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LEGAL MEMORANDUM

To: Honorable Members of Jacksonville's City Council

From: Jason R. Gabriel, General Counsel
Stephen M. Durden, Chief Assistant
James W. Linn, Special Pension Counsel

Re: Inquiries regarding proposed Ordinance 2014-386

Date: November 14, 2014

I. Introduction

Pending before City Council is proposed Ordinance 2014-386 and its incorporated 2014 Retirement Reform Agreement ("RRA") between the City of Jacksonville ("the City") and the Police and Fire Pension Fund Board of Trustees ("PFPF Board") which, if adopted, would replace what is known as the 30-year Agreement ("TYA") between the City and PFPF Board. The TYA was put into effect and modified by the following legislation:

Legislation	***Date Enacted***	***Mayor***	***Ordinance Number***
Original Agreement	August 1992	Austin	91-1017-605
1st Amendment	June 1993	Austin	93-229-329
2d Amendment	April 1996	Delaney	93-1983-1407
3d Amendment	August 1998	Delaney	97-1103-E
Restated Agreement	February 2001	Delaney	2000-1164-E
1st Amendment	April 2003	Delaney	2003-303-E
2d Amendment	March 2004	Peyton	2003-1338-E
3d Amendment	May 2006	Peyton	2006-508-E

The City entered into the TYA with the PFPF Board to settle litigation over the control of insurance premium tax rebates made available for certain local public safety pension plans under Chapters 175 and 185 of the Florida Statutes ("Chapter Funds"). The TYA expires in September 2030, but its legal validity has been challenged in one state court case and brought into question in two other cases which respectively reside in state and federal court. [*See Curtis W. Lee, et al. v. City, PFPF Board*, Fourth Judicial Circuit Court, Case No. 2011-CA-004348; *Denton v. City, PFPF Board*, Fourth Judicial Circuit Court, Case No. 2013-CA-5799; *Wyse, et al. v. City, PFPF*

Board, U.S. District Court, Middle District of Florida, Case No. 3:13-cv-121-J-34MCR]. The state cases remain open,[1] and the federal case is currently stayed. Proceedings previously brought before Florida's Public Employees Relations Commission ("PERC") by the unions and the City – which are likewise stayed at this time – may also test the legal effect of the TYA.

II. Questions Presented

In light of the foregoing, the following questions (portions of which are rephrased to achieve answers of greater clarity) have been presented to the Office of General Counsel ("OGC"):

1. Is City Council authorized to repeal legislation which approved the TYA and provides for its performance, such that the TYA may be terminated before 2030 (*i.e.*, its thirty year duration) and changes may be made to portions of the City's Ordinance Code which govern pension benefits?

2. Is Ordinance 2014-386 (in the form initially proposed) tantamount to a collective bargaining agreement, or contain certain subjects of a collective bargaining agreement, and therefore subject to a three-year duration under section 447.309 of the Florida Statutes?

3. Summarize the Florida Supreme Court's decision in *Scott v. Williams*, 107 So.3d 379 (Fla. 2013), and explain: (a) what, if any, significance *Williams* should have in City Council's consideration of proposed Ordinance 2014-386, and (b) whether *Williams* holds that City Council's rejection of 2014-386 signals the final step/conclusion of the collective bargaining process with the unions regarding the subject of pension benefits.

III. Short Answers

1. While City Council is generally authorized to repeal (and replace) its own legislation, it may <u>not</u> void, as a matter of law, an authorized and enforceable contract to which it is a party. A repeal of such legislation functions as a mere announcement of the City's *intention* to terminate the TYA before 2030, not as a *court judgment or declaration* that the law permits the City's early, unilateral termination of the TYA. Of course, the need to obtain a judgment or declaration of this nature would only arise if the PFPF Board and/or unions (if considered intended beneficiaries of the TYA) decide(s) to challenge the repeal as a breach of contractual rights purportedly reserved to them under the TYA. At that point, a court of competent jurisdiction would presumably decide if the City is, in fact, contractually bound by the TYA, and, if so, whether the

[1] In *Denton*, Florida's First District Court of Appeal issued an October 21, 2014 opinion which upheld the trial court's entry of summary judgment in favor of Plaintiff Denton on his claim that the City and PFPF Board collectively bargained police and firefighter pension benefits during closed-door mediation sessions in the *Wyse* litigation, in violation of section 447.605(2), Fla.Stat. (requiring collective bargaining "in the sunshine" pursuant to section 286.11, Fla.Stat.) [*See City v. Denton* and *PFPF Board v. Denton*, Case Nos. 1D-14-0443, 1D-14-3684]. The PFPF Board has moved for a rehearing by the First DCA and appears poised to appeal the decision to the Florida Supreme Court.

City is authorized to unilaterally terminate the "contract" before 2030.[2] Changing benefits contained in the Ordinance Code could be fairly characterized as a proactive breach of the TYA, subject to legal challenges as further described in this memo.

2. Ordinance 2014-386 is *not* a collective bargaining agreement, and while one could construe certain terms therein as subjects of collective bargaining, such construction does not invalidate the agreement. The proposal merely adopts and carries out the terms of an agreement (*i.e.*, the RRA) which settles the PFPF Board's claims against the City in *Wyse* and changes portions of the Ordinance Code that already govern pension benefits and various aspects of the PFPF Board's structure and operation. The fact that pension benefits are among the many "mandatory subjects of collective bargaining" does not mean that they must be contained in a collective bargaining agreement to be effective. Indeed, many collective bargaining agreements do not address pension benefits at all. Accordingly, legislation implementing the terms of the RRA is not subject to the three year limitation applicable to collective bargaining agreements.

3. The Florida Supreme Court's *Williams* decision provides two principles pertinent to City Council's consideration of proposed Ordinance 2014-386. First, it announced that (state) legislation which does not – on its face – remove pension benefits from the collective bargaining process guaranteed to public employees under Florida's Constitution is not facially unconstitutional/invalid. Second, it repeated the Court's previous approval of legislation which effects prospective changes to pension benefits of current public employees.

   Williams does not support the notion that City Council's rejection of 2014-386 somehow signals the conclusion of the collective bargaining process between the City and the unions. Indeed, it is possible that City Council's rejection of the proposed ordinance could lead to: (i) union demands to *initiate* bargaining over pension benefits, (ii) the continuation or initiation of litigation through which the unions would likely seek enforcement of their purported "contractual rights" under the TYA, or (iii) the continuation or initiation of PERC proceedings through which the unions may assert the City's purported breach of the TYA and/or previous demands to bargain pension benefits constitute unfair labor practice(s) ("ULP").

IV. Discussion

(1) Potential Repeal and Early Termination

City Council's general authority to repeal its own ordinances is beyond question. However, this general authority is curtailed where the ordinance subject to repeal is in the nature of a contract. *See City of Santa Barbara v. Davis*, 6 Cal. App. 342, 92 P. 308 (2d Dist. 1907); *see also People et al. v. Chicago West Div.*, 18 Ill. App. 125, 1885 WL 8532 (1st Dist. 1886), aff'd, 118 Ill. 113, 7

[2] While the City could also pursue a judgment of this kind in its favor, it may have no need to do so if the repeal is not challenged.

N.E. 116 (1886); *Eastern Wisconsin Railway & Light Co. v. Hackett*, 135 Wis. 464, 115 N.W. 376 (1908).

That the prospective repeal of the TYA may be rooted in a belief held by various Council Members that it is invalid (in whole or in part), such belief does not render the TYA invalid or unlawful as a matter of law. Only a court of competent jurisdiction can make that determination. To that end, we note the absence of any court ruling on that issue. While the court in *Denton* declared that the *Wyse* Mediation Settlement Agreement ("MSA") was *void ab initio* because it resulted from closed-door collective bargaining in violation of section 447.605(2), Fla.Stat., the court did not make the same declaration with respect to the TYA. Indeed, Plaintiff Denton never sought such a declaration. Likewise, neither PERC nor any court has ruled that the TYA resulted from collective bargaining or constitutes a collective bargaining agreement.

In any event, should a court later determine that the TYA imposes enforceable contractual obligations on the City, even the most well-informed and good faith belief that the TYA is invalid may not relieve the City from satisfying these obligations or entitle the City to repudiate or cancel it at this juncture. Certainly, no city can "purposefully … avail itself of the benefits of [a] contract until such time as it arbitrarily and capriciously [chooses] to ignore it, and do so with no fear that any court could compel it to honor its agreement." *Killearn Properties, Inc. v. City of Tallahassee*, 366 So.2d 172 (Fla. 1st DCA 1979) (city was not permitted to avoid its contractual obligations by asserting that the contract violated the sunshine law); *see also Board of Trustees of the City of Delray Beach Police and Firefighters Retirement System v. Citigroup Global Markets*, 622 F.3d 1335 (11th Cir. 2010) (pension fund board could not void its contract due to its self-alleged violation of the sunshine law).

The language of the TYA provides that termination within its first 30 years may only occur if such relief is granted by a court of competent jurisdiction. Specifically, Section 31 of the TYA states the following:

> 31. Term. This Agreement shall have a term extending to September 30, 2030. If for any reason the term shall be challenged as a matter of law, the term of this Agreement shall not be less than the minimum term allowed by law. The terms of this Agreement shall control beyond the expressed term hereof until such time as either party is notified in writing by certified mail, return receipt requested as to its intention to terminate.

The TYA therefore expressly permits termination *after* 30 years have passed, or within a shorter period if permitted by the court. Since neither event has occurred, the text of the TYA does not appear to support its unilateral termination as contemplated by Ordinance 2014-721.

Changing benefits contained in the *Ordinance Code* could be fairly characterized as a proactive breach of the TYA, subject to legal challenges as further described in this memo. Such an amendment would likely be followed by challenges filed before PERC or the courts. Prior to undertaking such an action, a general understanding of the *Williams* case is in order, as well as a general understanding of what legal consequences there may be if the City unilaterally modified pension benefits via legislative changes.

(2) Ordinance 2014-386 is not a Collective Bargaining Agreement

As explained in greater detail below, legislation which contains or effects changes to mandatory subjects of collective bargaining does not constitute, *per se*, a collective bargaining agreement or even collective bargaining.[3] Here, Ordinance 2014-386 is not a collective bargaining agreement. Its adoption would merely add to and modify various portions of the City's Ordinance Code which already govern pension benefits and various aspects of the PFPF Board's structure and operation. City Council is authorized to make such changes, so long as the associated legislation does not violate the constitutional right of public employees and their unions to demand collective bargaining over changes in pension benefits. Up to now the unions have made no demand to bargain over pension benefits, and have accepted the pension benefits contained in the TYA. These benefits have been implemented in City ordinances and now reflect the "status quo." Any attempt by City Council to unilaterally (without collective bargaining) enact changes in the current pension benefits would likely be challenged as an unfair labor practice with PERC or a legal action seeking to enforce the terms of the TYA, or both.

Unlike a collective bargaining agreement, the unions are not parties to the RRA. The only parties are the City and the PFPF Board. Further, the unions have not participated at all in negotiations over 2014-386 or the RRA. Indeed, they signed express waivers foregoing any right to collectively bargain pension benefits. Such waivers are entirely appropriate and valid. *See Palm Beach Jr. Coll. Bd. of Trustees v. United Faculty of Palm Beach Jr. Coll.*, 475 So.2d 1221, 1226 (Fla. 1985); *Comm. Workers of America v. City of Gainesville*, 65 So.3d 1070, at n. 1 (Fla. 1st DCA 2011) (discussing acquiescence or waiver of collective bargaining); *Bd. of County Commissioners v. Int'l Union of Operating Engineers, Local 653, and the Public Employees Relations Commission*, 620 So.2d 1062, 1066 (Fla. 1st DCA 1993) (discussing ability of union to waive collective bargaining). Notably, the lack of a "clear waiver" by the unions was one of the factors considered by the court in *Denton*.

Certainly the RRA contains elements (i.e., the pension benefit provisions) that could be considered subjects of collective bargaining. On the other hand, Section 447.309(5) does not require that pension benefits be in a collective bargaining agreement. PERC has noted the existence of many collective bargaining agreements that do not contain references to pension benefits. *See, e.g., Public Employees Union/PEU, a Division of Federation of Physicians and Dentists/FPD, AHPE, NUHHCE, AFSCME, AFL-CIO, and Professional Managers and Supervisors Association (PMSA), a Division of Federation of Physicians*, 40 FPER ¶ 29.

[3] Collective bargaining agreements need not even contain *references* to pension benefits. *See, e.g., Public Employees Union/PEU, a Division of Federation of Physicians and Dentists/FPD, AHPE, NUHHCE, AFSCME, AFL-CIO, and Professional Managers and Supervisors Association (PMSA), a Division of Federation of Physicians*, 40 FPER ¶ 29. PERC has consistently recognized collective bargaining agreements need not contain all the terms and conditions of employment. *See, e.g., Palowitch v. Orange County School Board*, 2 FPER ¶ 280 (1977), aff'd, 367 So.2d 730 (Fla. 4th DCA 1979).

Because 2014-386 and the RRA do not constitute a collective bargaining agreement, they are not subject to the three year limitation applicable to collective bargaining agreements under Chapter 447 of the Florida Statutes. [4]

(3) Impact of *Scott v. Williams*

***Scott v. Williams* – "Facial" Challenge**

In *Scott v. Williams*, 107 So.3d 379 (Fla. 2013), the Florida Supreme Court upheld statutory amendments to the Florida Retirement System ("FRS"), thereby rejecting claims that the amendments violated public employees' constitutional rights to collectively bargain pension benefits. The *Williams* decision also reaffirmed the Supreme Court's holding in *Florida Sheriffs Ass'n v. Department of Administration*, 408 So.2d 1033 (Fla. 1981) that the state legislature may enact prospective changes and reductions to pension benefits of current employees who have not reached retirement status.

The trial court in *Williams* earlier entered summary judgment in favor of the plaintiffs' claims that the amendments violated the impairment of contracts, takings and collective bargaining provisions of Florida's Constitution. Doing so, it heavily relied upon language contained in Section 121.011(3)(d), Fla.Stat. – the "preservation of rights" statute. It also noted the Supreme Court's 1981 decision in *Florida Sheriffs* through which it determined that the statute "vest[ed] all rights and benefits already earned under the present retirement plan" but did not preclude the legislature from altering benefits prospectively for future state service in the existing retirement plan. But the trial court in *Williams* refused to interpret the *Florida Sheriffs* decision to permit the legislature to "completely gut and create a new form of pension plan." The trial court also concluded that the amendments constituted an unconstitutional taking of private property without full compensation, violated the contracts clause, and abridged the rights of public employees to collectively bargain.

On appeal, the Supreme Court in *Williams* rejected the notion that the preservation of rights statute operated to prohibit *any* prospective changes to benefits provided under the FRS. It explained that the statute was intended to protect rights in accrued benefits, while permitting the legislature to alter unaccrued benefits prospectively, stating:

> We stress that the rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future

[4] Notably, even if it were considered a collective bargaining agreement, PERC has held agreements in excess of three years are neither illegal nor invalid. *See, e.g., Brevard County Sheriff's Department*, 7 FPER ¶ 12343 (1981), 7 Florida Pub. Employee Rep. ¶ 12343, 1981 WL 677362 ("The duration period provided for in Section 447.309(5) … requires that a 'window period' exists in which a certification petition or decertification petition may be filed. Thus, the agreement may remain in effect, but the bargaining unit may be petitioned-for by a rival employee organization or decertified at the prescribed intervals. The contract is currently in effect and valid"); *See also Jacksonville City Employees*, 6 FPER ¶ DA2311064 (1980), *Gambrell v. Florida PBA*, 5 FPER ¶ DA2310382 (1979); *Holmes County School Board*, 9 FPER ¶ 14207 (1983), 9 Florida Pub. Employee Rep. ¶ 14207, 1983 WL 863693 ("It does not invalidate an agreement simply because its duration may exceed three years") [emphasis added].

> benefits of active employees for future services, except in a manner favorable to the employee. This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state. Such a decision could lead to fiscal irresponsibility. It would also impose on state employees an inflexible plan which would prohibit the legislature from modifying the plan in a way that would be beneficial to a majority of employees, but would not be beneficial to a minority. Since two different plans cannot exist for the same type of employee, the implementation of appellants' contention would also bind the legislature to this plan for future employees. We find appellants' contention is not in accordance with the intent of the legislature and conclude that the legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees. *Williams* at 387.

The *Williams* Court likewise rejected the argument that *Florida Sheriffs* authorized prospective changes only to noncontributory features of the FRS. Rather, it clarified and reaffirmed the holding in *Florida Sheriffs* that recognized the authority of the legislature to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date were not impaired. In addition, the Court cautioned against an interpretation of the preservation of rights statute which could bind future legislatures:

> We again hold, as we did in *Florida Sheriffs*, that the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS … [the statute] … does not create binding contract rights for existing employees to future retirement benefits based upon the FRS plan that was in place prior to July 1, 2011. As we held in *Florida Sheriffs*, we again hold that the actions of the legislature have not impaired any statutorily created contract rights and, thus, we reverse the judgment of the trial court on this ground. *Williams* at 389.

Finally, the Supreme Court in *Williams* also rejected the contention that legislative amendments to the FRS prohibited the employees from collectively bargaining pension benefits. "Nor can we conclude," said the Court, "in a facial challenge to the amendments, that 'effective' collective bargaining has been abridged or impaired on those issues." *Id*

It is important to note that *Williams* involved a facial challenge to the Chapter 2011-68 amendments. That is, it concerned a challenge directed to the amendments as written, not as applied in a specific situation or to a specific contract. The Court made it clear that the amendments, on their face, did not prohibit employees from collectively bargaining – but also made it clear that it was not ruling on whether the state legislature can limit employees' collective bargaining rights simply by amending the FRS statute. The Court was likely aware that most collective bargaining agreements covering public employees who participate in FRS do not address retirement matters.

Union Challenge to 2011 FRS Amendments - "As Applied" Challenge

In a post *Williams* challenge to the application of Chapter 2011-68 to a specific provision in a collective bargaining agreement, the First District ruled in favor of the union and against the state. *Florida State Fire Service Assoc. v. State of Florida*, 128 So.3d 160 (Fla. 1st DCA 2013). *Florida State Fire Service Assoc.* involved a union challenge to the state's imposition of a sentence in the collective bargaining agreement stating: "the state agrees to administer the [FRS] in accordance with any statutory provision or act affecting the plan or its operation." Another provision in the agreement, stated that employees were not required to make financial contributions to the retirement fund. By imposing the language that the state would administer FRS "in accordance with any statutory provision or act," the state was attempting to implement the 3% member contribution and other FRS changes enacted by the Chapter 2011-68, without having to renegotiate the collective bargaining agreement. The First District concluded that the state had committed an unfair labor practice by imposing a "waiver" of the union's right to collectively bargain over changes in retirement benefits. The court found that the practical effect of the state's action in delegating the issue of retirement benefits to the state legislature was to make it impossible for the union to negotiate the issue at all. The court also noted that the state's action conflicted with section 447.309(1), Florida Statutes, which requires that collective bargaining be conducted by the bargaining agent and the chief executive officer of the public employer. By the state imposing language that granted the right to change retirement benefits to a third party (the Legislature), the court concluded the state's action was contrary to the requirements of Section 447.309(1).

Collective Bargaining Impasse Process for the State not the Same as for the City

In applying *Williams* and *Florida State Fire Service* to the current situation involving the proposed changes to pension benefits, fundamental differences in the way impasses are resolved by the State as compared with local governments (including the City of Jacksonville) must be recognized. Section 447.403, Florida Statutes, sets forth the process for resolving an impasse in collective bargaining negotiations involving public employees. This statute and Section 216.163, Florida Statutes (concerning the Governor's recommended budget) contain several key distinctions in the way the impasse process works at the state and local level:

- Section 447.403(1) provides that an impasse occurs when one of the parties (i.e., bargaining agent or chief executive officer) declares such in writing to the other party. However, Section 216.163(6) requires that the Governor declare an impasse in all collective bargaining negotiations for which he is the public employer, and for which an agreement has not been reached, at the time the Governor submits his recommended budget to the legislature.

- Section 447.403(1) provides that when an impasse occurs, the public employer or bargaining agent may secure the appointment of a mediator to assist in resolving the impasse. However, the same section states that if the Governor is the public employer, no mediator shall be appointed.

- Section 447.403(2) provides for the appointment of a special magistrate, at the request of either party, to hold a hearing and make recommendations to resolve the issues at impasse. However, the same section states that if the Governor is the public employer, no special magistrate shall be appointed and the parties may proceed directly to the last step of the

impasse process ("the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues").

- Section 447.403(5) provides an expedited impasse resolution process for the Legislature, in which a joint select committee is appointed to review the positions of the parties and render a recommended decision not later than 10 days prior to the commencement of the legislative session. This section further provides that during the legislative session, the Legislature shall take action to resolve the impasse in accordance with the statute, and that any actions taken by the Legislature shall bind the parties.

- Finally, the State Legislature's actions to resolve impasses are codified in the annual state appropriations act, and are set forth in a footnote to Section 447.403.

Thus, there are a number of distinctions between the manner in which the State Legislature resolves an impasse, and the impasse procedure that must be followed by all other public employers, including the City of Jacksonville. Unlike the Legislature, the City of Jacksonville cannot skip the mediation and special magistrate process, and cannot resolve collective bargaining impasses as part of the City's budgetary process. The City, like all other local governments, must follow all steps of the impasse resolution process, before the City Council may take action to resolve the impasse. Finally, as noted below, unilateral action by the City to change pension benefits would likely be challenged as an unfair labor practice. Nothing in *Williams* holds that Chapter 447 is not applicable to the City.

In sum, the *Williams* decision instructs that state legislation which does not – on its face – remove pension benefits from the collective bargaining process guaranteed by Florida's Constitution is not facially unconstitutional/invalid, and the law permits legislation adopted by the Florida legislature which makes prospective changes to pension benefits of current public employees. Conversely, *Williams* does not support the idea that City Council's rejection of proposed legislative changes to pension benefits signals the conclusion of the collective bargaining process between the City and the unions.

Legal Consequences of Unilateral Action

It is possible that City Council's adoption of unilateral legislative changes to pension benefits could lead to union demands to initiate bargaining of pension benefits, continuation or initiation of litigation to enforce their purported contractual rights under the TYA, or continuation or initiation of PERC proceedings asserting the City's breach of the TYA and previous demands to bargain pension benefits constitute unfair labor practices.

V. Conclusion

We appreciate the opportunity to provide the foregoing, and certainly invite you to contact the Office of General Counsel for any clarification, elaboration, or further services our office may provide to assist your consideration of the very important issues at hand.