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REPLY TO: TALLAHASSEE

June 28, 2010

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: City Pension Matters

Dear Ms. Siegel:

As requested, we have reviewed the City of North Miami Beach Retirement Plan for General Management Employees and the Retirement Plan for General Employees. You asked that we compare and evaluate the retirement plans, and provide recommendations for eliminating duplication, enhancing administrative efficiency and reducing costs. Our findings and recommendations follow.

Retirement Plan for General Employees – Overview

The Retirement Plan for General Employees (General Plan) was established by City ordinance in 1965, and has been amended on numerous occasions since. As of October 1, 2009, the General Plan had 300 active members (i.e, not retired or in the DROP), 208 retirees and 26 terminated members who are eligible for but have not yet begun receiving benefits. The General Plan is a "defined benefit" pension plan, meaning benefits are based on a formula that includes an employee's years of service with the City, final monthly compensation (best 60 consecutive months out of the last 10 years of service), and a benefit factor of 3% for each year of service. The normal retirement date (when an employee can retire and receive unreduced benefits) is age 62, or age 55 with 20 or more years of service. The General Plan also includes death and

disability benefits, a 2.25% annual cost of living adjustment and a five year DROP (deferred retirement option plan).

By law, the City is required to fund the General Retirement Plan on a sound actuarial basis. According to the latest actuarial valuation (as of October 1, 2009), the City's required contribution for FY 2009-10 is $2.7 million, or 20.7% of covered payroll (payroll of active plan members). For FY 2010-11, the City's required contribution will be $2.96 million, or 22.9% of payroll. Employees contribute 7% of their basic compensation to the General Plan. As of October 1, 2009, the General Plan had assets of $57.8 million and liabilities of $79.1 million (at actuarial value). The unfunded actuarial accrued liability (i.e., the value of plan assets minus liabilities) was $21.26 million as of October 1, 2009. Over the past six years, the unfunded liabilities have increased from $9.8 million to $21.26 million, an increase of 117%. Such increases in unfunded liabilities are not uncommon for governmental pension plans, due largely to investment losses in recent years. The General Plan had administrative expenses of $113,221 for the plan year ending September 30, 2009.

Retirement Plan for General Management Employees – Overview

The Retirement Plan for General Management Employees (Management Plan) was established by City ordinance in 2003. Prior to the adoption of the Management Plan, general management employees participated in a 401(a) defined contribution plan. Under the defined contribution plan, each employee had an individual account, to which the City and employees contributed. Plan benefits consisted of the balance in an employee's account upon retirement. As a condition of participating in the Management Plan and receiving service credit under the plan for their years of City employment, management employees were required to transfer their entire 401(a) account balances to the Management Plan.

As of October 1, 2009, the Management Plan had 31 active members, 16 retirees and 3 terminated members who are eligible for but have not yet begun receiving benefits. Like the General Plan, the Management Plan is a "defined benefit" pension plan. The benefit formula under the Management Plan is the same as the General Plan: years of service x final monthly compensation x 3%. However, the normal retirement date under the Management Plan is a little different: age 62, or age 55 if age plus years of service equal 75 or more ("Rule of 75"). The Rule of 75 allows management employees who are hired at a later age to retire earlier than age 62 if their age plus years of service equal 75 (example: an employee hired at age 45 could retire with 15 years of service at age 60). Another difference between the Management Plan and the General Plan: management employees contribute 8% of their salary to the plan, as compared to the 7% contribution for General Plan members. The Management Plan also includes death and disability benefits, and the same 2.25% annual cost of living adjustment and five year DROP as the General Plan.

The City is required by law to fund the Management Plan on a sound actuarial basis. According to the latest actuarial valuation (as of October 1, 2009), the City's required contribution for the current fiscal year is $575,493, or 25.13% of payroll. For the next fiscal year, the City's required contribution will be $1.2 million, or 57.9% of payroll. This large contribution increase is the result of investment losses, changes in actuarial assumptions, and changes in demographic experience (14 of the 33 active members on October 1, 2007 were no longer employed on October 1, 2009, and 11 of these members are now retired and receiving benefits from the plan). As of October 1, 2009, the Management Plan had assets of $9.5 million and liabilities of $14.9 million (at actuarial value). The unfunded actuarial accrued liability was $5.45 million as of October 1, 2009. Over the past six years, the unfunded liabilities decreased from $5.7 million to $5.45 million. The Management Plan had administrative expenses of $41,488 for the two plan years ending September 30, 2009 (an average of $20,744 per year).

Analysis

There does not appear to be a valid reason for the City to have two pension plans for its general employees, one for non-managerial and the other for management employees. By law, the City is ultimately responsible for the assets and liabilities of both plans. Section 112.66(8), Fla. Stat. (2009). And by law, the City is required to fund both plans on a sound actuarial basis. Section 112.61, et seq., Fla. Stat. (2009).

The benefit structure of both plans is nearly identical. The only differences are a "Rule of 75" normal retirement provision and a greater employee contribution rate for members of the Management Plan.

With two plans there are two pension boards, two actuaries, two investment advisors, and two sets of investment managers. This results in duplicative administration, and additional administrative costs.

Although there are a few cities in Florida that have established separate pension plans for management employees, the vast majority of local government plans include all general employees in the same plan. The Florida Retirement System (FRS), with more than 680,000 active members, includes several classes of membership. These include regular, special risk, senior management, and elected officers. Each FRS class has different benefits and different contribution rates.

Recommendation

We recommend that the City consider merging the Management Retirement Plan with the General Employees Retirement Plan. By merging the two plans, the City will eliminate duplicative administrative, actuarial, investment and legal requirements, and should reduce administrative costs. We believe the plans can be merged with no change in contributions or benefits for any employee, and no change in total funding requirements, but this would need to be confirmed by an actuary.

Implementation

Merging the Management Plan with the General Plan can be accomplished with a single ordinance. The ordinance would merge the Management Plan into the General Plan, and transfer all assets and liabilities of the Management Plan to the General Plan. Management employees would become members of the General Plan, and would retain their credited service and all benefits accrued under the Management Plan. In addition, management employees would retain the current "Rule of 75" normal retirement provision as members of the General Plan, and would continue to contribute 8% of salary to the General Plan. In all other respects, management employees would be treated the same as current members of the General Plan. There would be no change in General Plan governance or administration, and no change in the member contributions or benefits of General Plan members.

Collective Bargaining

The Florida Supreme Court has ruled that public employee retirement benefits are terms and conditions of employment that are mandatory subjects of collective bargaining. *City of Tallahassee v. Public Employers Relations Commission*, 410 So.2d 487 (Fla. 1981). Several years after *City of Tallahassee* was decided, the Second District Court of Appeal addressed the issue of whether a public employer's unilateral decision to decrease employer contributions to a pension plan, while leaving benefits and employee contributions unchanged, violated the collective bargaining law. The court reiterated the Florida Supreme Court's holding in *City of Tallahassee* that changes in pension benefits are a mandatory subject of collective bargaining. The court similarly concluded that bargaining is also required for any change in employee contributions. However, the court found that where the change affects only employer contributions, and there is no impact on employee benefits or contributions, the public employer is not required to bargain over the change. *City of New Port Richey v. Hillsborough County Police Benevolent Association, Inc.*, 505 So.2d 1096 (Fla. 2d DCA 1987); rev. denied 518 So.2d 1275 (1987). In describing the differing roles of public employers and their employees, the court pointed out a critical distinction:

> Additionally, while we recognize that public employees are entitled to the same right to bargain as private employees, we are mindful of the fact that the City, as a public employer, has a responsibility not only to its employees, but also to the taxpayers it serves. The City's duty is to provide services to those taxpayers as inexpensively as possible. Unlike a corporation that is responsible to a limited number of stockholders to produce a profit if possible, a public employer is responsible to the public and to the community as a whole to operate in the public interest as economically as possible. 518 So.2d 1275 at 1098. (Emphasis added)

Applying the above cases to the merger of the North Miami Beach Management and General Retirement Plans, the City is not in our opinion required to bargain this change with the union that represents its general employees (AFSCME Local 3239). The current collective bargaining agreement between the City and AFSCME is silent with respect to the General Retirement Plan.

As outlined above, the plan merger will not impact the pension benefits or contributions of bargaining unit employees. There will be no change in the benefits or member contributions of any employee, including employees in the AFSCME bargaining unit. The only change concerns the participation of management employees in the General Plan. Just as the court in *City of New Port Richey* held that the city was not required to bargain over a change in employer contributions that did not affect the benefits or contributions of bargaining unit employees, the City of North Miami Beach is not required to bargain with AFSCME over the merger of the Management and General Retirement Plans.

Plan Amendment Issue

There is one other issue that must be addressed concerning the merger of the Management and General Retirement Plans. The merger will necessarily involve amending both plans. Section 1.05 of the General Retirement Plan allows the City Council to amend the plan, but only if the amendment is approved by sixty-six and two-thirds of the active plan participants. Section 1.05 further states that approval of participants is not required if the amendment pertains to the actuarial soundness of the plan, or is necessary to comply with federal or state law.

In our judgment, the requirement that a pension plan amendment 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 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.

The requirement in the North Miami Beach General Employees Retirement Plan that plan amendments be approved by sixty-six and two-thirds of the active plan participants is invalid for a fundamental reason: it is an improper delegation of the City Council's legislative powers. The General Employees Retirement Plan was created by an ordinance adopted by the City Council, and may only be amended by an ordinance of the City Council.[1]

A legislative body is not permitted to improperly delegate its authority to legislate to another governmental body or private person or entity. *Vodshalk v. City of Lincoln Park*, 95 So. 2d 9 (Fla. 1957); *Watson v. City of St. Petersburg*, 489 So. 2d 138 (Fla. 2d DCA 1986). Moreover, the Florida Constitution's separation of powers clause prohibits the unlawful delegation of constitutional powers. See Arts. II-III, Fla. Const. The legislature may not parcel out this constitutional duty. *Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260 (Fla. 1991). A city council is not permitted to delegate its legislative duties to another person. *County of Volusia v.*

[1] Although the General Retirement Plan provides that the Plan may be amended by a resolution of the City Council, in our opinion an ordinance is necessary to amend the plan. The General Retirement Plan was originally established by ordinance, and has been previously amended by ordinance. An ordinance cannot be amended or repealed by a resolution; rather a new ordinance must be passed. *Carlton v. Jones*, 117 Fla. 622 (1934); *Bubb v. Barber*, 295 So. 2d 701 (Fla. 2d DCA 1974).

City of Deltona, 925 So. 2d 340 (Fla. 5th DCA 2006)(holding that the city was not permitted to delegate its legislative functions to a private property owner or administrative agency); See also *Amara v. Daytona Beach Shores*, 181 So. 2d 722 (Fla. 1st DCA 1966)(holding that an ordinance requiring permission from private property owners prior to the issuance of any license or permit was an unlawful delegation of legislative power). However, ordinances have been upheld when certain guidelines must be applied and there is no unbridled discretion. *St. Johns County v. Northeast Florida Builder's Association, Inc.*, 583 So. 2d 635 (Fla. 1991).

In our opinion Section 105(a)(1) of the General Retirement Plan is an unlawful delegation of the City's legislative power because it gives a group of non-elected City employees unbridled discretion to engage in legislative duties. In essence, 34% of the active members of the General Plan members have effective veto power over any plan amendment adopted by the City Council, and the employees may exercise this veto power for any reason whatsoever. There are no guidelines or criteria for approval of amendments to the General Retirement Plan. Employees who are in the General Retirement Plan have unbridled discretion on when, how and whether to amend the Retirement Plan. As such, the amendment approval requirement in the General Retirement Plan is distinguishable from cases such as *St. Johns County v. Northeast Florida Builder's Association, Inc.*, which have allowed limited delegation of legislative authority.

Based on the foregoing cases, the requirement in the North Miami Beach General Employees Retirement Plan that plan amendments be approved by sixty-six and two-thirds of the active plan participants is invalid as an improper delegation of the City Council's legislative powers.

As discussed above, the Florida Supreme Court has held that public employee retirement benefits are terms and conditions of employment, and any changes in such benefits are mandatory subjects of collective bargaining. *City of Tallahassee v. Public Employers Relations Commission*, 410 So.2d 487 (Fla. 1981). In 1983, the Public Employee Relations Commission (PERC), the state agency charged with interpreting and administering Florida's collective bargaining law for public employees, held that a city was not required to submit collectively-bargained changes in employee pension benefits to a referendum. *See In Re Lake Worth Utilities Authority*, 9 FPER ¶ 14178 (1983). In *Lake Worth Utilities Authority*, PERC specifically addressed the apparent conflict between the constitutional right of collective bargaining for public employees and the referendum provision in the Municipal Home Rule Powers Act:

> In pertinent part, Section 166.021(4), Florida Statutes (1981), provides that any rights of municipal employees shall not be changed without approval by referendum of the electors. However, changes in the terms of employment of public employees through collective bargaining do not necessitate a referendum. ... [W]e have an obligation to construe Chapter 447, Part II, consistent with the State Constitution. Article I, Section 6, of the Florida Constitution guarantees to public employees the right to collective bargaining and the Legislature in Chapter 447, Part II, has set forth a procedure for public employee bargaining in the state. That statutory scheme does not include a requirement that changes in the wages,

> hours, and terms and conditions of employment of public employees be submitted for ratification by the public through a referendum. The Legislature has chosen to grant that authority to the elected or duly appointed representatives of the public; that is, the legislative body of the public employer and the public employees themselves. Therefore, if the [public employer] and the certified bargaining agent for its employees agree upon a change in the retirement system, that change does not require submission to a public referendum.

In Re Lake Worth Utilities Authority, 9 FPER ¶ 14178 at 346.

More recently, in a case involving the City of Miami Beach, PERC again ruled that collectively bargained pension benefits need not be approved by referendum of the voters. *See In Re the Petition for Declaratory Statement of the City of Miami Beach*, 23 FPER ¶ 28230 (1997). The *Miami Beach* PERC decision also addresses the referendum language in Section 166.021:

> Section 166.021, Florida Statutes, states that a municipality's home rule authority is subject to any matter expressly preempted to the state government by the Constitution or by general law. See §166.021(3)(c) and (4), Fla. Stat. (1995); see also Art. VIII, § 2(b), Fla. Const. The State Legislature, when it enacted Chapter 447, Part II, Florida Statutes, did not provide for a veto of collective bargaining by the electorate of a municipality. A referendum to effectuate the negotiated changes in pension benefits is not required. See *City of West Palm Beach*, 448 So.2d at 1215 (a proposed ordinance which changed the method of the approval of terms of a collective bargaining agreement was prohibited under the preemption provisions of Article VIII, § 2(b), Fla. Const. and Chapter 166, Florida Statutes).
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> Accordingly, the Commission holds, consistent with its prior holding in *Lake Worth Utilities Authority*, that Section 447.309(3) does not apply to the factual situation of this case and that there is no need for the City to conduct a referendum to seek a change in its Code to effectuate the collective bargaining provision regarding pension changes.

In Re the Petition for Declaratory Statement of the City of Miami Beach, 23 FPER ¶ 28230 at 361.

In *Int'l Brotherhood of Teamsters, et al. v. City of Daytona Beach*, Case No. 99-31470-CICI (Fla. 7th Cir. Ct. August 10, 1999), the court found that that the referendum procedure, when applied to collectively bargained pension agreements, unconstitutionally abridges the employees' fundamental right of collective bargaining. The Daytona Beach court held that "the right to bargain collectively, as a fundamental right, may only be abridged upon a showing of a compelling state interest."

Similarly, in *City of Jacksonville v. Citizens for Public Safety*, Case No. 02-5378-CA (Fla. 4th Cir. Ct. Sept. 5, 2002) (a case affirmed by the First District Court of Appeal), the court found to be unlawful a proposed amendment to the Charter for the City of Jacksonville which would have established minimum health insurance benefits and coverage for City employees and retirees. The court, relying on the *City of Tallahassee* case, found that any Charter provision that would impede the opportunity to collectively bargain would violate the statutory implementation of Article I, Section 6 of the Florida Constitution.

In 2005, in another case involving the City of Miami Beach, the court ruled in favor of the City in a challenge to certain collectively-bargained changes (increased employee contribution rates) to the City's general employees' retirement system. *McKinnon v. City of Miami Beach*, Case No. 01-04241 CA 08 (Fla. 11th Cir. Ct. Dec. 21, 2005) (Final Order on Summary Judgment). The increases in employee contributions were not agreed to in negotiations, but were imposed through the impasse resolution procedure in Section 447.403, Florida Statutes. The challenge was based, in part, on the fact that the increased employee pension contributions had not been approved through the referendum process.

The foregoing court and PERC decisions make clear that a referendum is not required to approve pension changes that are collectively bargained between a city and a union representing its employees. Although a referendum requirement is not at issue here, the requirement in the North Miami Beach General Employees Retirement Plan that plan amendments must be approved by sixty-six and two-thirds of the active plan participants is analogous. If collectively-bargained pension changes prevail over a city's charter referendum requirements, then an ordinance provision requiring employee approval of any plan change is similarly invalid.

If you have questions concerning any of the matters discussed in this letter, please call.

Sincerely,

James W. Linn

JWL/es