

**June 17, 2016**  
*by: Steve Durden*

**MEMORANDUM**

**To: Police and Fire Pension Fund Board of Trustees**

**CC: Jason Gabriel, General Counsel**  
**Beth McCague, Interim Executive Director, PFPF**  
**Legal Opinion file**

**From: Stephen M. Durden, Chief Assistant General Counsel**

**Re: Cecil Field Firefighters**

**Date: June 17, 2016**

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**Introduction.**

Section 121.107, Ordinance Code, entitled, "Credit for broken service, continuous service, partial years transferability, and service as a Florida State Certified Police Officer or Firefighter," permits and regulates adding service time for service with other agencies. Subsection(d) permits, among other time tie-ins, "service with another government in Duval County." At this time, some members of the fund who now work for the Fire Department as firefighters previously worked for the federal government at Cecil Field. The question has been raised whether these firefighters may connect their time while working for the federal government.

**Question Presented.**

Whether Section 121.107 permits firefighters who worked as firefighters for the federal government, but not in the military, to purchase time service (up to five years) for that service.

**Short Answer.**

Section 121.107 does not permit firefighters who worked as firefighters for the federal government, but not in the military, to purchase time service (up to five years) for that service.

**Discussion.**

In 2009, the Legislature amended Section 175.032(4)(c) to read as follows:

(c) Credited service under this chapter shall be provided only for service as a firefighter, as defined in subsection (8), or for military service and does shall not include credit for any other type of service. A municipality may, by local ordinance, or a special fire control district may, by resolution, provide for the

purchase of credit for military service prior to employment as well as for prior service as a firefighter for some other employer as long as a firefighter is not entitled to receive a benefit for such prior service as a firefighter. For purposes of determining credit for prior service as a firefighter, in addition to service as a firefighter in this state, credit may be given for federal, other state, or county service if the prior service is recognized by the Division of State Fire Marshal as provided under chapter 633, or the firefighter provides proof to the board of trustees that his or her service is equivalent to the service required to meet the definition of a firefighter under subsection (8).

Section 3, Ch. 2009-97, Laws of Florida, (added provisions underlined, struck provisions redacted with line-through).

This amendment created an extraordinarily unfortunate internal conflict. The first sentence of this section states quite expressly that only a "firefighter" as that term is defined in Section 175.032 is entitled to credited service. The amendment also incorporates the term "firefighter," while at the same time referencing the federal government. The conflict is that Section 175.032 unequivocally limits the definition of firefighter to "a person employed solely by a constituted fire department of any municipality or special fire control district." Fla. Stat. Ann. § 175.032 (West) (emphasis added). This definition undeniably restricts firefighter to those who work for the state or some subdivision of the state, including, but not limited to, municipalities, counties, and special districts.

These references to the definition of firefighter seem to conflict with what appears to be permission granted to allow credited service for service as a firefighter "for federal . . . service if the prior service is recognized by the . . . Fire Marshal as provided in chapter 633." If "prior service is recognized" means that the individual involved had Section 633.408 "firefighter certificate" (hereinafter "Certified Firefighter") while working for the federal government, then any person who is a Certified Firefighter and who worked for the federal government in *any capacity* would qualify.<sup>1</sup> To take this reading would be to broaden the category of prior credited service to an extraordinary degree.

If the Fire Marshal is supposed to, instead, recognize the actual work done by the person not the certificate held by the person while working for the federal government, then Chapter 633 falls short. This chapter does not have a provision for certifying a federal program, which makes sense, because the state cannot require the federal government or its employees to obtain state licenses or

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<sup>1</sup> This would be akin to the provisions of Section 175.032(11)(a) which declares (1) that those who were not actually firefighters but supervised firefighters to be firefighters if they supervised firefighters prior to October 1 and (2) that those who are not firefighters but supervise firefighters after that date are police officers even though they may not be certified police officers. In particular, a non-firefighter Fire Chief who is not a certified police officer may be a police officer for retirement purposes.

certificates in order for those federal agencies or employees to operate or work within the state.

If, instead, "prior service is recognized" refers to the Fire Marshal as recognizing the *program or department*, the statute does not finish the sentence. In other words, in what way would the program or department be recognized by the Fire Marshal? Again, the state cannot require certification or licensing from a federal program or department.

And, assuming that all these statutory conundrums disappeared and that the statute referred to Certified Firefighters working to fight fires for the federal government, this statute creates a variety of unfairness's that might even rise to the level of constitutional violations. A Certified Firefighter who worked in another country for a federal fire-fighting division would be allowed to purchase time, but a person working in Florida for federal fire-fighting division, but who, knowing that the state could not require state certification to work for the federal government, was not a Certified Firefighter would not. These examples do not even begin to address the complications of determining what is a fire-fighting department of the federal government nor address the complications of a person who worked both inside and outside the State of Florida for a federal fire-fighting department.

Section 173.032 is, at best conflict-riddled. Additionally, Jacksonville does not need an amendment to Chapter 175 in order to add provision related to acquiring time-service credits that it deems in the best interest of the City (and, of course, adopted consistent with any requirements of collective bargaining). Finally, the 2009 amendment of Section 175.032(4)(c) begins with the phrase "in addition to service as a firefighter *in this state . . .*" This antecedent phrase recognizes that Section 175.042(4)(c) already permits credited service for any firefighter service by any government of the state

Subsequent to the 2009 amendment of Section 175.032(4)(c) regarding credit for time service for federal service, Ordinance 2015-304-E modified credited service purchase provisions in Section 121.107 of the Ordinance Code to read as follows:

Any active Member of the Police and Fire Pension Fund who is not a retiree and who has not attained vested status under any other governmental retirement system shall be entitled to purchase time service credit for up to five years of full time employment as a Police Officer under the provisions of F.S. Ch. 943, or as a certified Firefighter under the provisions of F.S. Ch. 633. Notwithstanding the preceding sentence, any active member of the Police and Fire Pension Fund who is not a retiree and seeks to purchase time service credit as a Police Officer under the provisions of F.S. Ch. 943, or as a certified Firefighter under the provisions of F.S. Ch. 633, under this paragraph for service with another government in Duval County, shall be entitled to purchase up to five years of such time service credit provided such service has not been used for entitlement for benefits under any other

pension system. To be entitled to pension credit, a Member shall make application to the Board at any time prior to retirement. Furthermore, the employee shall pay into the Pension Fund a sum equal to 20 percent of his or her current monthly salary multiplied by the number of months (60 months maximum) for which credit is being sought, on such terms as the Board shall determine.

Section 121.107(d). Ordinance 2015-304-E added the underlined provisions. Prior to the adoption of 2015-304-E, Section 121.107(d) stated, "Any active Member of the Police and Fire Pension Fund who is not a retiree and who has not attained vested status under any other governmental retirement system shall be entitled to purchase time service credit for up to five years of full time employment as a Police Officer under the provisions of F.S. Ch. 943, or as a certified Firefighter under the provisions of F.S. Ch. 633." (Emphasis added). The references to Chapters 943 and 633 modify the phrase "any other governmental retirement system" to ensure that the time-service connection applied to persons working for local governments working in the state. The Council adopted the new language referring to "another government in Duval County" to create a sub-class of firefighters and police officers referenced in the first sentence in subsection(d). This subclass includes those who worked for Jacksonville Beach, Neptune Beach, Atlantic Beach and Baldwin.

The first sentence of subsection(d) prohibits persons who are vested in another plan from purchasing time-service credit for years in that plan. The amendment in 2015-304 allows those vested in a plan from one of the local governments in Duval County to purchase time-service credits even if they are vested in another plan, as long as those purchased years are not also used for entitlement for benefits.

When the amendment was discussed in the City Council committees, as an amendment to proposed Ordinance 2104-386, the Council Members left no doubt that they sought to limit this modified right to purchase time-service credit to the governmental bodies wholly within Duval County, i.e., the Beaches, Baldwin and the independent agencies. For a half an hour or more the committee members sought assurance that the amendment be limited to those persons who worked for those governments. They expressed concern over the breadth of a right of an employee of any other government to purchase time service credit. This is justified, in part, due to the fact that the taxpayers of these communities may have paid for police or fire services in the past, and they pay taxes to the City of Jacksonville as well.

Finally, the language in the amendment is "service with another government in Duval County." It does not say "service in Duval County with another government in Duval County." Both the federal government and the state government are "in" Duval County. The sentence does not specifically require being a firefighter or police officer in Duval County. Consequently, either this new sentence refers to solely to the Beaches and Baldwin, or it refers to any person in any location who happened to be certified under Chapters 633 or 943 and also worked for the federal

or state government. The better answer is undeniably that this new sentence narrows the first sentence rather than expands the first sentence.

**Conclusion.**

Section 121.107 does not permit purchase of time service credits for work as a federal employee (except for military veterans).