

# POLICE AND FIRE PENSION FUND

ONE WEST ADAMS STREET, SUITE 100

JACKSONVILLE, FLORIDA 32202-3616

*"We Serve...and We Protect"*



May 25, 2016

Telephone: (904) 255-7373

Fax: (904) 353-8837

Pam Bondi, Attorney General  
Office of Attorney General  
State of Florida  
The Capitol PL-01  
Tallahassee, FL 32399-1050

Dear Attorney General Bondi:

The Jacksonville Police and Fire Pension Fund Board of Trustees ("Board") is a body politic created by the Florida Legislature, granted by Florida Statute with the authority to govern the operations of the Jacksonville Police and Fire Pension Fund. Pursuant to recent ordinance changes described in more detail below, the Office of the General Counsel for the City of Jacksonville ("Office of General Counsel") has become more involved in rendering advice to the Board on various matters. The Board, however, believes it is receiving advice from the Office of General Counsel that is in conflict with the Board's best interests. To be clear, were this simply a matter of conflicted representation, the Board would simply seek advice from the Florida Bar in the form of an ethics opinion. The attorneys employed by the Office of General Counsel though, have insisted their advice should govern over certain authority vested in the Board of Trustees by Florida Statute, the City Charter and local ordinance. Specifically, the Charter provision outlining the Office of General Counsel's duties and the Charter provisions creating the Board of Trustees and setting forth its powers are in conflict. As the Charter provisions are special acts of the Florida Legislature, the Board respectfully requests an opinion from your office on the following question:

Do the City of Jacksonville Charter provisions setting forth the powers of the Board of Trustees of the Jacksonville Police and Fire Pension Fund, an independent body politic created by the Florida legislature, take precedence over the Charter provisions setting forth the duties of the Office of General Counsel for the consolidated city government, in regards to the conduct of the Board's operations?

Specifically, over the last twelve months attorneys from the Office of General Counsel have:

# POLICE AND FIRE PENSION FUND

1. Advised Pension Fund personnel to provide voluminous responses to public records requests without charging fees pursuant to § 119.07(4), Fla. Stat., which conflicts with the customary practice of other agencies of the consolidated government;
2. Filed a lawsuit against the Board on behalf of the City of Jacksonville, while simultaneously publicly purporting to represent the Board in Fund governance matters, thereby constituting a suit against its own client on a major issue of law, governance and statutory construction;<sup>1</sup>
3. Provided legal advice to the Mayor of Jacksonville prompting the Mayor to order the Board to take action that if followed, would place the Board in breach of employment contracts with retired employees;
4. Advised the City Council that the Board lacked the authority to sue the City without the City Council's permission and that it could curtail the Board's statutory authority to sue and be sued under those circumstances through a "binding" legal opinion;
5. Drafted a legal opinion regarding the Board's powers to design pay and retirement benefits for its employees that was in conflict with the Board special pension counsel's opinion, and thereafter asserted that the Office of General Counsel's opinion was "binding" on the Board.<sup>2</sup>

The Board believes that the Charter provisions governing the powers of the Board may not be overridden by other provisions of the City Charter. It is the Board's view that Florida law gives the Board the authority to rely on counsel for advice only, govern Fund operations in accordance with the provisions of Chapters 175 and 185, Florida Statutes and hire counsel of its own choosing. The Board's position is that the role of counsel, whether special counsel hired by the Board or attorneys from the Office of General Counsel, only provide advice and possess no authority to bind the Board regarding its operations. For the reasons that follow, we believe the above question should be answered in the positive.

---

<sup>1</sup> See *City of Jacksonville, Fla. v. Jacksonville Police and Fire Pension Board of Trustees and John Keane*, 16-2015-CA-007380 (Fla. 4<sup>th</sup> Cir. 2015)

<sup>2</sup> Specifically, the letter stated: "The legal opinions of the General Counsel bind each and every officer of the City and its independent agencies as well as any and all employees. Any person who acts inconsistently with these opinions, particularly any person who expends or authorizes expenditures of any public funds in contravention of these opinions and in dereliction of the City's laws, risks personal liability. Section 22.05(b), City Charter providing protection for PFPF Board members 'when relying upon the advice of any attorney employed by the board,' does not shield the PFPF Board members who rely on the advice of an attorney who disagrees with a binding legal opinion of the General Counsel." Additionally, the opinion letter made thinly veiled references to criminal consequences for acting *ultra vires* of the ordinance code as well. The Office of General Counsel opinions of April 20, 2016 and August 10, 2012, and the opinion letter of the Board special pension counsel are attached for illustrative purposes to this request. They are not provided for a determination on the underlying substantial issue regarding Fund employee benefits.

# POLICE AND FIRE PENSION FUND

## Legal Background

The Jacksonville Police and Fire Pension Fund is a local law defined benefit pension plan created in 1937 by Chapter 18615, Special Acts of Florida, and codified in sections 121.101 - 121.401 of the City Ordinance Code. Its purpose is to provide retirement, disability and death benefits to police officers and firefighters of the City of Jacksonville. The Fund is governed by Article X, § 14 of the Florida Constitution and Chapters 112, 175, and 185, Florida Statutes. See Jacksonville, Fla., Charter Article 22.

In 1986, the Florida Legislature substantially revised the provisions of Chapters 175 and 185, Florida Statutes, which are the general state laws governing municipal police and fire retirement plans. Among the provisions of that amendment, was the establishment of independent boards of trustees of the more than 300 municipal public safety retirement plans, including Jacksonville. The boards were designated as independent bodies politic, separate and apart from the sponsoring governments. See §§ 175.311 and 185.31. Each board of trustees became an independent legal entity possessing the power to bring and defend lawsuits of every kind, nature and description. Fla. Stat. § 185.05(4). The Charter of the City of Jacksonville, at section 22.04, describes the Board as a body politic, enumerating its powers, including the power to sue and be sued, enter into contracts and construe all terms of the pension plan. Article 22 of the Jacksonville City Charter is the product of two special acts specifically related to the Fund.<sup>3</sup>

Further, the Florida Legislature has specifically preempted local law in the creation of Chapters 175 and 185 of the Florida Statutes. The Legislature specifically provided,

Minimum benefits and minimum standards for each plan may not be diminished by local charter, ordinance, or resolution or by special act of the Legislature and may not be reduced or offset by any other local, state, or federal law that includes firefighters in its operation, except as provided under s. 112.65.

Pursuant to Chapters 175 and 185, Florida Statutes, the State of Florida rebates to municipalities and special fire control districts a portion of the tax levied on premiums for certain types of fire and casualty insurance. See § 175.101; § 185.08. The Jacksonville Police and Fire Pension Fund is a recipient of insurance premium tax revenue dollars, which amounts to approximately 10 million dollars per year. As a recipient of those funds, the Board is required to comply with the provisions of those chapters. See § 175.351 and § 185.35.

Sections 175.071(7)(a) and 185.06(6)(a), Florida Statutes, both provide that in order to assist a board in meeting its fiduciary duties under each respective chapter, a board may,

[E]mploy independent legal counsel at the pension fund's expense... If the board chooses to use the municipality's or special district's legal counsel or actuary, or

---

<sup>3</sup> Ch. 90-442, § 2; Laws of Fla; Ch. 92-341, § 1, Laws of Fla.

## POLICE AND FIRE PENSION FUND

chooses to use any of the municipality's other professional, technical, or other advisers, *it must do so only under terms and conditions acceptable to the board.*<sup>4</sup> (emphasis added).

Moreover, at the local level, Section 22.04(e) of the Jacksonville City Charter, grants the Board with the power to "Employ and fix the compensation of an administrator and any consultants, attorneys, actuaries, accountants, and other employees or contractors as the board may require." The State Legislature, which drafted the special acts comprising Chapter 22 of the Charter, clearly considered this provision's potential conflict with the mission of Jacksonville's Office of General Counsel, but resolved it with Section 22.11 of the Charter. The drafters clarified the power of the Board to appoint counsel of its choosing by articulating that, "All provisions of law in conflict with this article are repealed, except to the extent necessary to give effect to employee rights and benefits preserved as provided in this article." As state premium tax revenues were instituted for the specific benefit of employees (See Sec. 175.021 and 185.01, Fla. Stat.), and the Board's power derives from Chapters 175 and 185, it follows naturally that the Board is empowered to hire counsel of its choosing to advise it on its fiduciary duty of administering the Fund in a prudent manner, and to reject said advice if it runs contrary to the Board's fiduciary responsibility to the Fund and its members.

The powers of the General Counsel for the City of Jacksonville are found in Article 7 of the Jacksonville City Charter, which states in part:

There is established an office of the City of Jacksonville to be known as the office of general counsel, which shall have the responsibility for furnishing legal services to the city and its independent agencies...<sup>5</sup> For purposes of utilization of central services by the city and its independent agencies, the services of the office of general counsel shall be deemed to be central services or services of the central service department, as the case may be...<sup>6</sup> The head of the office of general counsel shall be the general counsel who shall be the chief legal officer for the entire consolidated government, including its independent agencies...<sup>7</sup> Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion

---

<sup>4</sup> The statute also speaks to hiring and compensation of actuaries, professional and technical advisors as well.

<sup>5</sup> Charter, Jacksonville, Fla. Sec. 7.01

<sup>6</sup> *Id.*

<sup>7</sup> Charter, Jacksonville, Fla. Sec. 7.02

## POLICE AND FIRE PENSION FUND

of the Attorney General of the State of Florida dealing with a matter of solely state law.<sup>8</sup>

In consideration of the changes made to Chapters 175 and 185 of the Florida Statutes in 1986, General Counsel and former circuit judge James L. Harrison opined in 1987, “Chapters 175 and 185, Florida Statutes, create relationships, which despite good intentions, place our attorneys in either a present or potential conflict of interest.” With that opinion, Mr. Harrison advised the Board that the Office of the General Counsel could not represent the Board any longer.

In an effort to reduce administrative costs, changes to Section 121 of the Jacksonville Ordinance Code were enacted on June 9, 2015, concerning the Board’s use of special counsel. See Sec. 121.118, Jacksonville Muni. Code. Those changes state that the City’s Office of General Counsel is the proper source for legal representation on routine matters (e.g., open records, public meetings, other ordinary legal issues and non-pension legal services) subject to the Charter and Ordinance Code. The ordinance changes distinguish legal matters not related to fiduciary duties with those falling within the range of trustee duties, requiring special counsel. The ordinance is the product of an agreement between the Board and the City in an effort to diminish outside legal costs on matters not requiring expertise in local government pension law or fiduciary management. The ordinance precisely reflects the state statute quoted above in which a board of trustees may utilize the municipal attorney on “terms and conditions satisfactory to the board.” However, a single law firm, the Office of General Counsel, has been simultaneously advising the Board on governance matters, sometimes to its detriment, while representing entities that have instituted legal action against it. Further, it has advised those entities that the Office of General Counsel’s decisions override the independent statutory authority of the Board, which are clearly not “terms and conditions satisfactory to the Board.”

Although, as stated above, the Board is more concerned as to the ability of the Office of General Counsel to compel the Board on decisions of governance, the propriety of the Office of General Counsel’s actions are worth consideration. As the comments to Rule 4-1.11 of the Rules Regulating the Florida Bar state, “A lawyer who has served or is currently serving as a public officer or employee is personally subject to the rules of professional conduct, including the prohibition against concurrent conflicts of interest stated in rule 4-1.7.” FL ST BAR Rule 4-1.11. Attorneys employed to render legal services to county officers are not themselves county officers. *Hillsborough Cty. v. Sutton*, 8 So. 2d 401, 402 (1942). Moreover, pursuant to Rule 4-1.10, all members of a law firm have an imputed conflict of interest when one member of the firm would be disqualified from representing a client. See *Akrey v. Kindred Nursing Centers E., LLC*, 837 So. 2d 1142, 1144 (Fla. 2d DCA 2003). However, the strict rules regarding imputation of conflicts of interest in Rule 4-1.10 are moderated by Rule 4-1.11, governing conflicts for

---

<sup>8</sup> *Id.*

## POLICE AND FIRE PENSION FUND

government employees. *See comments* Rule 4-1.10. Nevertheless, a lawyer currently serving as a public officer or employee is subject to rule 4-1.7.<sup>9</sup> See FL ST BAR Rule 4-1.11. Rule 4-1.11 and its comments are mostly concerned with transfers between government agencies and private practice or other agencies. The rule speaks little to imputation of conflict to members of a government corporate counsel firm that presently represent one division of government in active litigation against another division of the same government.

It would appear that Florida law places no prohibition on the Board's actions vis-à-vis the Office of General Counsel, as the Office of General Counsel has no authority over the Board on matters of Fund governance. As articulated above, the Board's position is that it is vested with authority to choose counsel on terms satisfactory with Board, which precludes the Office of General Counsel from doing anything other than providing advice in any given instance and only upon a request of the Board.

It is worth noting that this is not the first time your office has been asked to opine on the relative powers of the City and the Board. In AGO 92-35 and AGO 92-69, your office advised that powers granted by the Legislature to the Board were not subject to municipal control nor could the Board delegate those powers to another governmental entity. The continued validity of those opinions was recently confirmed by letter from your office.<sup>10</sup> The Board respectfully believes the matter presented in this request is no different from the subject matter of those earlier opinions.

On May 20, 2016, the Board unanimously voted to seek your guidance on the above matter. Accordingly, we respectfully request an opinion affirmatively answering the question raised at the outset of this letter.

Respectfully



Lawrence V. Schmitt, Chairman

Cc: Robert D. Klausner, Esq.  
Paul A. Daragjati, Esq.

Enclosures (5):

1. Memorandum in Support of Request for Legal Opinion

---

<sup>9</sup> Rule 4-1.7 Conflict of Interest; Current Clients.

<sup>10</sup> January 26, 2015

# POLICE AND FIRE PENSION FUND

2. Klausner Opinion Letter 09-25-2012
3. Office of General Counsel Opinion Letter August 10, 2012
4. Office of General Counsel Opinion Letter April 20, 2016
5. Article 22, Charter of the City of Jacksonville, Fla.
6. Article 7, Charter of the City of Jacksonville, Fla.