

MINUTES

**GENERAL EMPLOYEES'
RETIREMENT COMMITTEE MEETING
TUESDAY - OCTOBER 8, 2013 - 3:30 PM**

PRESENT

Vic Espinal
Larry Gordon
Barbara Kramer
Frantz Pierre
Lori Helton – Chair

ALSO PRESENT

Larry Wilson, GRS
Darcee Siegel, City Attorney
Bob Sugarman – Sugarman & Susskind
Martin Lebowitz – Pension Administrator

ABSENT

DEPARTMENT REPRESENTATIVES

Alex Vinokur	Nick Douglas
Karim Rossy	Myriam Rosado
Susan Ritter	Hupert Rose
Marcia Fennell	Reine Pompee Dupuy
Laura Wozniak	Nehemi Vincent
Raul Sotero	Liliya Spetkor
Esmond Scott	Regan Kinzer
Shernett Lee	Andrise Bernard
Airia Austin	

Lori Helton called the meeting to order at 3:47 P.M., followed by a roll call of Trustees.

1. DISABILITY CASE – MICHAEL BROWN

General employee Michael Brown has applied for disability benefit pension. Bob Sugarman reviewed the case and asked the following questions to the trustees:

1. Did the applicant suffer an illness or injury?
2. If the applicant suffered an illness or injury, was the illness or injury suffered in the line of duty (directly caused by the performance of the applicant's duties as a Water Plant Operator III for the City of North Miami Beach)?
3. Does the illness or injury cause the applicant a disability?
4. If the applicant is suffering from a disability, is that disability permanent?
5. Is the applicant totally and permanently incapacitated from performing the duties of a Water Plant Operator III or is the applicant wholly prevented from engaging in any occupation for wage and profit and likely to remain so disabled continuously and permanently?

All questions must be answered "yes" to award a pension.

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After discussion and a review of medical records including the report of the independent medical examiner, the trustee concluded that all questions were answered "yes". A motion by Trustee Kramer, seconded by Trustee Espinal, to approve Michael Brown's Total and Permanent Disability Retirement Income

Motion carried unanimously

2. ORDINANCE 2013-15 PENSION CHANGES

Bob Sugarman handed out his legal opinion on a course of action for the Committee as a result of the City Council's recent amendment of the North Miami Beach General Employees' Retirement Plan and the outcome of the plan members' pre-amendment vote disapproving those amendments.

Because 2/3rds of the pension participants did not approve the changes to the pension plan adopted by the City Council, Bob Sugarman's opinion is that the Board cannot legally implement those changes unless and until they are approved by 2/3rds of the participants in a subsequent referendum or a court rules that the 2/3rds requirement is unconstitutional.

Please see attached letter of October 8, 2013 from Sugarman & Susskind.

Martin Lebowitz handed out to the trustees the results of the referendum among the Plan's active participants held between September 9 – 10 which concerned the plan changes in Ordinance 2013-15. The ballot was counted, no objections to vote or the count of the ballots were received and all plan benefits changes and the elimination of the participant's right to approve plan changes were overwhelmingly disapproved.

City Attorney Darcee Siegel referred to an opinion letter from city pension attorney James Linn that opined based on case law that administrative agencies have no power to declare a statute void or otherwise unenforceable and that the Retirement Committee is required to administer the retirement plan in accordance with the plan as amended by the City Council, unless and until a court rules otherwise.

Please see attached letter dated October 8, 2013 from Lewis, Longman & Walker PA.

Bob Sugarman presented the Board with the choice of following his opinion, following Jim Linn's opinion that would expose the Board to the risk of suits by participants in the future, or filing a declaratory judgment suit against the City.

Bob Sugarman recommends that the board follow his opinion and wait for the City to sue the Pension Board which would permit the cost of defending the suit to be possibly covered by the board's Fiduciary Liability Insurance Policy.

After discussion, motion by Trustee Vic Espinal, seconded by Trustee Larry Gordon, to continue to administer the terms of the current Plan (disregarding the amending ordinance 2013-15 because it was not approved by 2/3 of the participants) as was done before the City

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Council's amendments until such amendments are approved by 66 2/3% of the active members or a court rules that the City Council's amendments are valid and enforceable.

Roll Call:

Trustee Victor Espinal	Yes
Trustee Larry Gordon	Yes
Trustee Lori Helton	Yes
Trustee Barbara Kramer	No
Trustee Frantz Pierre	No

Motion carried

3. PUBLIC COMMENTS

Hubert Rose VP of the AFSCME union stated that the Union agreed to the 5 items reducing pension benefits and at no time did they agree to take away the 2/3rd right to vote.

Shernett Lee stated why her pension benefits should not be affected by AFSCME contract because she is not part of the AFSCME bargaining unit.

Marcia Fennell stated that non-bargaining unit members of the pension plan were not involved in the pension changes that AFSCME negotiated. She also stated the pension changes that the City Council approved result in drastic cuts to her pension benefits.

The next scheduled meeting for November 12, 2013. Meeting was adjourned at 5:57 p.m.

Martin Lebowitz, Pension Administrator



REPLY TO: TALLAHASSEE

October 8, 2013

Ms. Darcee S. Siegel
City Attorney
City of North Miami Beach
City Hall, 4th floor
17011 N.E. 19 Avenue
North Miami Beach, FL 33162-3100

Re: General Employees Retirement Plan – Duty of Retirement Committee to Administer the Plan

Dear Ms. Siegel:

As requested, I have reviewed Bob Sugarman's October 7, 2013 letter to the General Employees Retirement Committee concerning the recent plan changes adopted by the City Council in Ordinance 2013-15. The retirement plan changes, which were agreed to in collective bargaining with AFSCME, included the deletion of language in section 1.05 providing that plan amendments "must be approved by 2/3% of the active participants..."

Based on case law holding that administrative agencies have no power to declare a statute void or otherwise unenforceable, Mr. Sugarman advises the committee to "continue to administer the terms of the current plan (disregarding the amending ordinance because it was not approved by 2/3 of the participants) as you did before the City passed the ordinance until the City Council's amendments are approved by 66-2/3% of the system's active members ... or ... a court rules that the City Council's amendments are valid and enforceable."

In my opinion, the cases cited by Mr. Sugarman support the opposite conclusion: the Retirement Committee is required to administer the retirement plan in accordance with plan as amended by the City Council, unless and until a court rules otherwise.

See Things Differently

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Ms. Darcee S. Siegel
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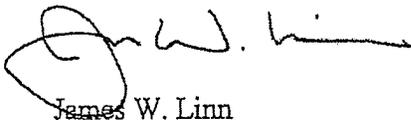
As stated in Mr. Sugarman's letter, Florida courts have concluded in a number of cases that administrative agencies have no power to declare a statute void or otherwise unenforceable; and that only the courts have the power to declare a law to be unconstitutional. An agency must assume that a law is constitutional until a court declares otherwise.

Thus, based on the cases cited by Mr. Sugarman, the Retirement Committee must administer and enforce the retirement plan in accordance with the ordinance establishing the plan, as amended by the City Council. The Committee has no authority to refuse to implement the provisions of the plan as amended by Ordinance 2013-15 simply because committee members or their attorneys may believe the ordinance is invalid or unconstitutional. The committee must assume that the plan as amended by Ordinance 2013-15 is constitutional until a court declares otherwise.

Simply put: the provision requiring plan amendments to be approved by 2/3 of active plan members was deleted by Ordinance 2013-15. Unless and until a court determines that ordinance 2013-15 is unconstitutional or otherwise invalid, the Retirement Committee must administer the plan in accordance with that ordinance.

If you have questions concerning these matters, please call.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Linn", written over a printed name.

James W. Linn

JWL/es

SUGARMAN & SUSSKIND

PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

Robert A. Sugarman♦
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October 8, 2013

Board of Trustees
North Miami Beach General Employees' Retirement Plan
c/o Marty Lebowitz, Pension Coordinator
17011 N.E. 19th Avenue
N. Miami Beach, Florida 33162-3194

Re: City Council's changes to the Pension Code

Dear Trustees:

This letter provides our legal opinion as to the appropriate course of action for the Committee in light of the City Council's recent amendment of the North Miami Beach General Employees' Retirement Plan and your participants' referendum vote disapproving those amendments.

This Committee, as trustees of the plan, has the duty to administer the terms of the pension ordinance and plan. The Plan empowers the Committee to take action to fulfill its duty to "carry out the provisions of the Plan" and "effectuate [its] purposes."¹ The pension plan can be amended by the City Council, under Section 1.05(a), but only after the proposed amendments have been approved by 66-2/3% of the Plan's participants.² Because the Committee must implement and enforce the terms of the plan as it is written, it may only implement those amendments which have been both approved by the participants and passed by City Council.

¹ See Retirement Plan for General Employees of the City of North Miami Beach, §5.04 ("The Retirement Committee shall have the authority to make such rules and regulations and to take such action as may be necessary to carry out the provisions of the Plan."); §5.05 ("In order to effectuate the purposes of the Plan, the Retirement Committee shall have the power to construe the Plan, to supply any omissions therein, to reconcile and correct any errors or inconsistencies and to make equitable adjustments for any mistakes or errors made in the administration of the Plan.").

² See §1.05(a) ("Resolution of City – The Plan may be amended by the City from time to time in any respect whatever, by resolution of City Council of North Miami Beach, specifying such amendment, subject only to the following limitations: (1) Approval of Participants – Approval of 66-2/3% of the active participants shall be required before the Plan may be amended by the City Council.").

Recently the City Council adopted an ordinance amending the plan. As you were required to do by §§1.05 and 5.04 of the plan, you submitted those plan changes to a vote of your active plan participants. We have been advised that the plan members overwhelmingly voted against so amending the plan. No objections to the conduct of the referendum were filed. If the Committee implements the changes set out in the City's ordinance it will be violating the terms of the plan because those changes did not receive the 66-2/3% participant approval required to change the plan.

In the past, the City's pension attorney contended that the 66-2/3% approval provision is unconstitutional and should be disregarded.³ To evaluate this claim, in 2010 you retained professor of law Bruce S. Rogow, a noted constitutional law expert and practitioner. Professor Rogow opined that that the approval provision was not unconstitutional. He also opined that repealing the member approval requirement "would violate Article I, Section 10 of the Florida Constitution."⁴

Thus, there is a clear disagreement between the City's lawyer and your lawyer on whether the 66-2/3% approval requirement is constitutional and whether it can be validly repealed. The Committee need not and cannot take sides in this debate. The question of the constitutionality of the 66-2/3% approval provision is not relevant in determining what the Committee should do because you do not have the authority to decide whether the 66-2/3% approval requirement is constitutional or unconstitutional.

It is a well-settled principle of Florida administrative law that an "administrative agency," such as the Committee, "has no power to declare a statute void or otherwise unenforceable." *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249, 249 (Fla. 1987); *Lennar Homes, Inc. v. Department of Business and Professional Regulation*, 888 So.2d 50, 53 (1st DCA 2004). This principle holds true even when following a statute or ordinance would lead to an unfair result that raises due process concerns. *Holmes v. City of West Palm Beach*, 627 So.2d 52, 53 (4th DCA 1993). Only the courts have the power to declare a law to be unconstitutional and agencies must assume that a law is constitutional until a court declares otherwise. *State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922);

³ See June 28, 2010 opinion letter of James W. Linn re "City Pension Matters," page ("In our judgment, the requirement that a pension plan be approved by sixty-six and two-thirds of the active plan participants is contrary to state law for two fundamental reasons: first the approval requirement [sic] it is an improper delegation of the City Council's legislative authority; and second, it conflicts with the constitutionally mandated collective bargaining process for any changes that are subject to that process.")

⁴ See August 5, 2010 opinion of Bruce Rogow re Proposed Ordinances 2010-15 and 17, page 2 ("My opinion is that the provisions of the Plan requiring amendments to be approved by a certain percentage of the active participants is not unconstitutional, is not in derogation of any law, and that to the contrary, any effort to 'eliminate' the approval provision would be in derogation of the Florida Constitution.")

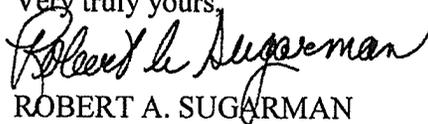
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In light of the foregoing, the Committee should continue to administer the terms of the current plan (disregarding the amending ordinance because it was not approved by 2/3 of the participants) as you did before the City passed the ordinance until (1) the City Council's amendments are approved by 66-2/3% of the system's active members in a subsequent referendum or (2) a court rules that the City Council's amendments are valid and enforceable.

It is possible that the City will commence litigation that seeks to vindicate its actions. The constitutionality of the 66-2/3% approval provision can then be determined by a court, the only forum that can decide such questions. Hopefully the City and the participants or their representatives can resolve their disagreements. In the meantime, you must administer and implement the plan as it was written.

The absence of 66-2/3% member approval prevents you from administering and implementing the City Council's changes. The specter of litigation cannot excuse the Committee's responsibility to properly administer the plan.

Very truly yours,



ROBERT A. SUGARMAN