



Office of the City Attorney

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*Via Certified Mail, U.S. Mail, and email*

David M. Williams, Plan Administrator  
Precision Pension Administration  
Sunrise Police Officers' Retirement Plan  
13790 NW 4 Street, Suite 105  
Sunrise, Florida 33325

*Via U.S. Mail and email*

Richelle Levy, Esq.  
Board Attorney  
Lorium Law  
101 N.E. 3<sup>rd</sup> Ave., Suite 1800  
Fort Lauderdale, FL 33301

Re: Expenditure of Retirement Plan Funds

Dear Mr. Williams:

It has come to the City's attention that the Board of Trustees (Board) of the City of Sunrise Police Officers' Retirement Plan (Plan) has used funds from the Plan to pay expenses not authorized under Florida law. On at least one occasion, the Board used Plan funds for an actuarial study to determine the cost of benefit changes to the pension plan. The study was not requested by the City, nor did it relate to changes agreed to by the City through the collective bargaining process. Since the Board is not involved in the consideration or approval of pension benefit change and has no authority or power to amend the Plan, there is no legitimate reason for the Board to authorize such a use of Plan funds.

The law is well settled in Florida that changes in public employee pension benefits are a mandatory subject of collective bargaining. The Florida Supreme Court ruled more than 30 years ago that public employee retirement benefits are terms and conditions of employment that may be modified only through the collective bargaining process under Chapter 447, Florida Statutes. *City of Tallahassee v. Public Employers Relations Commission*, 410 So.2d 487 (Fla. 1981).

Thus, any proposed changes in police pension benefits must be negotiated and agreed to by both the City and the union or imposed by the City through the collective bargaining impasse process, before the changes may lawfully be implemented. The Board has no role in the collective bargaining process under Chapter 447, or in the determination of how the Plan is to be amended. The use of pension fund assets by union representatives or officers, in order to circumvent the collective bargaining process is likely a violation of Chapter 447, Florida Statutes. It appears that there has been collusion between the Union and the Board to arrange for at least one of the actuarial studies and, therefore, the City is seeking reimbursement of these misallocated funds from all individuals involved.

Under section 185.06, Florida Statutes, which sets forth the general powers and duties of pension boards, the Board is authorized to perform a variety of administrative and investment functions to operate the Plan and ensure proper funding. Chapter 185 does not include consideration and promotion of benefit changes as an authorized function. To the contrary, section 185.06(4) provides:

The sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement trust fund and for making effective the provisions of this chapter are vested in the board of trustees; however, nothing herein shall empower a board of trustees to amend the provisions of a retirement plan without the approval of the municipality.

The role of the Board is to *administer* the pension plan, *as it was written by the City*. The Board may only incur “reasonable expenses” that are required for the effective administration of the Plan. The Board does not have unlimited authority to waste plan assets (which must be replaced by taxpayers) on expenses unrelated to Plan administration or investments. As the Board has neither the authority to amend the retirement plan nor participate in the collective bargaining process, expenses incurred in furtherance of such endeavors cannot be considered “reasonable.”

The performance of an actuarial study to determine the cost of benefits, which have not been approved by the Plan sponsor, is also not a function for which the Board employs the services of an actuary. Section 185.06 (6)(b) permits the Board to employ an independent enrolled actuary, at the pension fund’s expense, “to assist the board in meeting its responsibilities under [chapter 185].” Since costing out purely aspirational benefit improvements is not among the Board’s responsibilities under Chapter 185, the Board may not use the services of an actuary for such a purpose.

Misusing plan assets to influence the collective bargaining process is not only a violation of Chapters 447 and 185, Florida Statutes, but it is also likely a violation of Florida’s ethics laws. Section 112.313(6), Florida Statutes, prohibits misuse of a public position:

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official

duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

There is no legitimate administrative reason for a pension board to authorize a cost study for benefits it has no authority to enact. The use of Plan funds by the Board with no legitimate administrative purpose, is a misallocation of Plan assets. As Plan fiduciaries, trustees must “discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.” See section 112.656, Florida Statutes.

Authorizing the expenditure of pension fund assets for purposes that go beyond administering the existing plan is a violation of Board members’ fiduciary duties, for which Board members may be held personally liable. Expenditures directed by the Board or a member thereof that result in additional professional service costs to research, assess or process benefit modifications which have not been agreed to by the City and union through collective bargaining, will no longer be paid by the City and will be the responsibility of the Board member or members authorizing such illegal expenditure.

### ***Education Fees and Expenses for Non-Board Members***

In addition to the expenses identified above, the Board also appears to be using Plan assets to pay for expenses related to the training and education of individuals who are not on the Board and who have not been elected or appointed to the Board. This expense is also unauthorized by law and is a misappropriation of Plan assets. Neither Chapter 112 nor Chapter 185 authorizes the Board to use Plan funds to pay for education and training of non-board members. Section 112.661(14) requires the Plan’s investment policy to provide for the continuing education of “the board members in matters relating to investments and the board’s responsibilities.” Section 185.05(2) states that “trustees ... may receive expenses and per diem as provided by Florida law.” It does not authorize such expenditures for non-trustees.

It is well established in Florida that public funds can only be spent for a public purpose or function which the public entity is “expressly authorized by law to carry out” or which must be “necessarily” implied to carry out the purpose or function expressly authorized. See *Davis v. Keen*, 192 So. 200 (Fla. 1939); *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952); and see AGO’s 071–28 and 82-30, as well as the cases cited therein. Thus, every expenditure of Plan funds must be expressly authorized by law, even if the expenditure is not expressly prohibited by law.

Trustees serving on pension boards for funds governed by Chapters 175 and 185 are required to follow the travel expenses and per diem requirements under section 112.061. See Florida Op. Atty. Gen., 093-82 (1993), 92-35 (1992). According to this law and the Attorney General Opinions interpreting the law, reimbursement for travel expenses is limited to expenses necessarily incurred in the performance of a public purpose authorized by law to be performed by the government entity. AGO 72-284. An expenditure for “subsistence when traveling to a convention or conference” may be made

only when the convention or conference “may serve a direct public purpose with relation to the public agency served by the person attending such meeting.” *Id.*

Payment for education or training expenses or travel or meal expenses for non-board members is not “expressly” authorized by any law in Florida. Nor is the expenditure implied as “necessary” to carry out a purpose that is expressly authorized. An implied power is one that is “essential in order to carry out the expressly granted power or duty imposed.” See, e.g., Florida Op.Atty.Gen., 082-30, 062-97. The expense is clearly not essential, since to the best of the City’s knowledge, no other public pension board has a similar policy, and the duties carried out by those boards is unimpeded by the absence of such a policy. While the Board may believe paying for non-member education expenses is a “good idea” or “beneficial,” those attributes are entirely insufficient to render such expenditures lawful.

The Attorney General said the following with respect to expenditures of public funds on education expenses not required by law:

Although indirectly beneficial to the county, any type of formal educational program, be it a short course, university extension course, or other similar type, is basically of personal benefit to the individual taking such a course; hence, no authority for the payment of expenses in connection therewith from public funds exists in the absence of specific legislative authorization.

AGO 62-97 \*2. See also, Florida Op.Atty.Gen., 068-24, Feb. 20, 1968 (Law enforcement officers may not be advanced travel funds to attend school, where it is not a duty to attend.)

Municipal pension boards “may proceed in their official functions only as and in the manner authorized by applicable law; and all actions of such municipal administrative boards must be in accord with authority duly conferred.” *City of Miami v. Shires*, 167 So. 2d 22, 24 (Fla. 3<sup>rd</sup> DCA 1964), *citing City of Miami v. Rosen*, 10 So.2d 307 (Fla. 1942). Expenditures of public funds in a manner prohibited by law, or not expressly authorized by law is an *ultra vires* act by the Board and a breach of the Board’s fiduciary duty to the Plan.

The City expects the Board to immediately correct the current policies to avoid future unnecessary and unlawful expenditures of Plan funds. If the Board continues misusing public funds, the City will take any and all legal action necessary to correct such misuses.

Sincerely,



Thomas P. Moss  
City Attorney

Cc: Mark S. Lubelski, City Manager