



MEMORANDUM

To: David Tolces, Esq.

From: Milton Collins, Esq.

Date: October 14, 2024

RE: **City Commission's Authority to Pay Retirement Benefits for Prior Service**

I. INTRODUCTION

I reviewed the provided materials and evaluated the legal issues related to the issue of providing a retirement benefit to Vice Mayor Schwartz for prior service. I summarized the issue and provided a response on behalf of the City of Margate (the "City") as follows:

QUESTION

What options, if any, does the City Commission have to address Vice Mayor Schwartz's non-receipt of an elected official retirement benefit concerning her prior service?

ANSWER

The City Commission's interpretative authority relative to local law and the home rule powers granted to it by the Florida Constitution authorize the retroactive provision of a retirement benefit to Vice Mayor Schwartz, provided it is effectuated by a majority vote approving the action. The Commission has a couple of options to remit compensation to Vice Mayor Schwartz. This authority and the corresponding options are predicated upon a determination that the elected official retirement benefit was part of the total compensation to which Vice Mayor Schwartz was entitled, but never received. The inequity could therefore be addressed by retroactively making her whole or prospectively providing a benefit to her and any other similarly situated official.

II. RELEVANT FACTS

The Florida Retirement System (FRS) was created in 1970 by the State Legislature to provide a retirement program for participating public employees. In 1973, the City conducted a

referendum to permit its officers and employees to elect to participate in the FRS.¹ The City ultimately joined the FRS. Its employees were categorized into different classes of FRS membership. FRS membership classes include Regular, Special Risk, Special Risk Administrative support, Senior Management Service, and Elected Officers. During the relevant period, the Regular, Elected Officers', and Senior Management Service classes vested after six (6) or seven (7) years of service and reaching age 62. FRS benefits are based on age and/or years of service, average final compensation, and service credit. During the relevant period, the average final compensation was the average of the five highest fiscal years' earnings. The total percentage value of the benefit (i.e., the multiplier) received was based on the applicable membership class, with the Regular Class being 1.6% and the Elected Officers' Class being 3%. Accordingly, Elected Officers' Class members who retired at or after age 62 with the requisite creditable years of service were entitled to a monthly retirement benefit equal to 3% times the years of service times their average final compensation.

Arlene Schwartz ("Schwartz") was first elected to serve as a City official in 1991 and, from 1991 through 1994, as well as from 1997 through 2004 and 2016-2020, served as an elected official. The City had been a participating employer of the FRS, but in 1997 established an Elected Officers' Class for its elected officials via the approval of Resolution No. 8437. This resulted in elected officials being eligible to receive a 3% multiplier on and after 1997. At the time the Elected Officers' Class was established, Schwartz was working for the School Board of Broward County ("School Board"), another FRS employer. State law prohibits a person dually employed by one or more FRS employers from simultaneously earning two benefits. On June 8, 1998, Schwartz, who at the time held the title of Vice Mayor, advised the Commission that she was required by the FRS to choose between being an Elected Officers' Class member with the City or remaining a Regular Class member with the School Board. She chose the latter. Schwartz noted that the City's contribution rate was approximately 28% for the Elected Officers' Class and 17% for the Regular Class.

Schwartz therefore proposed that the City set aside the difference in cost between the Elected Officers' Class and Regular Class and provide it to her as an alternative retirement benefit. By way of example, she explained that her salary of \$11,800 should be multiplied by the aforementioned membership class contribution rate difference (i.e., 28% minus 17% or 11%) each year, resulting in an approximate total of \$1,300. She proposed that this amount, which would vary each year based on the contribution rates, be provided to her annually for retirement.

In 1998, at least one meeting was held by the Commission whereby the matter was discussed. At that meeting, which occurred on June 17, several options were explored. The

¹ Ordinance No. 73-16.

consensus course of action was that Schwartz would work with the-then City Manager to determine how to best provide an equivalent retirement benefit. Commission records do not show any formal follow-up or official action after this meeting and, in 2004, Schwartz discontinued serving as an elected official.

Sometime in November 2005, Schwartz, who at that time was no longer serving as an elected official, met with the City Manager to discuss the matter. As a result of that meeting, as well as following a review from the City Attorney's Office, the City Manager advised the Commission that an ordinance would need to be prepared to address the matter of an alternative benefit. In October 2006, the then City Attorney informed the Commission that members of the State Legislature who were dually employed in a FRS-covered position did not receive additional FRS benefits; they were provided a choice to either receive the Elected Officers' Class benefit as a legislator or receive the Regular Class benefit vis-à-vis their (FRS) employer. The City Attorney further added that the same choice is afforded to School Board employees who also serve as elected officials.

In 2016, Schwartz again became a member of the City Commission. Records show that at least one meeting was held in 2014 between Schwartz and City officials regarding the matter, but records do not reflect any official action taken by the City. In November 2021, City Manager Cale Curtis broached Schwartz's retirement benefits with the Commission, requesting direction related to resolving the ongoing matter. In December 2021, the Commission passed Resolution No. 21-487, which prospectively addressed the inequity with respect to dually employed FRS elected officials by permitting alternative retirement vehicles. Recently, City Manager Curtis directed the City Attorney to explore options, if any, relative to resolving Schwartz's non-receipt of a retirement benefit for her service from 1997 through 2004, as well as her service from 2016 through 2021.

III. LEGAL ANALYSIS

In 1997, Resolution Number 8437 established an Elected Officers' Class granting FRS benefits to elected officials. Statutory law set the multiplier at 3% for the class. Schwartz could not join the Elected Officers' Class unless she forfeited her full-time Regular Class FRS benefit with the School Board. This forfeiture scenario was unique to dual FRS employment, as any elected official who had a non-FRS retirement benefit with another employer would have likely joined the City's Elected Officers' Class without issue. Schwartz did not receive the stated benefit authorized under Resolution Number 8437. While it is true that Schwartz was not compelled by the City to decline the Elected Officers' Class membership rather than receive her School Board benefit, Resolution Number 8437 offered her, and only her, an illusory choice.² Schwarz had the option to either receive retirement benefits based on

² Cf. *Disc. Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316, 322 (Fla. 5th DCA 2020) (holding that avoiding a fire service user fee, which was adopted by City ordinance, involved either not paying the

her average final compensation for full-time employment or accept the City's Elected Officers' Class benefit that was presumably at least 50% lower. This was no real option and, therefore, it appears that Schwartz was not provided a benefit to which she was entitled. Because this matter involves prior service, Florida's "extra compensation" provision was reviewed.

Section 215.425, Florida Statutes, provides in pertinent part:

No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature.³

The purpose of the aforementioned provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed - not for compensation earned during service. The most recent version of this provision is comparatively stringent, as prior iterations excluded any extra compensation provided to local government employees pursuant to policies adopted by local law.

The provision is not applicable to the instant matter. Schwartz rendered the requisite service to earn the Elected Officers' Class benefit but simply did not receive it. In other words, the Elected Officers' Class benefit was earned in accordance with the terms of Resolution No. 8437, but not provided. In fact, the records provided demonstrate that members of the Commission, as well as management officials, conceded to varying degrees that she was entitled to the benefit yet did not receive it. Because statutory law prohibited Schwartz from receiving the Elected Officers' Class benefit (due to her dual FRS employment), and as of today she cannot retroactively join FRS as an Elected Officers' Class member, the operative question is whether the Commission has the legislative authority to provide a monetary equivalent benefit. It appears that it does.

In interpreting legislative provisions, it must not be construed in a manner that would defeat the legislative purpose, which here is the provision of retirement benefits.⁴ The rules of construction to be followed in construing local law are the same as those governing the construction of state statutes. In short, the provisions of the legislative materials must be

fee and being disconnected from utility services or moving outside the city limits – illusory choices at best).

³ § 215.425(1), Fla. Stat (2024).

⁴ See *Webster Outdoor Advertising Co. v. City of Miami*, 256 So. 2d 556 (1972) (holding that statutory construction should buttress the intent of the drafters) .

considered as a whole and construed so as to be reasonable and consistent with one another.⁵ Here, in Section 3.06 of the City Charter, which is titled Compensation and Expenses, the Commission has the authority to provide compensation. The Attorney General has concluded that the term “compensation” generally includes benefits.⁶ Generally, retirement benefits and public employer contributions towards it are considered to be part of the employee's compensation.⁷ It therefore appears that the Commission has the authority to provide additional retirement benefits for its elected officials and that it would constitute part of their compensation. In fact, the Commission did just that in 2021 when it passed a resolution to “implement separate retirement accounts and benefits for any current or future City Commissioner that receives an FRS contribution rate that is less than the FRS Elected Officers’ Class rate.”⁸

Case law provides that a legislative body’s interpretation is not absolute, but can be challenged when the agency’s construction of a provision “amounts to an unreasonable interpretation, or is clearly erroneous.”⁹ In this matter, the issue would be whether the Commission’s determination that Resolution No. 8437 entitled Schwartz to a retirement benefit, irrespective of her dual employment, constitutes an “unreasonable interpretation” of its powers or is “clearly erroneous.” The language of the City Charter coupled with the inapplicability of the extra compensation provision are unlikely to meet that definition. In a similar situation, the Attorney General determined that a county attorney who had been deemed ineligible to participate in the state retirement system could receive payment to a private retirement account since such funds were considered to be part of the attorney’s compensation earned and agreed to at that time.¹⁰ The contributions were, therefore, not considered extra compensation, as they were part of the agreed-upon wages between the employee and the county. The same analysis applies to the instant matter.

More importantly, the “paramount law of a municipality is its charter, (just as the State Constitution is the charter of the State of Florida,) and gives the municipality all the powers it possesses....”¹¹ As already noted, the City’s Charter not only explains that the Commission has unenumerated authority, but also can establish compensation. Furthermore, the City operates under a commission-manager form of government so the governing authority of the City is vested in its Commission which exercises broad home rule powers granted to municipalities by the Constitution of the State of Florida, as well as the powers

⁵ *Alsop v. Pierce*, 155 Fla. 185, 19 So. 2d 799, 802 (1944); *See also Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 262-263 (1970).

⁶ Fla. Att’y Gen. Op. 2004-17 (2004).

⁷ *See City of Hialeah v. Willey*, 189 So. 2d 194 (Fla. 3d DCA 1966).

⁸ *See* Resolution 2021-487.

⁹ *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999).

¹⁰ Fla. Att’y Gen. Op. 1986-102 (1986).

¹¹ *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972).

enumerated in the Charter. A municipality is afforded broad authority to enact resolutions and ordinances under Home Rule powers.¹² Under its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State.¹³ “Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature.”¹⁴ The City, in enacting any resolution or ordinance, must yield to state law.¹⁵

No general or special law was discovered that preempts or conflicts with an attempt to make Schwartz whole, as it has been determined that the benefit does not constitute extra compensation. Also, it is without dispute that establishing Commission compensation is a bonafide Commission issue. Consequently, the City has a valid municipal purpose in ensuring that all of its commissioners receive the equivalent benefit as detailed in Resolution Number 8437. Therefore, in the event the Commission concurs with the opinion and determines that Schwartz is entitled to the Elected Officers’ Class benefit, which she earned, the following functionally equivalent options may be approved:

Option 1

Retroactively make Schwartz whole using the Elected Officers’ Class and Regular Class contribution differential formula previously proposed (the “differential formula”). The calculated amount, including lost interest, would be placed in the Commissioner’s existing 457 deferred compensation plan (subject to any Internal Revenue Code contribution limitations). Due to the level of complexity regarding the retroactive calculation of lost interest, the Department of Labor’s assistance tool should instead be utilized to determine lost earnings during the relevant periods.

Option 2

Increase the commissioner’s salary, as permitted in the City Charter.

IV. CONCLUSION

This memorandum advances as a general proposition that the Commission is granted broad discretion to interpret and enforce its laws so long as said interpretation is not unreasonable or clearly erroneous. Further, the Commission via its home rule authority can enact ordinances and resolutions, with the caveat that these actions do not contravene State law. The City’s Charter indicates that the Commission’s powers are broad and only

¹² *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

¹³ *Wyche v. State*, 619 So. 2d 231, 237–38 (Fla. 1993) (citing *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981)).

¹⁴ *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).

¹⁵ Article VIII, section 2(b), Florida Constitution; see also § 166.021, Fla. Stat. (2022).

limited by preempted superior law or any specific language therein. The aforementioned supports the position that the Commission can compensate Schwartz for the non-receipt of the Elected Officers' Class benefit because she served as an elected official during the relevant periods and earned the benefit. The aforementioned also undermines any challenge to the City's ability to make her whole (i.e., provide a retirement benefit equal to other elected officials) since it is just correcting or redressing an oversight.