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LEGAL MEMORANDUM

To: Tim Johnson, Executive Director, Police and Fire Pension Board of Trustees

CC: Jason Gabriel, Lawsikia Hodges, Bob Sugarman

From: Stephen Durden, Chief Assistant

Re: Bailiff Time Buy Back

Date: September 14, 2017

I. Background.

Pursuant to Chapter 67-1320, *Laws of Florida*, the Florida Legislature adopted (and approved by local referendum) the Consolidated Jacksonville Charter (Jacksonville Charter) which provides for the existence of an unclassified employment category of employees who are designed to conduct inquiries, surveys and special services while being exempt from the civil service system. See Section 17.06(e), *Jacksonville Charter*. For a number of years the Ordinance Code has provided that retired members of the Police Fire Pension Fund and the Correctional Officers Retirement Fund could work as Bailiffs while simultaneously collecting their retirement pay. Sections 120.309 and 121.105, *Ordinance Code*. Additionally, Section 121.107, *Ordinance Code*, on its face, prohibits “Bailiffs” from connecting their time if they later join the PFPF. Neither the General Employees Pension Plan nor the Correctional officers Plan has such a prohibition.

Section 16.04, *Jacksonville Charter* provides, in pertinent part, “any noncivil service employee... may elect to become a member of the retirement and pension system of the City of Jacksonville...” Section 16.04(a), *Jacksonville Charter*. The Jacksonville City Council has adopted legislation to define membership eligibility for the General Employees Pension Plan (“GEPP”) to include “[a]ppointed and elected officials and permanent employees not in the civil service system [who] opt to become members of the [GEPP] Plan, consistent with Section 16.04 of the City Charter”. Section 120.202(b), *Ordinance Code*.

The following question has been raised and is address below:

II. Question.

Whether a Bailiff can ever be eligible for buying time for service as a Bailiff.

III. Answer.

Yes, if, but only if, a particular Bailiff actually worked in a manner consistent with being a regular, full-time employee may that particular Bailiff be eligible for buying time for service as a Bailiff.

IV. Discussion.

This analysis begins with the *Jacksonville Charter*, Section 16.04(a), which reads, in pertinent part, as follows: “[A]ny noncivil service employee . . . may elect to become a member of the retirement and pension system of the City of Jacksonville. . . .” *The Charter*, then, grants to noncivil service employees the right to join the City’s retirement and pension system. In implementing Section 16.04, the City Council clarified membership eligibility of the GEPP within Section 120.202(b) which provides: “Appointed and elected officials and permanent employees not in the civil service system may opt to become members of the Plan, consistent with Section 16.04 of the City Charter. . . .” Section 120.202(b), *Ordinance Code*.

While the Ordinance Code does not define “permanent”, the term permanent under conventional labor law connotes *regular* employment on a long term and continuous basis. Black’s Law Dictionary states that “permanent employment” is “employment done on a *regular*, continuous basis, rather than hiring on a contractual basis.” *The Law Dictionary.org*. The Law Dictionary, 2015. Web. 29 July 2015. Although utilizing “Regular Full-time” in 2005, City Council similarly established the expression to mean “a budget allocated position requiring 40 hour of work per week on a *regular and recurring basis*”. See Sec. 116.1501(a), *Ordinance Code*. [emphasis added]

On the other hand, Section 116.1501, *Ordinance Code*, defines “temporary” and “part-time” employment as employment with limited or abbreviated durations. “Temporary” employment is initially limited to six months. See Section 116.1501(b), *Ordinance Code*. “Part-time” employment also limits employment within the City to be merely hourly-based. See Section 116.1501(c), *Ordinance Code*. The Florida Public Employees Relations Commission (PERC) similarly recognized “temporary” employees to “have no reasonable expectation of continued employment and who usually receive no benefits other than an hourly wage.” See *In Re Petition of Palm Beach County*, 19 FPER ¶24507 (1993). The Commission further distinguished “temporary” employees as limited in employment duration to a particular project or limited funding for mere weeks inhibit the employment from having a reasonable expectation of continuance. See *Id*.

In 1987, the Commission specifically considered the employment status of Jacksonville’s Special Purpose Employees (“SPE”) in *Florida Public Employees Council 79, AFSCME v. City of Jacksonville*, 13 FPER ¶18273 (1987). The Commission ordered that the SPEs be admitted in the AFSCME bargaining unit despite the fact they were referenced as “temporary” employees. The Commission found that due to their employment status existing for a “long-term uninterrupted” duration, the SPEs were not “temporary employees” as recognized by labor law, despite the arguments made by the City. *Id*.

PERC has relied on this opinion on multiple occasions to explain the term regular employment or to distinguish between regular and temporary employment. “For example, the Commission has determined that a ‘temporary’ employee who: (1) had been employed full-time for at least eleven months; (2) received the same hourly wage; (3) performed work similar to that

performed by regular employees under the same supervision; and (4) who could expect to remain employed as long as his performance was satisfactory, shared a community of interest with regular employees, and thus was not a temporary employee.” *In re Petition of Palm Beach County*, 19 FPER ¶ 24507. PERC may use other factors to distinguish whether an employ is in “regular” or “temporary” employment. PERC has defined as “regular” those employees “who have worked 40 or more hours on average per two week pay period for . . . 26 weeks.” *City of Miami (Department of Off Street Parking)*, 23 FPER ¶ 28288. *See, also, Metropolitan Dade County Public Health Trust*, 23 FPER ¶ 28101 (“ ‘regular full-time’ physicians . . . include all physicians regularly working forty or more hours per week pursuant to pre-arranged schedules” and “ ‘regular part-time’ physicians . . . include all physicians regularly working an average of at least forty hours per pay period (two weeks) for at least six consecutive months”). Whether full-time or part-time, these “physicians [had] an expectation of regular continued employment.” *Id.* So the term “regular” has no special meaning, other than as applied to a weekly or bi-weekly pay period.

An earlier memorandum from this office, applying PERC decisions and Section 120.202(b), *Ordinance Code*, concluded that because Community Service Officers were anticipated to remain regular, full-time employees for the Sheriff’s Office for up to five years, CSOs should be afforded benefits of retirement provided for any regular, full-time employees.

Applying this conclusion to the Bailiffs, however, is not as simple as exchanging the word “Bailiff” with the words “Community Service Officers.” The City Council has, in Section 121.107(d), identified Bailiff, as being in the class of temporary, part-time or seasonal employees. Additionally, Section 116.1502, seems to create a special employment status for Bailiffs. Bailiffs appear to be exempted from being designated as Temporary Full-time or Regular Part-time employees. Clearly, the Council sees the position Bailiff as being outside easy classification. Section 116.1501, *Ordinance Code*, defines Regular Full-time employment status as “a budget-allocated position requiring 40 hours of work per week on a regular and recurring basis.” Finally, the handbook for Bailiffs indicates that Bailiffs shall expect no more than 30 hours per week. Finally, they are not offered vacation or sick leave. They only work when called and when they choose to work.

Each and all of these factors distinguish Bailiffs from Community Service Officers. Neither the *Ordinance Code* nor the Sheriff’s manual suggests that Bailiffs have the status of “regular, full-time employment.” This does not mean that an individual Bailiff would never be categorized as a regular, full-time employee. Such a Bailiff, in order to demonstrate such status, would need to demonstrate that the Sheriff treated such Bailiff as a regular, full-time employee. Indications of that could be that such Bailiff worked at least 40 hours per week, week in and week out, for a period of time to exceed six months, or 80 hours per two-week period for a period of time to exceed six months.

On the other hand, even 40 hours per week for more than six months alone does not make the employee a regular, full-time employee. For example, if an employee worked six months at 40 hours per week then worked six months at 20 hours per week and then worked 40 hours per week for six months, it could not be concluded that the employee had a reasonable expectation of “regularly” working 40 hours per week. At the same time, using other factors used by PERC, it could not be reasonably be concluded that the 40-20-40 employee had a community of interest with the full-time, regular employees who never get to work only 20 hours per week for six months.

The Ordinance Code unquestionably declares that employees who work less than six months are temporary as opposed to “regular” employees. PERC opinions agree. Full-time requires 40 hours per week (or 80 hours per two week period). In order for a Bailiff to prove that he or she was entitled to connect time, i.e., was previously a permanent (regular), full-time employee, the Bailiff would need to show, at a bare minimum, more than six consecutive months of working not less than 40 hours per week (or not less than 80 hours per two-week pay period). Should that Bailiff’s employment record indicate periods of part-time work (less than 40 hours per week), then the Bailiff may not be able to demonstrate a reasonable expectation of working as a full-time, regular employee.

As noted, the position of Bailiff, then, is far more factually complex than that of the CSOs, because, undeniably, many Bailiffs do not work 40 hours per week and certainly do not do so on a regularly occurring basis for more than six consecutive months.

V. Conclusion.

I trust that this answers the question asked. Please do not hesitate to contact me with further questions.