statutes. As a result, the Senior Staff Plan was maintained in compliance with Chapter 112, Part VII, at all times.

At the time Richard Cohee was hired by the Fund, his agreement provided for the Fund to create a retirement program which replicated the Florida Retirement System. The Senior Staff Voluntary Pension meets that requirement, with one important financial difference. Unlike FRS, which had been non-contributory since the early 1970s, the Senior Staff Plan has always required an employee contribution, at the same rate as the police officers and firefighters pay in the Police and Fire Plan. The Mayor and City Council, who are participants in FRS, paid no contributions to their retirement plan until the Legislature altered that arrangement in 2011. (The contribution for FRS participants was struck down as unconstitutional by a Circuit Court in Tallahassee and is pending review in the Florida Supreme Court).

The Senior Staff Voluntary Pension Plan was preceded in 1998 by a money purchase plan and later a 401(a) Plan through the ICMA, replicating the contribution rates for FRS. Those plans were costly relative to the benefit yielded. In May 1999, then Chairperson Barbara Jaffe requested a legal opinion as to the Board's authority to adopt a staff pension. The

Board appointed a compensation committee consisting of two trustees who *reviewed several* types of retirement programs. On December 15, 1999, the Board received a report, which was a public document, outlining several options for a staff pension plan. After a year of study and consideration, the current plan was adopted in late 2000, which essentially replicates the benefits paid to Fund members. All of the discussion and consideration took place at public meetings and was supported unanimously by the Board, which included three taxpayers of the City as well as the two elected employee trustees (who are also taxpayers). The cost of the staff plan was included in the Board budget routinely reported to the City Council. For the City to now claim that the plan is unenforceable would violate clear precedent from the Florida Supreme Court. *Branca v. City of Miramar*, 634 So. 2d 604 (Fla. 1994). Further, the standard of deference to the Board's decision making process has been judicially approved. See *Starling v. Board of Trustees*, 656 So. 2d 289 (Fla. 1st DCA 1995).

The Voluntary Nature of the Plan Conferred Immediate Contract Rights

Florida law has long recognized the distinction between voluntary and mandatory plans. In a voluntary plan, constitutionally protected contract rights attach immediately. See *Anders v. Nicholson*, 150 So. 639 (Fla. 1939); *City of Jacksonville Beach v. State ex. rel. O'Donald*, 151 So. 2d 430 (Fla. 1963); *Nation v. City of Ft. Lauderdale*, 419 So. 2d 630 (Fla. 1982). As such contract rights have been in place for many years, both contract and equity principles do not permit their cancellation. Nothing prohibits the City from opening the membership of the City Retirement System to the senior staff of the Fund. Were that to occur, there would not be a need to maintain the Senior Staff Plan for new hires.

Practices in Comparable Systems


The retirement benefit practices for senior staff of plans vary around the country. Generally, the staff are made participants of the system they administer, even if the staff is not in the same employment class as the members of the underlying plan. For example, staff of the Louisiana Sheriffs Pension Plan are in that system, even though they are not law enforcement officers. Members of the City of Jacksonville Retirement System who transfer to the employment of the Board remain in that the City System. The City of Miami General Employees and Sanitation Employees Retirement Plan and the City of Ft. Worth Employees Retirement System each has a staff pension virtually identical to Jacksonville, created by Board rule. Some administrators are independent contractors and include a cost for retirement as part of the contract price. It should also be noted that several years ago the Board of Trustees engaged a highly regarded actuarial and human resources firm (which now

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serves as the actuaries for the Jacksonville City Retirement System) to do a compensation survey, which included the value of staff pension benefits, and was found to be within the relevant market. For further examples of retirement benefits provided to public pension plan administrators, you may review the job opportunities listings on the website for the National Association of State Retirement Administrators, www.nasra.org.

Conclusion

It is clear from the plain language of the Charter and more than 70 years of case authority that the Board has the clear right to create and a maintain a retirement program for its employees as part of their compensation. Our view, as expressed in 1999, remains unchanged and the Board acted within its statutory authority.

Sincerely,

ROBERT D. KLAUSNER

RDK:ldm