Municipalities - Public Employees - Severance Pay

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Subject:
Municipalities - Public Employees - Severance Pay

Mr. Scott E. Simpson
City Attorney
City of South Daytona
Korey, Sweet, McKinnon & Simpson
595 West Granada Boulevard
Ormond Beach, Florida 32174

RE: MUNICIPALITIES – PUBLIC EMPLOYEES – SEVERANCE PAY – EARLY RETIREMENT PLAN – whether the city may award severance pay to employees hired before July 1, 2011; whether the city may adopt a new severance pay program consistent with s. 215.425, Fla. Stat.; and whether the city may adopt an early retirement plan.

Dear Mr. Simpson:

On behalf of the City of South Daytona, you have asked for an opinion on the following questions:

1. Does section 215.425, Florida Statutes, prohibit a local government from adopting a personnel policy providing payment in lieu of notice to employees who are terminated without cause or who submit a resignation?

2. If no, does section 215.425, Florida Statutes, limit the payment in lieu of notice to 20 weeks?

3. If yes, are employees who were employed by the City prior to the effective date of the amendment to section 215.425, Florida Statutes, grandfathered under the existing City's policy and therefore still entitled to receive the full payment in lieu of notice even if in excess of 20 weeks?

4. Can the City provide an early retirement program that provides benefits that exceed 20 weeks of compensation?

In sum:

1. Section 215.425(4)(a), Florida Statutes, permits a local government to adopt a personnel policy providing severance pay to employees terminated without cause or who submit a resignation.

2. Section 215.425(4)(a)1., Florida Statutes, limits such severance pay to 20 weeks.

3. The amendment to section 215.425, Florida Statutes, operated prospectively, and therefore, under the South Daytona ordinance that existed prior to the effective date of July 1, 2011, the City Manager retains the discretion to decide whether to provide severance pay to City employees who were hired before that date.

4. Section 215.425(4)(d)2., Florida Statutes, provides that an early retirement program that complies with part VII of Chapter 112, Florida Statutes, is not subject to the limitations on severance pay found in section 215.425, Florida Statutes.

You state that in South Daytona, city employees who are not in a bargaining unit serve at the pleasure of the City Manager and can be terminated from employment without cause. In 2009, the City adopted an ordinance authorizing severance pay in lieu of notice to employees who resign or who are terminated from employment without cause.[1] The municipal ordinance provides, in part: “The city manager shall, in the manager’s sole direction, be entitled to provide upon resignation and/or termination of a nonbargaining unit personnel, pay in lieu of notice, up to but not exceeding the limits set forth in subsection 2-402(c)[.]”[2]

Section 215.425, Florida Statutes, has long prohibited state and local governments from using public funds to pay additional compensation for work that has already been performed for an agreed-upon wage.[3]

“No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two-thirds of the members elected to each house of the Legislature.”[4]

In 1992, the Legislature amended the statute to add the following exemption from this general prohibition for local governments:

“The provisions of this section also do not apply to extra compensation given to county or municipal employees pursuant to policies adopted by county or municipal ordinances.”[5]

In the same bill, the Legislature amended sections 125.01, Florida Statutes, and 166.021, Florida Statutes, setting forth the powers and duties of county and municipal government, respectively, to permit programs providing extra compensation to employees after the work had been performed.[6] The South Daytona ordinance quoted above was consistent with the 1992 amendments.

In 2011, the Legislature amended section 215.425, Florida Statutes, removing the exception specifically addressed to local governments and adding provisions dealing with bonuses and severance pay. Your first three questions pertain to application of the following severance pay provisions of the statute:

“(4)(a) On or after July 1, 2011, a unit of government that enters into a contract or employment agreement, or renewal or renegotiation of an existing contract or employment agreement, that contains a provision for severance pay with an officer, agent, employee, or contractor must

include the following provisions in the contract:
1. A requirement that severance pay provided may not exceed an amount greater than 20 weeks of compensation.
2. A prohibition of provision of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.036(29), by the unit of government.
(b) On or after July 1, 2011, an officer, agent, employee, or contractor may receive severance pay that is not provided for in a contract or employment agreement if the severance pay represents the settlement of an employment dispute. Such severance pay may not exceed an amount greater than 6 weeks of compensation. The settlement may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement.
(c) This subsection does not create an entitlement to severance pay in the absence of its authorization.
(d) As used in this subsection, the term 'severance pay' means the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated."[7]

Questions One and Two

Paragraph (4)(a) clearly states that a unit of government is permitted to provide an employee with severance pay upon termination of employment, when an employment agreement has been negotiated or renegotiated after July 1, 2011, so long as the amount does not exceed 20 weeks of compensation and the employee was not terminated for misconduct.

Question Three

In 2009, when South Daytona enacted its ordinance giving the city manager the discretion to award severance pay in lieu of notice, the 1992 amendment to section 215.425, Florida Statutes (quoted *supra* on page 2), authorized municipalities to provide such extra compensation programs by ordinance as an exception to the general prohibition against compensation for work already performed. The language of the 2011 amendment, by stating that it specifically applied to employment contracts or agreements entered after July 1, 2011, and to employment disputes settled after July 1, 2011, shows that the Legislature intended it to operate prospectively.[8]

Accordingly, the 2011 amendment to section 215.425, Florida Statutes, limiting severance pay to 20 weeks, applies only to employment agreements negotiated after July 1, 2011. There is no language in the amendment disturbing any employment arrangements that were entered into pursuant to lawful ordinance prior to that date that have not been renegotiated.

Question Four

Included in the 2011 amendment, section 215.425(4)(d), Florida Statutes, states that the term "severance pay" does not encompass "[e]arly retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112[.]" This unambiguous language establishes that an early retirement program consistent with this provision would not be subject to the limitations for severance pay found in paragraph (4)(a).

Therefore, it is my opinion that section 215.425, Florida Statutes, permits the City Manager of South Daytona to award severance pay to employees who were hired prior to July 1, 2011, as authorized by then-existing statutes and municipal ordinance, and permits South Daytona to adopt a personnel policy providing severance pay in lieu of notice in an amount no greater than 20 weeks for employees hired or who renegotiate a contract after July 1, 2011, who are not discharged based upon misconduct. The statute further permits the City to adopt an early retirement program providing benefits in excess of 20 weeks of compensation so long as it is an actuarially funded pension plan subject to Part VII of Chapter 112, Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

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[1] "Wages in lieu of notice" are payments for a specified period of time made to employees who are discharged immediately without cause. Such employees remain on the payroll for a period of time in which they would ordinarily have been working after giving notice. *See* Op. Att'y Gen. Fla. 91-51 (1991).

[2] Art. VIII, s. 2-402(d), South Daytona Code of Ordinances.

[3] This office has previously stated that s. 215.425, Fla. Stat., is intended to "carry out a basic and fundamental principle that public funds may be used only for a public purpose and it is contrary to this policy to use public funds to give extra compensation for work which has already been performed for an *agreed upon wage*." (emphasis in original) Op. Att'y Gen. Fla. 97-21 (1997).

[4] This prohibition was originally enacted in Art. XVI, s. 11 of the 1885 Fla. Const., and was converted to statute by Art. XII, s. 10 of the 1968 Constitution.

[5] Section 3, Ch. 92-90, Laws of Fla.

[6] Sections 1 and 2, Ch. 92-90, Laws of Fla.

[7] Section 1, Ch. 2011-143, Laws of Fla.

[8] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Moreover, a substantive law will not be applied retroactively when this would impair an existing right or duty. *See id.*; *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 194-95 (Fla. 2011); *Morris v. Swanson*, 940 So. 2d 1256, 1257-58 (Fla. 1st DCA 2006); Op. Att'y Gen. Fla. 13-27 (2013). South Daytona's 2009 ordinance stated that the city manager was "entitled" to provide severance pay to employees who resigned or were terminated.