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REPLY TO: TALLAHASSEE

MEMORANDUM

TO: Chris Hand, Chief of Staff
Jason Gabriel, General Counsel
City of Jacksonville

FROM: Jim Linn

DATE: January 23, 2015

RE: Police and Fire Pension Fund – City's Ability to Waive Imposition of Pension Changes

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This responds to your request for an opinion on whether the City may agree to waive the final step in the statutory impasse process – imposition by the City Council -- regarding changes in Police and Fire Pension Fund benefits, for a specified period of time.

Short Answer: Yes. Chapter 447, Part II, Florida Statutes, which governs collective bargaining between public employers and their employees, does not prohibit or restrict the ability of an employer to voluntarily waive a statutory procedure, as long as employees' bargaining rights are not restricted. After significant research, it appears that this issue is one of first impression in Florida. Florida court and PERC decisions recognize the ability of a union to voluntarily waive the right to bargain over particular subjects, if the waiver is clear and unmistakable. Based on relevant court and PERC decisions, in my opinion a public employer may voluntarily waive its ability under the collective bargaining statute to impose, through the impasse process, a change in pension benefits.

Analysis

The right to collective bargaining is guaranteed by Article I, section 6 of the Florida Constitution, providing that "[t]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." This constitutional right is implemented in Part II, Chapter 447, Florida Statutes. Section 447.501(1) provides in relevant part:

1. Public employers or their agents or representatives are prohibited from:
   a) Interfering with, restraining, or coercing public employees in the exercised of any rights guaranteed them under this part.
   c) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.

§ 447.501(1)(a) and (c), Fla. Stat. (2014).

Once a union is certified to represent a unit of public employees, the public employer is required to negotiate with union representatives to determine the wages, hours and terms and conditions of employment of bargaining unit employees. Section 447.309(1) describes the collective bargaining process:

> 447.309 Collective bargaining; approval or rejection.--
>
> (1) After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. The chief executive officer or his or her representative and the bargaining agent or its representative shall meet at reasonable times and bargain in good faith. In conducting negotiations with the bargaining agent, the chief executive officer or his or her representative shall consult with, and attempt to represent the views of, the legislative body of the public employer. Any collective bargaining agreement reached by the negotiators shall be reduced to writing, and such agreement shall be signed by the chief executive officer and the bargaining agent. Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit...

If agreement on wages, hours, and terms and conditions of employment cannot be reached at the bargaining table, Section 447.403 provides for the resolution of impasses. The parties may secure the appointment of a mediator to assist in the resolution of the impasse. If no mediator is appointed, or upon the request of either party, the Public Employees Relations Commission (PERC) appoints a special magistrate, who conducts a hearing and makes recommendations on

the issues at impasse. If a special magistrate is appointed, and either party does not accept, in whole or in part, the recommended decision of the special magistrate, the disputed issues are submitted to the legislative body (City Council) for final action. Alternatively, the parties may jointly waive the appointment of a special magistrate, in which case the disputed issues are presented to the legislative body for final action. The final step in the statutory impasse procedure is a public hearing before the legislative body, at which the parties explain their positions with respect to the disputed issues. At the conclusion of the hearing, the legislative body takes "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(4)(d), Fla. Stat.

Although Chapter 447 requires public employers and unions to collectively bargain over wages, hours and terms and conditions of employment, courts and PERC have upheld voluntary waivers by unions that limit or foreclose negotiations on mandatory subjects of bargaining. *School District of Polk County v. Polk Education Association*, 100 So. 3d 11 (2d DCA 2011). In *Polk County*, the court held that "absent a clear and unmistakable waiver by the certified bargaining representative [union] ...a public employer's unilateral alteration of wages, hours, and other terms and conditions of employment ... constitutes a per se violation of Section 447.501(1)(a) and (c), Fla. Stat." See also, *Local 1222 v. Pinellas Suncoast Transit Authority*, 24 FPER ¶ 29304 (1998); and *Florida Nurses Ass'n v. Florida Department of Management Services*, 20 FPER ¶ 25102 (1994). The rule established in all of these cases is that it must be "clear and unmistakable" that the union intended to give up its right to bargain over a term or condition of employment.

The above cases illustrate bargaining waivers by unions. However, there is no statute or case law to suggest that an employer cannot waive or limit a statutory procedure as long as the limitation does not result in a waiver or limitation of employees' bargaining rights. If the City were to agree not to exercise the last step of the statutory impasse procedure (imposition by the City Council) with respect to a change in pension benefits, the City's voluntary waiver would not adversely affect the bargaining rights of employees. Employees, through their unions, would still be able to bargain over and mutually agree on pension changes through the collective bargaining process. The only limitation would be placed on the City, which could not exercise the final step in the statutory impasse procedure for a specified period of time. The City's voluntary waiver of its ability to resolve disputed bargaining issues through City Council action at an impasse hearing would not, in my judgment, result in any waiver or limitation of the bargaining rights of employees under the Florida Constitution or statutes. Accordingly, in my opinion a public employer may voluntarily waive its ability under the collective bargaining statute to impose, through the impasse process, a change in pension benefits.

It has been suggested that, even if the City is able to waive its ability to impose changes in pension benefits through the impasse process, the waiver could not extend beyond the three year maximum period for collective bargaining agreements under Chapter 447, Florida Statutes. However, the proposed agreement containing the waiver is between the City and the Board of

Trustees of the Police and Fire Pension Fund, and is not a collective bargaining agreement. Even if the agreement were considered to be a collective bargaining agreement, PERC has held in numerous cases that collective bargaining 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]. Thus, even if the agreement between the City and PFPF is determined to be a collective bargaining agreement, the fact that the City's waiver of its ability to impose changes in pension benefits extends for 10 years would not invalidate the agreement.

Should you have any questions, please feel free to contact me.

JAMES W. LINN

James W. "Jim" Linn is a shareholder in the Tallahassee office of Lewis, Longman & Walker, P.A. The firm has four offices (West Palm Beach, Jacksonville, Bradenton and Tallahassee) with 32 attorneys and three paralegals. Lewis, Longman & Walker represents a number of cities, counties, special districts and other governmental entities throughout Florida in employment, pension, environmental, land use, administrative and legislative matters. Mr. Linn has practiced law in Florida for more than 30 years. He was selected for inclusion in the 2009-2015 editions of "The Best Lawyers in America" in the areas of Labor & Employment Law and Employee Benefits Law, and holds an AV® Preeminent 5.0 out of 5 rating in Labor & Employment Law from Martindale-Hubbell, the highest rating available for legal ability and adherence to ethical standards. Mr. Linn received the Ralph A. Marsicano Award in 2011, presented by the Florida Bar Section on City, County and Local Government Law, recognizing his significant contributions to the development of local government law in Florida.

A substantial portion of Mr. Linn's practice is devoted to advising public employers and pension boards on federal and state laws pertaining to governmental retirement and retiree health benefit programs. He has also advised numerous local governments on the evaluation and implementation of pension reform strategies. Prior to entering the practice of law, Mr. Linn served as a Legislative Analyst for the Florida House of Representatives Committee on Retirement, Personnel and Collective Bargaining. There he researched and drafted legislation affecting a broad range of retirement and employment issues. Mr. Linn assisted in the research and drafting of Part VII, Chapter 112, Florida Statues (the "Florida Protection of Public Employee Retirement Benefits Act"). As an attorney, Mr. Linn has conducted numerous comprehensive reviews of local government pension plans to ensure compliance with applicable federal and state laws, has worked closely with local governments, pension boards and plan actuaries in restructuring retirement benefit programs, and has prepared numerous pension and retiree health benefit plan amendments. In 1998-99, Mr. Linn served as a member of the Florida Retirement System Work Group, an advisory panel established by the Legislature to review and make recommendations on actuarial assumptions and cost methods for FRS.

Mr. Linn has represented a number of public entities in pension-related litigation. Most recently he prepared a friend of the court brief for the Florida League of Cities in Scott v. Williams, 107 So.3d 379 (Fla. 2013), the Florida Supreme Court case involving 2011 changes to the Florida Retirement

System. He successfully represented a city and pension board in City of Hollywood v. Nickerson, 830 So.2d 917 (Fla. 4th DCA 2002) and City of Hollywood v. Petrosino, 864 So.2d 1175 (Fla 4th DCA 2005). He also represented the Florida League of Cities and several cities in an administrative challenge to the Florida Division of Retirement's policy on "extra benefits" for police officers and firefighters under Chapters 175 and 185, Florida Statutes. Mr. Linn represented a city and pension board in City of Orlando v. Department of Insurance, 528 So.2d 468 (Fla. 1st DCA 1988). In City of Orlando, the district court reversed a lower court's ruling that elected and appointed city officials could not serve on local police/firefighter pension boards. As a result of this case, elected and appointed city officials are able to serve on municipal pension boards. Mr. Linn has also successfully defended several cities and pension funds in retirement-related litigation, including age discrimination claims. He has assisted a number of cities and special districts in joining the Florida Retirement System, and he has represented many local governments in disputes with the Florida Division of Retirement involving various state pension laws.

Mr. Linn is a frequent lecturer on pension-related topics, and has appeared at seminars sponsored by the Florida Bar, Florida League of Cities, Florida Association of Special Districts, Florida Division of Retirement and Florida Department of Insurance. He chaired the Florida Bar Section on Local Government Law (now the Section on City, County and Local Government Law) in 1995-96. He graduated, with honors, from the Florida State University College of Law in 1980.

Mr. Linn has been admitted to practice in Florida since 1980, and is also admitted in the U.S. Eleventh Circuit Court. He is a member of the Florida Bar Sections on City, County and Local Government Law, Labor and Employment Law, and Administrative Law. He is also a member of the National Association of Public Pension Attorneys.

Professional Experience

1995 to Present: Shareholder with Lewis, Longman & Walker, P.A. Clients include local governments, pension boards and professional associations. Areas of practice include pension law, labor and employment related matters, legislative and executive agency representation; and administrative and civil litigation.

1983-1994: Shareholder with Carson, Linn & Adkins. Represented clients in all areas of the firm's practice before all three branches of state government. Represented public and private entities throughout Florida in labor and employment law matters, pension and benefits matters, administrative and regulatory issues, bid disputes, and professional licensure and disciplinary proceedings. Supervised associate attorneys and paralegals in all areas of the firm's practice.

1980-1983: Associate attorney, Seyfarth, Shaw, Fairweather & Geraldson. Worked in Miami and Tallahassee offices of 250 lawyer firm, handling employment law matters, retirement issues, administrative and regulatory matters, professional licensure and disciplinary matters, and legislative matters.

1978-1980: Intern and Legislative Analyst, Florida House of Representatives Committee on Retirement, Personnel and Collective Bargaining. Researched and drafted legislation pertaining to public pension and benefit matters, and labor/employment law.

Education

J.D., Florida State University, 1980, with honors.
B.S. Florida State University (Government), 1977, Magna Cum Laude.

Recent Speeches

"Pension Reform Primer," Florida League of Cities Labor Relations Summit, Jacksonville Beach, February 2013.

"Pension Reform Update," The Florida Bar Public Employment Labor Relations Forum, September 2012.

Pension Reform Webinar, Florida Government Finance Officers Association, February 2012.

"2011 Pension Reform Update," Florida League of Cities Annual Conference, August 2011.

"Managing Municipal Pension Liabilities," Florida Municipal Attorneys Association Annual Seminar, July 2011.

"Playbook for Collective Bargaining (Pension Issues)," Florida Government Finance Officers Association, June 2011.

"The Future of Public Service Pensions," Florida City and County Managers Association, June 2011.

"Getting Past No: Implementing Pension Reform," The Florida Bar Public Employment Labor Relations Forum, September 2010.

"Pension Reform: Effective Strategies for Reducing City Pension Costs," Florida League of Cities 2010 Annual Conference, August 20, 2010.

"Pensions: Stop the Bleeding," Florida Government Finance Officers Association Annual Conference, May 2010.

"Navigating the Shoals of Public Pension Reform," Florida Public Employer Labor Relations Association Annual Training Conference, February 2010.

"2009 Retirement Law Update," Florida Municipal Attorneys Association Annual Conference, July 2009.

"Considerations for Local Governments In Joining the Florida Retirement System," Florida Public Employer Labor Relations Association Annual Training Conference, February 2009.

Publications

"1999 Police/Firefighter Pension Law: Analysis and Compliance Strategies," published by the Florida League of Cities, September 1999.

"Liberty Interest Protection for Discharged Public Employees," The Florida Bar Journal, October 1990.

Section 1983: The Changing Contours of Local Government Liability," The Florida Bar Journal, October 1984.

"Closer to Home: Applying the APA to Local Government Decision Making," The Florida Bar Journal, June 1983.

"Constitutional Issues in Administrative Practice," The Florida Bar Journal, December 1981.

"Collective Bargaining and the Protection of Public Employee Retirement Benefits," The Review, Florida State University Center for Employment Relations and Law, Summer 1980.