

JULY 8, 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: Thirty-year Drop

Date: July 8, 2016

Introduction.

The question has arisen as to the application of DROP.

Question presented.

Whether a PFPF member can have their pension benefits calculated based on 30 years of credited service and participate in DROP for 130 pay periods.

Short answer.

Yes, a PFPF member can have their pension benefits calculated based on 30 years of credited service and participate in DROP for 130 pay periods .

Discussion.

This question was answered in the attached May 20, 2013 memorandum. The basic conclusion is that while the JFPF Board's interpretation seems, at best, strained, it is the interpretation for the past decade and a half. Part of the reason for the interpretation relates to the Board's long-held interpretation that retirement is based on whole years, meaning that whether a member retires with 20 years of credited service or 20 years plus 364 days of credited service, the member's pension is based on exactly 20 years, not 20 years plus whatever fraction of a year over 20 the member worked. This means that a member with 29 plus years of service can retire before 30 years and be a 29-year retiree or wait until just after 30 years and become a 30-year retiree.

Because of this interpretation, DROP if interpreted literally would prohibit any member from obtaining both maximum retirement benefits (a 30-year

retirement) and maximum DROP benefits. The Board's interpretation, although a bit strained, allows for a person to obtain both.

While this interpretation may not be the one chosen by others, it has been, as explained in the May 2013 memorandum, the interpretation used by the Board for more than a decade and consequently is an interpretation that falls into the category of "established practice." Supporting this conclusion from the May 2013 memorandum is that there is no evidence of any effort to have this interpretation modified by legislation. This lack of modification is particularly important in light of years of efforts to amend the pension plan, culminating in the enactment of 2015-304-E.

The Board may continue in its interpretation as to 30-year retirees. It may make sense at some point to codify the Board's interpretation, including its "whole year interpretation."

Conclusion.

I trust this answers the question presented. If I can be of further assistance or you have further questions, please do not hesitate to contact me.

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**CITY OF JACKSONVILLE
OFFICE OF GENERAL COUNSEL
MEMORANDUM**

To: Brian Parks, Council Auditor's Office

From: Derrel Q. Chatmon, as to Question 1(c)
Gayle Petrie, as to Questions 1(a), and 1(b)
Tim Horkan, as to Questions 2(a) and 2(b)

Re: Audit of Police and Fire Pension Fund.

Date: May 20, 2013

You asked for our legal opinion on several questions relating to (i) the administration of DROP benefits under Section 121.209, *Ordinance Code*, and (ii) the application of certain state laws to the Senior Staff Voluntary Retirement Plan (the "Senior Staff Plan") created in 2000 by the Board of Trustees, Police and Fire Pension Fund (the "Board"). Our response is provided below.

* * *

Question 1(a)(i). Can a PFPF member have their pension benefits calculated based on 30 years of credited service and participate in DROP for 130 pay periods?

Answer. Possibly, in a limited number of cases. This issue depends on the interpretation the term "time of election" in subsection 121.209(b)(1), *Ordinance Code*, which limits the number of pay periods a member can participate in DROP according to the following chart:

Years of Credited Service at Time of Election	Maximum Pay Periods of Participation	Maximum Months of Participation
20 but less than 30 years	130 biweekly	60
30 but less than 31 years	78 biweekly	36
31 but less than 32 years	52 biweekly	24

The term "election to participate" and "time of election" are not defined in Section 121.209 and are interpreted in an inconsistent manner by the Pension Office. The Pension Office interprets "election to participate" as meaning commencement of participation for purposes of freezing a member's final average salary and amount of credited service. Not only do we agree with this interpretation, but we are of the opinion that election to participate and time of election mean commencement of participation throughout Section 129.209. We disagree with the Pension Office's interpretation that for other purposes, including the chart set forth above, time of election means the time at which required paperwork is submitted to the Pension Office.

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For at least the past decade, the Pension Office has interpreted the phrase “*Years of Credited Service at Time of Election*” to mean the years of credited service on the date the member submits his/her paperwork to participate in DROP, not the years of credited service the member has on the date he/she actually begins to participate in DROP. This interpretation means that a PFPF member could have retirement benefits calculated with 30 years of service and still participate in DROP for the full five year period as long as the member submitted an application in the quarterly enrollment period immediately preceding the date the member reached 30 years of service.¹

We are of the opinion that the Pension Office has misapplied the DROP provisions of the Ordinance Code since this interpretation results in a violation of the time limit set forth in subsection 121.209(b). Section 121.209(b)(4), states: “*Upon electing to participate in the DROP, the member shall submit on forms prescribed and required by the Board: (i) A written election to participate in the DROP; (ii) Selection of the DROP participation and retirement dates, which satisfy the limitation stated in subsection (b)(1) of this Section*”. This section makes it clear that the limitations of Section 121.209(b)(1) are to be utilized in the paperwork submitted by the member stating both the retirement date and the DROP participation date.

However, the Pension Office’s practice since 2001 may be supported by the well-established legal principle that the City cannot unilaterally change an established practice affecting retirement benefits without engaging in collective bargaining. See, CWA v. City of Gainesville, 65 So.3d 1070 (Fla. 1st DCA 2011).

It should be noted that the practical effect of the Pension Office’s interpretation may be very limited. The conditions on which a DROP participant can have both a 30-year pension benefit and a 5-year DROP period, in the view of the Pension Office, are described more fully in Pension Bulletin #4.

* * *

Question 1(a)(ii). On the date a member signs up for DROP, can the member have 19 years, 11 months and 29 days of service?

Answer. Yes. Section 121.209(a)(2), *Ordinance Code*, requires that “*Election to participate [must be] made on a date following the date on which the member first reaches the minimum normal retirement benefit after completion of 20 years of credited service.*” In our opinion, the term “election to participate” in subsection (a)(2) means the date the member begins his participation, on the date stated in the subsection (b)(4) paperwork. The act of submitting the paperwork is not limited by 20 years of service, but the relevant date state in the paperwork must comply with the 20 year requirement.

¹ See, Pension Bulletin #4, dated March 15, 2001. See also, Question B(2) in the PFPF’s DROP Booklet.

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The PFPF Pension Office should take a consistent approach and interpret the “Time of Election” as the commencement date of participation rather than the date the member submits his/her DROP paperwork.² This means that the member can submit their paperwork prior to the time a full 20 years has been served, but the retirement date and DROP participation date stated in the paperwork must comply with subsection (b)(1).

* * *

Question 1(b)(i). When Section 121.209 states, “*upon an eligible member’s election to participate in the DROP, the amount of credited service and final average salary becomes frozen for purposes of determining pension benefits*”, does this mean that the date a member signs up to participate, the date the member actually begins to participate, or some other date? Please explain.

Answer. The amount of credited service and final average salary become frozen on the date the member actually begins to participate in DROP. As required by Section 121.209(b)(4), the paperwork filed by the member must set forth the retirement date and DROP participation date which satisfy the limits of Section 121.209(b)(1). The stated retirement date should be used for benefit calculation purposes when it complies with the subsection (b)(1) limits.

The Pension Office has interpreted the term “election to participate” under this provision as something different than the meaning given elsewhere in Chapter 121. Here, the Pension Office has determined that the date a member’s credited service and final average salary are “frozen” is the date the member actually begins to participate in DROP, not the date the DROP application was filed.³ As discussed previously, in our opinion, the phrase “election to participate” means commencement of participation throughout the DROP provisions of the Ordinance Code.

There is no basis to infer that the City Council intended to deprive a PFPF member of credited service based merely on the date the member filed DROP paperwork. We believe a member’s credited service and final average salary become frozen on the date the member actually begins to participate in DROP, as contemplated by subsection (b)(4).

* * *

² Florida courts have held that where a word is used more than once in a statute it is presumed to have the same meaning throughout unless a different meaning is necessary to avoid an absurd result. See, Anderson Columbia v. Brewer, 994 So. 2d 419 (Fla. 1st DCA 2008); Hobbs v. Don Mealey Chevrolet, Inc., 642 So.2d 1149 (Fla. 5th DCA 1994).

³ See, PFPF Bulletin #4. See also, the PFPF DROP Manual, Question E(1).

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Question 1(b)(ii). When the chart in Section 121.209(b)(1) states “*Years of Credited Service at Time of Election*”, is this the date the member signs the paperwork to begin, the date the member begins participation, or some other date? Please Explain.

Answer. As previously discussed, this means the date the member begins to participate in DROP, which is the date stated in his subsection (b)(4) paperwork that complies with the subsection (b)(1) limits.

* * *

Question 1(b)(iii). If there is a cut-off of when someone has to have submitted the appropriate paperwork does this affect the answer to [the two preceding questions]? Please Explain.

Answer. No. Section 121.209(b)(1) provides: “*A member who reaches 32 years of service after the effective date of this Section and who fails to make an election prior to attaining 32 years of service shall forfeit all rights to participate in the DROP.*” The cutoff date for commencing to participate in DROP is a date that precedes the date on which the member reaches 32 years of credited service. Accordingly, the Section 121.209(b)(4) paperwork would have to be submitted at an even earlier date. This answer does not affect the answer to the two preceding questions.

* * *

Question 1(c). Is it allowable per the ordinance code for the members to only be credited for whole years of service when calculating the benefit percentage?

Answer. Despite ambiguities, Chapter 121 appears to grant credit for benefit calculations based on “years”. The calculation of benefits reflected within §121.201(c) – Retirement benefits illustrates that members may receive either a deferred benefit or a percentage of salary for “each year of credited service...”. Cf. §121.201(a). An amendment to the Ordinance Code defining the basis for calculations could clarify the Code’s ambiguities and clearly reflect the Chapter’s intent to utilize only whole years to calculate benefits, but expressly a “year” is provided to determine service credit and not a “partial year”.

* * *

Question 2(a). Do you agree or disagree with Mr. Klausner’s legal opinion given to Mr. Keane on 12/21/11? Please explain.

Answer. We disagree. Mr. Klausner’s opinion states that the Jacksonville Police and Fire Senior Staff Voluntary Retirement Plan (the “Senior Staff Plan”) is not a reporting entity under Chapter 112, Part VII, Florida Statutes, because the PFPF is not a “governmental entity” as defined in Section 112.625(5), Florida Statutes. We believe the reporting requirements do apply to the PFPF and the Senior Staff Plan.

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Sections 112.60 – .67, Florida Statutes, is titled the “Florida Protection of Public Employee Retirement Benefits Act” (the “Act”). Section 112.62, Florida Statutes, provides that the Act applies to:

[A]ny and all units, **agencies**, branches, departments, boards, and institutions of state, county, special district, and municipal governments **which participate in, operate, or administer a retirement system or plan** for public employees, **funded in whole or in part by public funds.**” (emphasis added)⁴

The PFPF is clearly a unit of the City of Jacksonville.⁵ Therefore, to the extent the Senior Staff Plan is “*a retirement system or plan for public employees, funded in whole or in part by public funds,*” the Act will apply to the PFPF.

The term “retirement system or plan” is defined in Section 112.625(1) as:

[A]ny employee pension benefit plan supported in whole or in part by public funds, provided such plan is not:

- (a) An employee benefit plan described in s. 4(a) of the Employee Retirement Income Security Act of 1974, which is not exempt under s. 4(b)(1) of such act;
- (b) A plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;
- (c) A coverage agreement entered into pursuant to s. 218 of the Social Security Act;
- (d) An individual retirement account or an individual retirement annuity within the meaning of s. 408, or a retirement bond within the meaning of s. 409, of the Internal Revenue Code of 1954;
- (e) A plan described in s. 401(d) of the Internal Revenue Code of 1954; or
- (f) An individual account consisting of an annuity contract described in s. 403(b) of the Internal Revenue Code of 1954.

⁴ See also, Rule 60T-1.001(1), Florida Administrative Code, promulgated in 1991 by the Florida Division of Retirement, which states: “This chapter sets forth the rules under which municipal and special district units of government are to provide information on their retirement systems to the Division of Retirement (Bureau of Program Services) pursuant to Part VII of Chapter 112, Florida Statutes. The provisions of this chapter shall be applicable to all municipal governments and special districts (or agencies and instrumentalities thereof) which operate or administer a retirement system or plan for public employees funded in whole or in part by public funds.” (emphasis added).

⁵ See, Section 22.11, Jacksonville Charter.

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Based on the 14-page plan document you provided, the Senior Staff Plan fits within the definition of a “retirement system or plan” and does not qualify for any of the six exemptions in Section 112.625(1).

The Act’s reporting requirements are summarized as follows:

- Section 112.63(1) provides: “Each retirement system or plan subject to the provisions of this act shall have regularly scheduled actuarial reports prepared and certified by an enrolled actuary.”
- Section 112.63(2) provides: “. . . The results of each actuarial report shall be filed with the plan administrator within 60 days of certification. Thereafter, the results of each actuarial report shall be made available for inspection upon request. Additionally, each retirement system or plan covered by this act which is not administered directly by the Department of Management Services shall furnish a copy of each actuarial report to the Department of Management Services within 60 days after receipt from the actuary.”
- Section 112.63(3) provides: “[n]o unit of local government shall agree to a proposed change in retirement benefits unless the administrator of the system, prior to adoption of the change by the governing body, and prior to the last public hearing thereon, has issued a statement of the actuarial impact of the proposed change upon the local retirement system, consistent with the actuarial review, and has furnished a copy of such statement to the division.”

Mr. Klausner’s letter argues that these reporting requirements apply only to “governmental entities” such as cities and counties.⁶ This ignores the fact that the term “governmental entity” is not used in any of the provisions cited above and that Section 112.62 clearly states that the Act applies to local government units.

* * *

Question 2(b). For purposes of determining whether the actuarial report should be submitted to the state as required by Chapter 112 of the Florida Statutes, would it matter whether the plan was currently making payments to pensioners?

⁶ Section 112.625(5) defines a “governmental entity” as “*the state, for the Florida Retirement System, and the county, municipality, special district, or district school board which is the employer of the member of a local retirement system or plan.*” The Klausner letter takes an overly technical interpretation that an agency (such as the PFPF) existing within a city/county government (such as the City of Jacksonville) is not itself a government entity. However, the issue seems moot because the term “government entity” is not used at all in the applicable provisions concerning reporting requirements.

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Answer. Yes. Under Section 112.625(1)(b), Florida Statutes, the requirements of the Act would not apply to a plan that is “unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” However, this exemption for “unfunded plans” obviously would not apply in cases where payments were being made to pensioners. The funds would have to come from somewhere.

* * *

Thank you for requesting our input and please let us know if we can be of further assistance.