

Police and firefighters' pension board, appointments

Number: INFORMAL

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Mr. W. Michael Brinkley
Plantation Assistant City Attorney
200 East Las Olas Boulevard
Suite 1800, New River Center
Fort Lauderdale, Florida 33301

Dear Mr. Brinkley:

You ask whether the members of the city council may appoint the final members to the city employees' retirement board, the police officers' retirement board and the firefighter's retirement board should the members of such boards be unable to agree upon the appointment of a final member. You also ask whether the city council may appoint the attorney and actuary for such boards. Attorney General Butterworth has asked me to respond to your letter.

You have not provided this office with any information regarding the creation of the city employees' retirement board. Therefore, any comment by this office must, in the absence of such information, be general in nature. A municipality establishing a retirement system for its employees under its home rule powers, however, would appear to have the authority to prescribe the manner in which the governing board for the system or how its staff will be appointed in the absence of an applicable statute prescribing the manner of appointment of such individuals.

Chapters 175 and 185, Florida Statutes, respectively, create a uniform pension and retirement system for firefighters and police officers in a municipality and establish minimum standards for the operation and funding of the trust funds.[1] In considering these two chapters, the court in *Florida League of Cities, Inc. v. Department of Insurance and Treasurer*,[2] stated:

"Both chapters authorize two types of retirement or pension plans. One type is known as "chapter plans" and the other as "local law plans." Chapter plans are those created under chapters 175 and 185, and the provisions of those chapters are controlling on the plans' terms, conditions, and benefits. Local law plans are those created either by special act of the legislature or by municipal ordinance and contain provisions relating to terms, conditions, and benefits that may substantially differ from many requirements found in chapters 175 and 185 for chapter plans."

The court determined that the individual sections in Chapters 175 and 185, Florida Statutes, are applicable to local law plans only if there is a specific provision expressly making them applicable to such plans.[3] This conclusion was based on a recognition of a municipality's constitutional and statutory home rule powers. Thus, in the absence of language specifically making a section of these chapters applicable to a local law plan, the statute does not control such a plan.

Section 185.05(1), Florida Statutes, provides for the appointment of the board of trustees of the police officers' retirement trust fund, stating in pertinent part:

"[T]he board of trustees shall consist of five members, two of whom, unless otherwise prohibited by law, shall be legal residents of the municipality, who shall be appointed by the legislative body of the municipality, and two of whom shall be police officers as defined in s. 185.02 who shall be elected by a majority of the police officers who are members of such plan. The fifth member shall be chosen by a majority of the previous four members, and such person's name shall be submitted to the legislative body of the municipality. Upon receipt of the fifth person's name, the legislative body of the municipality shall, as a ministerial duty, appoint such person to the board of trustees as its fifth member. . . ."[4]

Section 185.29, Florida Statutes, provides for the city attorney to represent the board of trustees unless the board of trustees elects to employ independent legal counsel, together with such other professional, technical, or other advisers as the board of trustees deems necessary.[5]

In considering the provisions of Chapters 175 and 185, Florida Statutes, this office has stated that where the Legislature has directed how a thing shall be done, it is implicit that no other manner is allowed.[6] The Legislature has prescribed the manner in which the boards of trustees of police officers' and fire-fighters' retirement funds created pursuant to Chapters 175 and 185, Florida Statutes, are to be selected. Moreover, both Chapters 175 and 185 provide for selection of the attorney for such boards and for the employment of professional personnel by the board of trustees. I find nothing in Chapter 175 or Chapter 185 which grants a municipality power to alter such provisions.

Accordingly, for those charter plans adopted by a municipality, the municipality would appear to be bound by the provisions of Chapters 175 and 185, Florida Statutes.

As noted above, however, a municipality may adopt a local law plan which would be governed by the provisions of its enabling act. Thus, for example, this office stated in Attorney General Opinion 91-15 (1991) that despite the provisions of section 185.15 prohibiting reentry into a retirement fund by police officers who previously had elected not to participate, a municipality could amend its local law plan to permit such reentry. If a municipality with a local law plan wishes to participate in the distribution of the tax funds established in Chapters 175 and 185, however, its pension plan must meet the standards specified in sections 175.351 and 185.35, Florida Statutes.[7]

I hope that the above informal advisory comments may be of some assistance to you and the city in resolving these issues.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See ss. 175.021 and 185.01, Fla. Stat.

[2] 540 So. 2d 850, 853 (Fla. 1st DCA 1989).

[3] *Id.* at 859.

[4] See *also* s. 175.061(1), Fla. Stat., which contains similar provisions for the board of trustees of the municipal fire-fighters' pension board and the selection of the fifth member by the other four members of the board of trustees.

[5] See *also* s. 175.291, Fla. Stat., containing a similar provision for the board of trustees' of the municipal fire-fighters' pension fund.

[6] See Op. Att'y Gen. Fla. 93-76 (1993), stating that investment of the police officers' and firefighters' trust funds were limited to those investments prescribed in Chs. 175 and 185, Fla. Stat., and Op. Att'y Gen. 89-90 (1989), stating that a charter plan of a municipality was subject to the minimum requirements therein and thus police officers who had previously elected not to participate in the plan were permanently barred from reentry. *And see* Ops. Att'y Gen. Fla. 93-82 (1993) and 92-35 (1992). See *also* *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (when the Legislature has prescribed the mode, that mode must be observed).

[7] See s. 175.351, Fla. Stat., setting forth the standards that must be met if a local pension fund for firefighters wishes to participate in the distribution of the tax fund established in sections 175.101-175.121 and 175.131-175.151, Fla. Stat.; and s. 185.35, Fla. Stat., setting forth the standards for participation in the tax distribution provided in ss. 185.07, 185.08, and 185.09, Fla. Stat.