Collective Bargaining, retirement

Number: INFORMAL

Date: July 11, 2007

Mr. James E. Baker, Esq.
Weiss, Serota, Helfman, Pastoriza,
Cole & Boniske, P.L.
2525 Ponce De Leon Boulevard
Suite 700
Coral Gables, Florida 33134

Dear Mr. Baker:

As Special Labor and Employment Counsel for the Town of Juno Beach, Florida, you have asked for this office's assistance in determining whether section 121.051(2)b.4., Florida Statutes, providing for compulsory membership in the Florida Retirement System, conflicts with section 447.309(1) Florida Statutes, authorizing collective bargaining for public employees.

According to your letter, you are Special Labor and Employment Counsel for the Town of Juno Beach, Florida. You have written to ask for this office's comments on a perceived conflict in state laws between section 447.309(1), Florida Statutes, and section 121.051(2)b.4., Florida Statutes.

Article I, Section 6, of the Florida Constitution states:

"Right to work.--The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

As Florida courts have held, the right to bargain is a fundamental right guaranteed to public employees by the constitution[1] and requires a showing of special circumstances or compelling state interest to justify its abridgement; however, the right to bargain does not encompass all subjects within the scope of bargaining.[2]

Part II, Chapter 447, Florida Statutes, implements Article, I, Section 6, Florida Constitution, with respect to public employees.[3] The Legislature has stated that it is the policy of this state

"to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."[4]

Section 447.301, Florida Statutes, provides public employees with the "right to form, join, and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing."[5] Further, public employees have the right to be represented by an employee organization and to negotiate collectively through a certified bargaining agent with

their public employer for the terms and conditions of their employment.[6] According to your letter, the Palm Beach County Police Benevolent Association has recently been certified as bargaining agent for all regular full and part-time permanent and probationary police officers, police investigators, police sergeants, communications records specialists, and communications record supervisors employed by the Town of Juno Beach. All of the sworn personnel are members of the Florida Retirement System under Chapter 121, Florida Statutes.

Florida courts have determined that retirement benefits and pension plans are appropriate subjects for collective bargaining.[7] Since private employees are entitled to collectively bargain as to retirement benefits, so too are public employees.[8]

Section 121.051, Florida Statutes, describes participation in the Florida Retirement System. Subsection (2) of the statute controls optional participation and allows "[t]he governing body of any municipality . . . in the state [to] elect to participate in the system . . . ."[9]

Prior to being approved to participate in the Florida Retirement System under section 121.051(2)(b)1., Florida Statutes, the governing body of the municipality is required to submit a certified financial statement to the Department of Management Services showing the condition of the local retirement system. Any city that has an existing retirement system covering the employees in the units that are to be brought within the Florida Retirement System may only participate after conducting a referendum in which the employees in the affected units have the right to participate. Only those employees that elect coverage under the Florida Retirement System by affirmative vote in the referendum are eligible for coverage under Chapter 121, Florida Statutes, and those units that do not participate or do not elect coverage by the Florida Retirement System shall remain in their present systems and are not eligible for coverage under Chapter 121.

The statute requires that "[a]fter the referendum is held, all future employees shall be compulsory members of the Florida Retirement System."[10] Pursuant to section 121.051(2)(b)4., Florida Statutes:

"Once this election is made and approved it may not be revoked . . . and all present officers and employees electing coverage under this chapter and all future officers and employees shall be compulsory members of the Florida Retirement System."

A legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.[11]

In Attorney General’s Opinion 89-90, this office considered whether section 185.15, Florida Statutes, precluded police officers who withdrew from the retirement fund, but who were still employed by the city from rejoining the police officers' retirement trust fund. Section 185.15, Florida Statutes, authorizes municipal police officers to reject participation in the municipal police officers' retirement trust fund created and administered under chapter 185 and to receive a refund from the retirement fund of all deposits made to the fund. Pursuant to the statute "[t]henceforward no withholding shall be made from such salary and all police officers who have given such notice shall be barred from participating in the retirement system." In considering the scope of this statutory language, this office concluded that chapter 185 makes no provision for

reentry into the retirement system for those officers who have elected not to participate pursuant to section 185.15, Florida Statutes. The opinion notes that the Legislature has prescribed the manner in which this system is to be administered and made no provision for other options.

As this office has previously concluded, the fact that labor negotiations may result in agreements which conflict with statutes or ordinances does not limit the scope of such negotiations, but rather may result in recommendations by the chief executive officer for legislative changes. In Attorney General's Opinion 76-174, the question presented was whether a welfare trust fund could be established as part of a compensation package for employees of the school board through collective bargaining negotiations. While the opinion recognizes that a welfare trust fund established pursuant to a collectively bargained agreement would appear to be a proper subject of negotiations pursuant to part II, chapter 447, Florida Statutes, and also a proper activity in which the school board could engage, the opinion notes that if the agreement conflicts with any specific statute or ordinance, the agreement would not be operative until the conflicting statute or ordinance is amended to encompass the terms of the agreement.

As these earlier opinions recognize, a broad scope for labor negotiations serves the useful purpose of fostering recommendations for statutory changes which will allow agreements to be effectuated. If negotiations result in an agreement that conflicts with any specific statute, it is the duty of the chief executive officer to submit to the appropriate governmental body having amendatory power a proposed amendment to the conflicting law in order to effectuate the terms of the collectively bargained agreement. However, until such amendment is enacted, the conflicting provision of the agreement does not become effective.[12]

Therefore, it would appear that sections 121.051(2)b.4. and 447.309(1), Florida Statutes, do not conflict but may be read together to allow collective negotiations on the topic of participation in and benefits to be provided in retirement plans for municipal police officers.

This informal opinion was prepared by the Department of Legal Affairs in an effort to be of assistance to you. The conclusions herein are those of the writer and do not constitute a formal Attorney General's Opinion.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/t
---

[1] *See, e.g., Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority,* 522 So. 2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487 (Fla. 1981); *Dade County Classroom Teachers' Association v. Ryan,* 225 So. 2d 903 (Fla. 1969).

[2] *City of Miami v. F.O.P. Miami Lodge 20*, 571 So. 2d 1309 (Fla. 3rd DCA 1989), *approved* 609

So. 2d 31 (Fla. 1992).

[3] Section 447.201, Fla. Stat.

[4] *Id*.

[5] Section 447.301(1), Fla. Stat.

[6] Section 447.301(2), Fla. Stat.

[7] *See City of Tallahassee v. Public Employees Relations Commission,* 393 So. 2d 1147 (Fla. 1st DCA 1981). *Cf., Retail Clerks Union, No. 1550 v. NLRB,* 330 F. 2d 210 (D.C. Cir. 1964).

[8] *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903 (Fla. 1969).

[9] Section 121.051(2)(b)1., Fla. Stat.

[10] Section 121.051(2)(b)2., Fla. Stat.

[11] *Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State,* 335 So. 2d 815, 817 (Fla. 1976); Ops. Att'y Gen. Fla. 00-25 (2000) (specific enumeration in statute of those projects for which tourist development tax revenues may be spent implies the exclusion of others); and 00-18 (2000). *And see*, Op. Att'y Gen. Fla. 91-68 (1991) and Inf. Op. to William H. Andrews, dated January 3, 2006, concluding that in the event that a county officer chooses not to participate in the Florida Retirement System, county funds which had been allocated to fund the employer's portion of the officer's retirement plan could not be used to fund an alternate retirement plan.

[12] Section 447.309(3), Fla. Stat.