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REPLY TO: TALLAHASSEE

August 13, 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:

On June 28, 2010, we provided an opinion stating, in part, that the requirement in the City retirement plans that any plan amendment be approved by sixty-six and two-thirds of the active plan participants, is contrary to state law. We based this decision on two fundamental legal principles: first, the employee approval requirement 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 in terms and conditions of employment.

Attorney Bruce Rogow, at the direction of the police officers' and general employees' pension boards, reviewed our opinion and has submitted a contrary opinion, in a letter dated August 5, 2010. Mr. Rogow concluded that the employee approval provision is constitutional, and any attempt by the City to eliminate the provision would be an unconstitutional impairment of a contract right. Mr. Rogow is one of the most respected constitutional attorneys in the State of Florida. However, this case deals predominantly with pension and labor law issues with constitutional underpinnings.

We have carefully reviewed Mr. Rogow's opinion and the cases cited therein. As explained below, we have concluded that our initial opinion is correct, and that the employee approval provision in each of the City retirement plans is an impermissible delegation of the City

Council's legislative authority. The employee approval provision also conflicts with collective bargaining rights under the Florida Constitution and Chapter 447, Florida Statutes. In addition, since the employee approval provision does not form a contract with City employees, no impairment of contract would result from the City's removal of the employee approval requirement. The City's labor attorneys, James Crosland and David Miller of Bryant Miller Olive join us in this opinion as to the conflict with collective bargaining law and the impairment of contract issues.

The City is Ultimately Responsible for the Assets and Liabilities of the Retirement Plans; Thus, the City Must Have the Authority to Amend the Plans

In the wake of municipal bankruptcies in New York City and Cleveland in the 1970s, the people of Florida approved Article X, Section 14 of the Florida Constitution. Article X, Section 14 states:

> A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

To implement the provisions of Article X, Section 14, the legislature enacted Part VII, Section 112, Florida Statutes (the "Florida Protection of Public Employee Retirement Benefits Act") in 1978. Section 112.66(8) states:

> The assets and liabilities of a retirement system or plan shall remain under the ultimate control of the governmental unit responsible for the retirement system or plan, unless an irrevocable trust has been or is established for the purpose of managing and controlling the retirement system or plan, in which case the board of trustees shall have ultimate control over the assets and liabilities of the retirement system or plan. Nothing herein shall absolve the governmental unit from being ultimately responsible for the payment of its contribution to a retirement system or plan nor remove from the governmental unit the ultimate authority to adjust benefits consistent with the Florida Statutes and the retirement system or plan; however, nothing contained herein shall be construed to permit the creation of such irrevocable trust except by special act of the Legislature.

The City of North Miami Beach created the City retirement plans by ordinance, and the City is the governmental unit responsible for the retirement plans. The legislature has not created an irrevocable trust for the City of North Miami Beach employee retirement plans. Therefore, the above statute makes clear that the assets and liabilities of the City retirement plans are under the ultimate control of the City, and nothing shall absolve the City from being ultimately responsible

for the payment of its contributions to the City retirement plans, nor remove from the City the ultimate authority to adjust retirement plan benefits.

It is a matter of common sense that if the City is legally responsible for the assets, liabilities, and funding of its retirement plans, the City is also authorized to amend the plans without the approval of its employees. Otherwise, the employees could effectively "veto" any amendment that may be required to bring the plans into line with the City's budgetary priorities and constraints.

The Employee Approval Requirement is an Improper Delegation of Legislative Authority

In his letter, Mr. Rogow argues that the requirement that two thirds of active plan participants vote to approve any amendment to the plan is a lawful condition precedent. However, his analysis misses the mark in this situation, where there are no ascertainable rules, standards or criteria provided in the retirement plans to guide how the participants should evaluate and vote on any retirement plan modifications. Moreover, the ability to veto any and all types of retirement plan amendments goes far beyond a mere condition precedent. The power to legislate the terms of the retirement plans is a legislative function, whereas a condition precedent is a mere vote allowing or disallowing already enacted provision to operate on its own terms.

As an initial observation, Mr. Rogow takes the time in his letter to point out (on page 7) that the cases we cited are merely "analogous" to the facts in this case. This observation must be addressed. Very rarely is a previous court decision directly on point with all of the given facts in a new situation. If there was a case directly on point, our legal opinion would be very short indeed. It is important to note that Mr. Rogow conceded, in response to a question from a trustee at the August 10, 2010 pension board meeting, that there are **no cases directly on point.** Therefore, as Mr. Rogow well knows, because there is no case directly on point, every case cited in his letter is also "analogous."

Mr. Rogow correctly points out that enacted laws can, in certain circumstances, be dependent upon a clearly defined condition precedent. However, even the case law cited in his opinion provides "that it is still necessary for the exactions to be fixed" in the law "with such certainty" that the decision making "could not be left to the whim of a private property owner or the administrative agency." *Amara v. Town of Daytona Beach Shores*, 181 So. 2d 722, 724 (Fla. 1st DCA 1966). Mr. Rogow's opinion cites *Taylor v. City of Tallahassee*, 130 Fla. 418 (Fla. 1937) to support his contention that an unlimited right to veto changes to the City's retirement plan wholly based on the discretion of the plan participants is a mere condition precedent.

In *Taylor* a city ordinance mandated that a license application for a pool hall must be accompanied by signatures of 60% of the "property owners." *Id.* at 423. Mr. Rogow seeks to improperly extend this holding stating in pertinent part that "[t]he lesson of *Taylor* is that if 60% of the Monroe Street property owners had been the only required approvers of any pool hall, the

ordinance would have passed muster. " But that is not what the Court said. The Court held that a legislative body cannot make execution of a law dependent upon "the unbridled discretion of a single individual or an unduly limited group of individuals." The Court in *Taylor* held there was an unlawful delegation of legislative authority.

Regardless of the holding in *Taylor*, the case did not involve a vote on whether an ordinance took effect; it involved a vote on whether a business owner received a license under an ordinance that was already in effect. In the present case, retirement plan members are not voting on application of a city ordinance to an individual, such as who is entitled to a disability benefit or cost of living adjustment, but rather the employees are voting on whether an ordinance, as passed by the City Council, actually takes effect. Even though the City Council makes a finding that an ordinance is in the best interest of the City, retirement plan members have the ability to "veto" that ordinance. If the retirement plan members vote against an ordinance, the entire ordinance (not its application to an individual) is nullified. Mr. Rogow has cited no case law that would permit such a delegation, and we have been similarly unable to locate any such cases.

There are instances when the legislature can mandate that certain groups or individuals apply a clearly defined law to a set of circumstances or other individuals, based on clearly defined criteria[1]. *Amara*, 181 So. 2d at 724 *internal citations omitted.* However, this delegated authority does not extend to legislating the terms of the law. For example, the ability to revoke licenses or make other discretionary decisions is an invalid delegation of legislative authority without clearly defined parameters. *Id.* Applying these principles to the instant facts it seems at least arguable that a group of individuals or some other municipal authority, such as a pension board, could be granted the authority by the City Council to administer the clearly defined terms of the retirement plan. However, the suitability of a proposed plan amendment or modification of plan terms cannot be left to the "undirected and uncontrolled discretion" of those members. *See Id.* at 724. The requirement for an employee vote before any retirement plan amendment can take effect, without additional parameters, is an unlawful delegation of the City's legislative authority.

The City retirement plans do not contain even a single parameter, rule, condition or other guidance concerning the vote of the plan participants. As such, the retirement plan participants have arbitrary, unbridled and uncontrolled discretion in the manner in which they vote on any modifications to the plan. Even assuming arguendo that the power to vote on modifications to the retirement plan is valid, this power without guidelines for the exercise of such power is invalid. Accordingly, while the legislature can delegate its authority to apply the law, it can only do so where it has created ascertainable minimal standards, and it cannot delegate its responsibility to create those standards. *Sloban v. Florida Bd. Of Pharmacy*, 982 So. 2d 26 (Fla. 1st DCA 2008); *State ex rel. Palm Beach Jockey Club v. Florida State Racing Com'n State*, 158

[1] This delegation is often found in the context of professional licensing. In these circumstances the legislature would enact a law defining the standards to be applied to an individual seeking a professional license. Register v. Milam, 188 So. 2d 785 (Fla. 1966).

Fla. 335 (Fla. 1946). Any attempt by the legislature to abdicate its responsibilities is void. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991).

In conclusion, it remains our opinion that the employee approval requirement contained in the retirement plans is an unlawful delegation of the City Council's legislative power to the participants of the retirement plan. The cases cited by Mr. Rogow are distinguishable and do not alter that opinion. The North Miami Beach retirement plan members are not voting on the application of plan terms to an individual (i.e. *Taylor*); they are voting on whether to allow a duly enacted ordinance to take effect. The retirement plan contains no ascertainable minimal standards for directing the employees' vote. Nor does the retirement plan contain any rules, parameters or guidelines for voting on modifications to the plan. Rather, the participants are given the unbridled discretion to vote on any and all modifications to the actual terms of the retirement plan. Accordingly, the portion of the retirement plans allowing the participants the ability to vote to approve any amendments to the plans is an unlawful delegation of the City's legislative authority and cannot stand.

Voting Requirement Conflicts with Collective Bargaining Process

Mr. Rogow addresses the subject of whether the employee approval requirement conflicts with the constitutionally-mandated collective bargaining process, by offering his assurance that it does not. The one and one-half pages of his legal analysis on the issue are devoted to distinguishing the facts in *In RE the Petition for Declaratory Statement of the City of Miami Beach*, 23 FPER ¶ 28230, from the present situation. He argues that voter approval of a collective bargaining agreement is different from the approval of plan members. But focusing on the designation of the group doing the voting misses the point: **no one but the City and the union can decide the terms of the collective bargaining agreement**. He suggests that plan members (many of whom are not in the union) can be part of the approval process within the collective bargaining process. *Rogow opinion at 8*. There is no provision in Fla. Const. Art. I § 6 or Chapter 447, Florida Statutes, that would permit a non-union third party to reject a term of a ratified collective bargaining agreement.

Collective bargaining is a fundamental right guaranteed by the Florida Constitution. Fla. Const. Art. I § 6. Thus, collectively bargained benefits cannot be infringed by conflicting statutes, ordinances, or rules. *See Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Auth.*, 522 So. 2d 358 (Fla. 1988). In *Hillsborough Aviation*, the Court held that collective bargaining rights under the Constitution and Florida Statutes Chapter 447 (which governs labor relations between Florida public employers and employees) preempted conflicting rules of a civil service system. 522 So. 2d at 362-63. This concept that collectively bargained rights cannot be infringed by statute, ordinance, or rule underlies the series of cases cited in our prior opinion at pages 5-6. *See City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487, 489 (Fla. 1981) (explaining that any statute or ordinance that abridged the right of employees to collectively bargain retirement benefits would be unconstitutional).

This idea was explained by the court in *International Bro. of Teamsters v. City of Daytona Beach*, 25 FPER ¶ 30,272, at 546 (Fla. 7th Jud. Cir. Ct. Aug. 10, 1999). In *Daytona Beach*, the city sought a declaratory judgment as to whether the Home Rule Powers Act required it to submit collectively bargained changes to a pension system to a referendum. *Id.* The court held that applying the statute's referendum requirement to collectively bargained agreements "abridges the fundamental right of collective bargaining." *Id.* at 545. The court reasoned that the right to collective bargaining is only meaningful if the bargaining is "effective." *Id.* Subjecting bargained-for agreements to the veto of third parties renders the right of bargaining ineffective and abridges the fundamental right to bargain. *See id.*

The employee approval provision in the retirement plans is analogous to a referendum of the electors of a city. For the same reasons explained by the courts and PERC in the decisions cited above, the employee approval requirement infringes on the right of collective bargaining. Mr. Rogow asserts, in strong terms but without explanation, that the two types of votes are not analogous. He goes further, stating that the decisions we cited do not support "the notion that Plan members cannot be part of the approval process within the collective bargaining process." *Rogow Letter* at 8. While this is an interesting assertion, which we will address below, we did not cite any authority for the opposite proposition or, indeed, argue it at all.

The key point of these cases for the matter at hand here is not merely the narrow idea that collectively bargained agreements may not be subject to a veto of the electors of a unit of government. The point is that the fundamental right of collective bargaining may not be abridged by subjecting it to the veto of any third party – except by action of a government with a compelling interest. *See id.* at 545-56.

Mr. Rogow admits that a number of employees whose positions are not within the general employees' bargaining unit are active members of the General Plan. Thus, the member vote requirement gives these non-bargaining unit employees a say over changes to the General Plan – changes that, if they affect terms and conditions of employment – must be the subject of collective bargaining.

To illustrate: Suppose the City administration and the general employees union representatives agree in bargaining to change some retirement benefit in the general employees' retirement plan. Florida Statutes Section 447.309 requires that a vote of the bargaining unit employees be held to ratify the change. By law, a collective bargaining agreement must be ratified by a majority (50% plus one) of the bargaining unit employees who participate in the ratification vote. Suppose the bargaining unit employees vote to ratify the agreement containing the retirement plan change by a narrow margin (51%). In order to implement the agreement, the City Council must amend the general employees' retirement plan by ordinance. However, when the change is submitted to a vote of the active members of the general plan, enough non-bargaining unit members join with those bargaining unit employees who opposed the change to prevent a two-thirds majority from

approving it. Indeed, as Mr. Rogow suggests, these non-bargaining unit employees have effectively become a part of the collective bargaining process, with a decisive veto power over the will of the majority of bargaining unit employees. Such a situation not only plainly abridges the constitutional right of collective bargaining, but it also it contravenes Florida Statutes Section 447.309(1), which requires a majority vote of *bargaining unit* employees and makes no provision for non-bargaining unit employees to participate.

It should also be pointed out that consistency between the voting provision and collective bargaining law was not an issue at the time the voting provision was implemented. According to Pension Board counsel, Robert Sugarman, the voting provision was implemented in 1965. The collective bargaining provisions of Florida law for public employees were not enacted until several years later.

We conclude that the employee approval requirement in the retirement plans would thus conflict with the Florida Constitution's fundamental right of collective bargaining. Further, as the court ruled in *Daytona Beach* and as the Public Employees Relations Commission ruled in the cases cited above and in our prior opinion, subjecting a collectively bargained agreement to a third-party veto such as a vote which includes non-bargaining unit employees infringes collective bargaining rights and would be impermissible.

Impairment of Contract

Mr. Rogow ends his letter with a section addressing the constitutional prohibition of impairment of contracts. It is only on this basis that he mistakenly concludes the City Council may not repeal the member approval requirement without a compelling interest. Because impairment of contracts is not at issue in this case, this argument by Mr. Rogow was not addressed in our earlier opinion. In short, there would be no impairment of contract by the City in removing the employee approval provision, because the ordinance provision giving plan members the ability to approve plan amendments is not a contract or contract right.

Mr. Rogow was hired by the pension board based on his expertise in constitutional law. He readily admitted that he is not a pension lawyer. And while he provided a concise legal opinion as to why a legislative body may not impair rights under a contract, he has provided no legal opinion or basis for concluding that a contract exists in this case. Mr. Rogow assumes and baldly asserts, without a single case citation or further explanation, that the City retirement plans constitute a contract "between the City and Plan members." *Rogow Letter at 8.* He does not distinguish between active employee members and retirees, but presumably is addressing only active employees, as only they may participate in the member approval process. However, Mr. Rogow's unsupported assertion that the City retirement plans are contracts is incorrect under well-established Florida law.

It has long been held that, **on the date they retire**, eligible public employees obtain a contractual right to pension benefits as they exist on that date. *E.g., Florida Sheriff's Ass'n v. Dep't of Admin.*, 408 So. 2d 1033 (Fla. 1981); *City of Daytona Beach v. Caradonna*, 456 So. 2d 565 (Fla. 5th DCA 1984). Thus, benefits of retirees may not ordinarily be reduced or modified. *Caradonna.* It has likewise long been held that Florida public employers may change the terms of the retirement plans they offer prospectively as to **current employees**. *E.g., City of Jacksonville Beach v. O'Donald*, 151 So. 2d 430 (Fla. 1963), *aff'g State ex rel. O'Donald v. City of Jacksonville Beach*, 142 So. 2d 349, 352 (Fla. 4th DCA 1962) (stating, "Under the decisional law of this state, it has been established that benefits provided by a pension or retirement plan created by an act of the legislature ... may be subsequently modified by amendatory legislation which would be binding on all employees who are in the active service of the employer at the time such amendment is adopted ...").

A retirement system is not by itself, without language indicating otherwise, a contract. This is borne out by Florida case law. One of the leading Florida cases on the contractual nature of pension benefits and the ability of a plan sponsor to revise a public employee retirement plan is the Florida Supreme Court's opinion in *Florida Sheriffs Association v. State Dept. of Administration, Division of Retirement*, 408 So.2d 1033 (Fla. 1982). *Florida Sheriffs Association* concerned the right of the state legislature to prospectively reduce benefits under the Florida Retirement System (FRS) of employees who have not yet retired. The legislature had amended the FRS statute to reduce the benefit multiplier for special risk employees from 3% to 2% for each year of future service. There was no change in the accrued benefits earned by FRS special risk members up to the date of the change. Thus, a member who had 10 years of service prior to the change would have an accrued benefit of 30%, and would earn an additional 2% for each year of service after the change. The Florida Sheriffs Association and others challenged the legislature's right to make the benefit change, based on the "preservation of rights" provision in the FRS statute, which stated:

> The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

The appellants in *Florida Sheriffs Association* argued that the 1974 enactment of the "preservation of rights" provision made Florida's retirement system an absolute and binding contractual relationship between employees and the state. The appellants contended that by this act, the legislature agreed that it would not abridge those rights by unilateral action at any future time. The Court rejected the appellants' argument, 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 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.** . . . 408 So. 2d at 1035.

In essence, the Supreme Court held that there could be no contract that would bind future legislatures from amending the Florida Retirement System, as that would lead to fiscal irresponsibility. The Supreme Court's words in response to the appellants' contention in the *Florida Sheriffs Association* case are equally apt when applied to the pension board's position: to agree with the board's position would mean that no future City Council could in any way alter the retirement plan, except in a manner favorable to the employees. This view would, in effect, impose on the City the ongoing responsibility for maintaining a retirement plan which could not be amended or repealed irrespective of the fiscal condition of the City. The employee approval provision in the retirement plans gives employees the effective ability to veto the proposed plan merger or any other plan change that would save the City a significant amount of money. Such a decision could lead to fiscal irresponsibility. The Supreme Court's opinion in *Florida Sheriffs Association* lends strong support to the City's position that pension modifications are necessary in order for the City to bring its pension costs under control in a fiscally responsible manner. Such changes cannot be left to the whim of a super majority of retirement plan members, who have a vested interest in maintaining their current benefits.

As the Supreme Court made clear, even with contractual language a plan sponsor can amend a plan. However without such language, the plan is simply not a contract. If the retirement system *becomes* contractual between retiree and the City upon retirement, then it is not – without more – a contract before. This proposition certainly is implied (if not stated) by *Florida Sheriff's Association* and others and is made explicit in *Ex rel. O'Donald, supra.* It is recognized by retirement systems, such as the Florida Retirement System, that state expressly that their terms (or certain of them) constitute current contracts with employees. Fla. Stat. § 121.011(3)(d). The City's retirement plans do not expressly state that any of the provisions constitute a "contract" between the members and the City.

The City retirement plans do not include an express provision making them a contract between the City and current employees. Florida law makes it clear that the retirement plan is not a contract between the City and the plan members, and no case has been offered by Mr. Rogow that would contradict this conclusion. Because the City retirement plans are not contracts with the current employees, we disagree with Mr. Rogow's conclusion that changing the member approval provision would constitute an unconstitutional impairment of contract. **He offered no**

other basis for his conclusion that the City could not remove the approval provision. The ability to vote on plan changes was granted to plan members gratuitously by the City at a time when public employees had no right to collectively bargain and the City may remove the provision at its discretion.

Conclusion

In our opinion, a provision of a retirement plan requiring the approval of a super-majority of plan members for any ordinance duly enacted by the City is an impermissible delegation of the City Council's legislative authority. The employee approval provision is also contrary to the constitutional right of the City and its employee representatives to collectively bargain. And finally, since the City's retirement plan is not a contract, removal of the voting provision would not constitute impairment of contract.

Sincerely,

James W. Linn
Glenn E. Thomas

James C. Crosland
David C. Miller