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Via E-mail

Chairman and Members of the Board of Trustees
City of Sunrise Police Officers' Retirement Plan
c/o Dave Williams
13790 NW 4 Street, Suite 105
Sunrise, Florida 33325

Re: Retired Police Officer Serving as City Commissioner

Dear Chairman and Members of the Board:

You have asked us to discuss the situation concerning a retired police officer who is considering running for an elected commission seat and wants to know if his serving on the Commission will affect his receipt of a pension benefit. We have prepared this letter to assist you during our discussion of the issue. I believe this question can only be answered by the Board of Trustees (subject to review by the courts). One of the duties of the Board of Trustees is to interpret the provisions of the Plan, (which are ordinances of the City). In interpreting the ordinance, you should be aware of the discretion that is granted to you. In *Paloumbis v. City of Miami Beach*, 840 So. 2d 297, 298-99 (Fla. 3d DCA 2003), the Appeals Court stated, "It is the Board's duty to apply, thus interpret, the rules and to do so in a rational fashion. Its administrative interpretation is entitled to judicial deference as long as it is within the range of possible permissible interpretations." (citing *Humhosco, Inc. v. Department of Health & Rehabilitative Servs.*, 476 So. 2d 258 (Fla. 1st DCA 1985)."

In interpreting an ordinance, "when the language...is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." When construing a statute, a court strives to effectuate the legislature's intent. To determine that intent, the court looks first to the statute's plain language. When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. If not clear and unambiguous, one of these rules of construction, or interpretation, is that "pension statutes are to be liberally construed in favor of the intended recipient." Scott v. Williams, 107 So. 3d 379, 384-85 (Fla. 2013).

Unfortunately, the Ordinance is not a model of clarity on this issue, and in our opinion, does not provide a straightforward answer to the question. We will now discuss several of the issues that you may want to consider in interpreting the Ordinance. The Ordinance states that if a member is reemployed by the city their compensation is suspended. It does not say whether their compensation as an employee gets suspended, or their retirement compensation gets suspended. The Ordinance does provide, however, that if compensation is not suspended when it is required to be suspended, a retiree's "future benefits may be reduced..." This may mean that the City Commission intended that retirement benefits are to be suspended. For purposes of this first section, we will assume that it means retirement compensation is suspended under certain circumstances. The Ordinance provision is 11-39 and provides in full as follows:

- **Sec. 11-39. - Employment after retirement.**
 - (a) *Any member of the plan who has accepted and is receiving retirement compensation under this article shall have compensation suspended during any period of reemployment in any capacity whatsoever by the city. Any member receiving retirement compensation under this article who becomes reemployed by the city shall furnish timely notice in writing to the city and the board of the fact that he is prohibited from receiving retirement compensation and salary at the same time and should he fail to do so, and should he receive and retain both benefits and compensation, his future benefits may be reduced pursuant to section 11-43. (Emphasis added).*
 - (b) The reemployment by the city of any person who has accepted and is receiving retirement compensation under this section shall have no effect on the average final compensation or the aggregate number of years of service of such person, nor shall any deductions for retirement contributions be made from the salary paid such person with respect to such reemployment.
 - (c) Any member eligible to receive benefits under this article and workers' compensation benefits may receive both so long as the total plan benefits and workers' compensation benefits does not exceed the average final compensation. If such total exceeds the average final compensation, the benefits shall be reduced by the amount of such excess.
 - (d) The provisions of (a) above shall not apply to retired police officers who are reemployed as reserve officers to provide traffic control and security at the Broward Civic Arena; or to dispatchers and communication supervisors who are laid off by the city and become employees of Broward County or an entity designated as the operator of the Consolidated Regional E-911 Communications System pursuant to the participation agreement between Broward County and the city which is effective October 1, 2013, and who are reemployed by the city on a part-time basis which does not qualify for membership in the plan or any other fringe benefits from the city.

The Ordinance does not specify when someone is considered reemployed by the city. There is not a definition of reemployed in the definitions section (Sec. 11-3). There is, however, a definition of hired, which states, “as to a permanent full-time employee, the date he was employed full-time by the city.” There is certainly a significant question as to whether a City Commissioner, who is elected by the voters, is “employed by the city.” Nor are City Commissioners necessarily required to devote full time to their work as Commissioners.

There is a definition of “city commission” which states that city commissioners “shall be deemed” general employees for purposes of the retirement article. This definition can be interpreted to mean that city commissioners are employees for purposes of the pension article and are therefore reemployed by the City, but the definition could mean that Commissioners can participate in the General Employees plan. However, the rest of the definition requires that a general employee member be a full time employee, which I do not believe that Commissioners are required to be.

While the IRS deems elected officials are employees for purposes of FICA and withholding, there are other federal laws such as the Fair Labor Standards Act or the Family Medical Leave where elected officials are specifically excluded from the definition of employee. The most recent law we considered was the Affordable Care Act and it is silent on the issue. We do not believe federal law answers the question.

We were asked to look into how the pension benefits of two employees who were employed after retiring were treated. One employee, Bruce Moeller, was vested deferred which means that he was not at retirement age and therefore not receiving his pension. The other was Ruth Castellon who retired as finance director and subsequently served as a consultant. The records show there was no break in her monthly benefits. In any event, neither of these two examples were elected officials and that goes to the crux of the issue: is an elected official reemployed by the city.

As an elected official, the commissioners are neither hired nor fired by the city although the city provides a workplace and benefits, but does not have control over the day to day activities, like in the usual employment relationship. If you determine that an elected commissioner is not reemployed in any capacity by the city, then you should keep paying benefits to the retiree during the period of time he serves as a city commissioner.¹ If, however, you decide that an elected commissioner is reemployed by the City and retirement benefits do have to be suspended, there will be a number of other questions that you must consider.

We were also asked to consider the possible outcomes and the issues with each, if the member serves as commissioner:

¹ If you decide that retirement benefits do not have to be suspended, the City could still decide to suspend the Commissioner’s compensation. We express no opinion about the legality of such an action, because it does not involve us.

- He receives his salary and his pension benefit is suspended: this would occur if the Board determines that an elected official is “reemployed by the city in any capacity.” The question will then be what does it mean to have benefits suspended? The term suspended is not defined in the Ordinance. Merriam Webster dictionary defines “suspend” as 1) to force (someone) to leave a job, position, or place for a usually short period of time as a form of punishment; 2) to stop (something) for a usually short period of time. If his pension benefits are suspended, you will need to determine whether he receives them retroactively when he is no longer serving on the City Commission.
- He agrees to forego his salary and continues to receive his pension benefit. We would play no role in any discussions between the City and the commissioner over this course of action. It would be up to the city whether or not he can waive his salary since there is nothing in the pension ordinance that we found that addresses this.
- He accepts his commissioner salary and asks to suspend his benefit. We do not have a provision in the ordinance that allows him to waive his benefit for a period of time after he has been retired and receiving it. It may raise significant tax questions.

We regret that we cannot provide you with a definitive answer, but we hope that you understand that when we say the Ordinance is not a model of clarity, it is an understatement. We have been careful in this letter to present the issues to you without telling you our opinion as to the best interpretation. The best we can do is provide you with this guidance and assist you with your task of interpreting this Ordinance. We recognize, however, that you have been interested in our interpretation, and look to us for guidance. If we were considering the issue, we would first consider what constitutes a “reemployment in any capacity by the City”, and it is our opinion that an elected official is not “reemployed by the City” and therefore the provision requiring a benefit suspension does not apply.

Sincerely,

RICE PUGATCH ROBINSON STORFER &

COHEN PLLC



Ronald J. Cohen

RJC/mlk