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**VIA E-MAIL and U.S. MAIL**

April 20, 2015

Board of Trustees of the City of  
Jacksonville Police and Fire Pension Fund  
1 West Adams Street  
Jacksonville, Florida 32202

**Re: Deferred Retirement Option Program (DROP) Issues**

Dear Trustees:

You have requested our opinion on interpretation of Section 121.209 of the City of Jacksonville's Code of Ordinances ("Code of Ordinances"). Specifically, you inquire as to the interrelationship between an "election" to enter DROP and the actual "date of entry" on one of four quarterly entry dates<sup>1</sup>.

**General Rules of Statutory Construction**

Courts are guided by several general rules of construction when interpreting a statute or ordinance. The same rules of construction apply to administrative agencies like the Board.

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<sup>1</sup> This opinion is limited to a discussion of law and operative legal principles. Accuracy of any particular calculations is determined by accounting review. As noted below, the City Charter vests the Board with authority to correct any errors in benefit calculation.

The starting point is the plain language of the enactment itself. *Holly v. Auld*, 450 So.2d 217 (Fla. 1984). Words are to be given their plain and ordinary meaning. Courts may look to the dictionary to determine the plain and ordinary meaning of words. *Barco v. School Board of Pinellas County*, 975 So.2d 1116 (Fla. 2008). Further, it is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence and part of the statute. *School Board of Palm Beach County v. Survivors Charter School, Inc.*, 3 So.3d 1220 (Fla. 2009). Words in a statute should not be construed as mere surplusage. *Hechtman v. Nations Title Ins. of N.Y.*, 840 So.2d 993 (Fla. 2003).

Moreover, an administrative agency's interpretation is entitled to considerable deference when it is interpreting a statute or ordinance within its purview. A reviewing court properly defers on questions of statutory interpretation to the agency to which the legislature has given responsibility and authority to administer a statute, unless that interpretation is contrary to the plain meaning of the statute, or is clearly erroneous. *State Board of Administration v. Huberty*, 46 So.3d 1144 (Fla. 1st DCA 2010).

#### **Administration of the Police and Fire Pension Fund**

In applying the above general rules of Florida law, it is next appropriate to look at the specific authority of the Board to administer the retirement system. The Board was created by special act of the Florida Legislature, codified in Chapter 22 of the City Charter. Section 22.04 outlines specific powers of the Board. In pertinent part, those powers vested in the Board by Section 22.04 are the duty and authority to:

- (a) Be the sole entity responsible for administering the Jacksonville Police and Fire Pension Fund.
- . . . .
- (g) Determine all facts with regard to any participant's age, normal retirement date, disability, amount of compensation, length of service and credited service, and date of initial coverage under the pension plan, and by application of the facts so determined and any other facts deemed material, determine a participant's amount of benefit.
- (h) Make rules and regulations for the administration of the pension plan which are not inconsistent with the terms and provisions of law.
- (i) Construe all terms, provisions, conditions, and limitations of the pension plan; and its construction thereof, made in good faith, shall be final and conclusive upon the interested parties.
- (j) Correct any defect or supply any omission or reconcile any inconsistency that may appear in the pension fund and make any equitable adjustments for any mistakes or errors made in the administration of the pension.
- (k) Determine all questions relating to the administration of the pension fund in order to promote the uniform administration of the pension fund and to effectuate its purposes and provisions.
- . . . .

After enumeration of the foregoing specific powers in Section 22.04, the legislature also provided:

The foregoing list of expressed powers is not intended to be complete or exclusive, and the board shall, in addition, have all such powers as it may reasonably determine to be necessary or appropriate to the performance of its duties under the retirement system. Any decision or judgment of the board in good faith on any questions arising hereunder in connection with the exercise of its powers shall be final, binding and conclusive upon all parties concerned.

Notably, a Florida appellate court has heretofore specifically approved the Board's construction of the plan terms and conditions pursuant of this section of the pension plan. *Starling v. Jacksonville Police and Fire Pension Board of Trustees*, 656 So.2d 289 (Fla. 1st DCA 1995).

### **The Deferred Retirement Option Program (DROP)**

The DROP provisions are outlined in Section 121.209 of the Code of Ordinances. Section 121.209 is one of the DROP's most complex provisions. Section 121.209 contains 12 subsections, more than any other section of the retirement system. If internal subsections are counted, the section contains approximately 50 subsections and subdivisions. Thus, unlike routine administrative interpretations, the Board must untangle a web of imprecise and overlapping methodologies.

The term "election" is used 11 times in Section 121.209. The term "elect" is used 9 times, although the respective terms are not necessarily used consistently. In addition, the terms "time of election", "written election" and "election process" are used as nouns, but terminology "make an election" and "may elect" are verb forms. Section 121.209(b)(3) introduces the concept of "the beginning date of the DROP period," which is defined as "the first full bi-weekly pay period after the first of January, April, July or October subsequent to the date of election to participate, or as soon as administratively practical thereafter<sup>2</sup> and shall not exceed the DROP participation period as provided in (b)(1) above."

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<sup>2</sup> Use of the phrase "as soon as administratively practical thereafter" confirms that timing is not critical, provided that maximum participation is not exceeded.

Importantly, Section 121.209(b)(4) provides that “upon electing to participate” in the DROP, the member shall submit forms “prescribed and required by the Board.” Section 121.209(b)(4), specifies, *inter alia* that the forms shall require “written election” to participate in the DROP. Yet, Section 121.209 does not require that the date of “election to participate” correspond to the “date of entry into the DROP.” Further, Section 121.209(b)(1) is, at best, ambiguous as to whether the “years of credited service at time of election” are measured based on “date of entry” into the DROP, or the date of “election to participate.” On this point, Section 121.209(b)(1) introduces the concept of “date on which the member begins participation in the DROP.” Alternatively, Section 121.209(b)(3) refers to the “beginning date of the DROP period.”

As interpreted by the Board, the length of time that a member may participate is determined by the date a member makes an “election” to enter the DROP. Administratively, a member may make “entry” into the DROP only on the first full bi-weekly pay period after the first day of January, April, July or October following date of election, “or as soon as administratively practical thereafter.”

#### **Date of “entry into the DROP” versus date of “election to participate”**

Issues have been raised as to treatment of additional service “beyond the date of entry into the DROP.” Section 121.209 provides that any additional service beyond the “date of entry” into the DROP “shall no longer accrue any additional benefits under the Pension Fund.” The terms “elect”, “date of entry,” “time of election” and “date on which the member begins participation” are not defined in Section 121.209<sup>3</sup>. As used in

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<sup>3</sup> The term “date of entry” is used only once, in the prefatory paragraph above Section 121.209(a). The term “time of election” is used only once. In the chart under Section 121.209(b)(1).

Section 121.209, these terms are ambiguous, requiring the Board to construe them using its institutional expertise and practical reality of administering the DROP<sup>4</sup>.

Florida courts, relying on the dictionary, have defined “elect” as choosing by reference a course of action. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976). The writer has been unable to locate a Florida case specifically defining the term “enter” or “entry” in context of anything akin to a DROP. However, the dictionary defines “entry” in various ways: (1) the act of entering; (2) a place of egress; (3) permission or right to enter; (4) recording something in a book or register; (5) a statement or item recorded; and (6) a person or thing entered in a contest. Section 121.209 is best defined as it has been applied by the Board as either the act of beginning DROP participation or permission to enter the DROP.

Applying the language of the ordinance, staff permits a member to make application immediately prior to attaining 20 years of service, but payment of DROP benefits does not commence until the nearest “entry” date of January, April, July or October following the completion of 20 years. Similarly, for a member to participate for the maximum 5 years in the DROP, the member must elect DROP participation prior to completion of 30 years of service. In such case, entry then occurs on the next date immediately following that is one of the four quarterly beginning dates.

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<sup>4</sup> Section 121.209(k) empowers the Board to make such rules as necessary for the effective and efficient administration of the DROP. Significantly, Section 121.209(a) provides that members may elect participation in the DROP “provided members comply administratively with the rules and regulations established by the Board for the administration of the DROP.” Likewise, Section 121.209(c) recognizes the need for rulemaking authority by the Board with regard to administration of DROP interest calculations.

For example, suppose a member hired on May 15, 1990 wishes to DROP with 30 years of service. That member must elect DROP participation no later than May 14, 2020. The first DROP check would be credited on the first full pay period after July 1, 2020, which is the next "entry" date. No credited service or average final salary would be counted between May 14, 2020 election date and the July 1, 2020 start date. Using the same hypothetical member who elects DROP in May 2010, he would begin DROP in July 2010. Unlike a 30 year employee, the date of DROP election for an employee with 20 years of service must only precede the DROP entry date. We have been advised that DROP is being administered precisely this way. (The Board may want to have its auditor perform random testing of DROP member accounts, to determine correctness of calculations and consistency of application.)

A review of the chart in Section 121.209(b)(1) clearly shows that the critical date to determine length of DROP is the "time of election." Entry or commencement of DROP payments must occur at the next quarterly entry date after both election and attainment of retirement eligibility. The language modifying entry date to include either the quarterly start date, or as soon as administratively feasible, clearly indicates a recognition that the election date measures length of the DROP period, while the entry date is simply when payments may begin to member's DROP account.

Because of the delayed DROP entry dates, as well as the administrative work necessary to calculate benefits and to offer preretirement counseling to members, a member who elects DROP in his 30th year of service may actually have more than 35 years of total service with the City. Nonetheless, as long as the time between election and DROP entry is not counted to extend the number of DROP payments, or to alter the final average salary, the period of delay appears to have been contemplated.



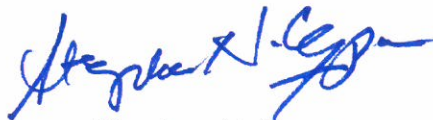
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**Summary and Conclusion**

Based upon our review of relevant DROP provisions, materials and procedures, we find them to be in accordance with standards prevailing among Florida public pension plans with DROP provisions. The ordinance, which uses both dates of "election" and dates of "entry", creates the prevailing confusion. In our judgment, the practice in place has been determined in good faith, and as such, the Board's interpretation and determination are entitled to deference.

If you have any questions or require anything further, please do not hesitate to ask.

Very truly yours,  
CYPEN & CYPEN



Stephen H. Cypen  
For the Firm

SHC/arc

cc: Robert D. Klausner, Esquire