

Item 5.e.
Sugarman, Susskind, Braswell & Herrera

Item 5.e.i.

Petition for Disability Benefit Enhancements

Law Offices
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Lynn Gelin
City Attorney
City of Delray Beach
City Hall
100 NW 1st Avenue
Delray Beach, Florida 33444

February 8, 2022

**Re: Former Police Officer Fred Ziegler
Petition for Disability Retirement Benefits Enhancement**

Dear Ms. Gelin:

On behalf of Fred Ziegler, a disability retiree, I am attaching a Petition for Disability Retirement Benefits Enhancement. We would like to be heard at a meeting of the Board of Trustees of the City of Delray Beach Police Retirement System. Thank you for your courtesy and consideration.

Respectfully submitted,

/s/ Mark J. Berkowitz
Mark J. Berkowitz, on behalf
of Fred Ziegler

cc: Plan Administrator
Fred Ziegler

**CITY OF DELRAY BEACH
BOARD OF TRUSTEES FOR THE POLICE RETIREMENT SYSTEM**

**FRED ZIEGLAR,
Petitioner,**

vs.

**BOARD OF TRUSTEES
CITY OF DELRAY BEACH,
POLICE RETIREMENT
SYSTEM,
Respondent.**

**PETITION FOR DISABILITY RETIREMENT BENEFITS ENHANCEMENT,
PURSUANT TO THE APPLICABLE PLAN**

Petitioner, FRED ZIEGLAR, by his undersigned counsel, hereby files this Petition for Disability Retirement Benefits Enhancement, Pursuant to the Applicable Plan Documents, before the Board of Trustees, City of Delray Beach, Police Retirement System; and he further seeks a declaration of his rights and benefits, as a retirement disability annuitant, under the terms and provisions of the applicable Plan documents, under the City of Delray Beach ("CITY"), Police Retirement System. In support of this Petition for Disability Retirement Benefits Enhancement, the Petitioner, FRED ZIEGLAR, states as follows:

1. Chapter 185 of the Florida Statutes, provides for uniform retirement systems for municipal police officers.
2. Petitioner, FRED ZIEGLAR ("ZIEGLAR"), is former CITY Police Officer, and he is also a disability retirement annuitant, under the City of Delray Beach Police Retirement System

(hereinafter, referred to as, the “Plan”); and moreover, he retired prior to the effective date of the 1999 Ordinance,¹ *see*, the Plan Section 33.689, as amended.

3. At its meeting, held on September 22, 1999, the Board of Trustees of the Plan, interpreted the relevant section of the Ordinance, at Section 29-99, to mean that all members, who retired prior to the date of the 1999 Ordinance, including those disability retirees, such as the Petitioner, herein, were indeed eligible for the pension benefit enhancement.
4. This analysis was confirmed in a formal legal opinion, wherein, on May 15, 2020, the former counsel to the Board of Trustees, City of Delray Beach, Police Retirement System, Ms. Janice Rustin, issued an Opinion Memorandum,² on the applicability of the benefit retirement enhancement, for disability retirement annuitants.
5. Ms. Rustin concluded, in her Legal Opinion Memorandum, that disability retirement annuitants, who retired prior to 1999, are indeed entitled to the enhanced retirement pension benefit, and in support of this conclusion, she stated, as follows:

... at its meeting on September 22, 1999, the Plan Board of Trustees interpreted the relevant section of Ordinance 29-99 to mean that all members who retired prior to the effective date of the 1999 ordinance, including disability retirees, were eligible for the benefits enhancement. Although the minutes do not describe the full details of the Board’s motion, the memo from the Plan Administrator to the City clarifies that the Board’s motion included beneficiaries of disability retirees. See Memo dated June 16, 2000.

*

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*

... Based upon the Plan documents stated above, the beneficiaries of the two disability retirees are entitled to the retirement benefit enhancement adjustment that should have been paid to them on the anniversary of the disability retirees’ first benefit payment.

¹ The Petitioner retired from active service on August 1, 1990.

² Counsel’s Opinion Letter is attached hereto, as **EXHIBIT A**.

The adjustment should be based on the benefits received by the beneficiary at the end of the preceding year. See Ord. 29-99. The adjustment percentage should be equal to the benefit enhancement percentage in effect on the date they were due to receive it:

For adjustments that should have been made on or after July 7, 2015, the retirement benefit enhancement is 1% of the member's benefits.

For adjustments that should have been made prior to July 6, 2015, the retirement benefit enhancement is a percentage of the member's benefits that is based on the annual premium tax revenue as reflected in that year's actuarial valuation report

The adjustment amount should also include interest at a rate determined by the Board. The Plan does not address the rate of interest for a payment correction of this nature, but it does provide that interest paid to members for a refund of their contributions is either 3% or 5% depending on the member's years of continuing service, See Section 33.62 (G)(1). The Board may want to consider this section when determining the rate of interest to apply to an adjustment of a retirement benefit enhancement.

6. In her formal Legal Opinion, Ms. Ruskin also referenced the Minutes of the Plan Board of Trustees Meeting, which was held on September 22, 1999, which specifically held, that those disability retirees, who had retired prior to the effective date of the 1999 Ordinance, were indeed entitled to receive the retirement benefit enhancement.³

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Mr. Frysinger made the motion that on the advice of counsel the Board reaffirms that anyone who retired prior to the effective date of Ordinance 29-99, including disability retirees, not affected by the change, which would otherwise prohibit disability retirees after that date from receiving the benefit enhancement. The Board has previously, on more than one occasion, brought this issue to the City's attention in order to seal the number of retirees who went out prior to the ordinance change. Off. Arena seconded the motion. Mr. Levitt opposed. Motion passes.

³ The Minutes of the Board's September 22, 1999 Meeting, is attached hereto, as **EXHIBIT B**.

7. Finally, in a decision of the First District Court of Appeal, in Department of Management Services v. City of Delray Beach, 40 So.3d 835 (Fla. 1st DCA 2010), the Court rejected the CITY's position, and upheld the administrative determination of the Florida Department of Management Services, finding that there was no impairment of vested pension rights, by upholding the provisions of the 1999 ordinance, whereby disability retirement annuitants, retiring prior to 1999, were indeed entitled to the pension benefit enhancement. The Petitioner maintains that the same analysis should apply in the instant case before the Plan Board of Trustees.⁴
8. On January 14, 2022, undersigned counsel for the Petitioner contacted the Plan Administrator, Ms. Lisa Castronovo, regarding the pending pension enhancement issue, pertaining to the Petitioner, and describing the nature of his claim, in an effort to secure the enhanced pension benefits for the Petitioner.⁵ However, there has been no response to our inquiry, from the Plan Administrator.
9. Therefore, the Petitioner, herein, seeks the placement of his Petition to Receive Enhanced Disability Pension Benefits on the Board of Trustees' Agenda, before the City of Delray Beach, Police Pension Board, on the earliest possible date with the requisite notice, to all parties, for due and proper consideration of this Petition and the substantive relief requested herein.

⁴ A copy of the decision of the First District Court of Appeal, is attached hereto, as **EXHIBIT C**.

⁵ The January 14, 2022, e-mail communication to Ms. Castronovo, as Plan Administrator, is attached hereto, as **EXHIBIT D**. The correspondence was originally sent to Ms. Ruskin, however, Ms. Ruskin indicated that she was no longer counsel for the Plan Board of Trustees, and therefore, the correspondence was sent to the Plan Administrator.

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Mark J. Berkowitz, on behalf
of Fred Ziegler

cc: Plan Administrator
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... Based upon the Plan documents stated above, the beneficiaries of the two disability retirees are entitled to the retirement benefit enhancement adjustment that should have been paid to them on the anniversary of the disability retirees’ first benefit payment.

¹ The Petitioner retired from active service on August 1, 1990.

² Counsel’s Opinion Letter is attached hereto, as **EXHIBIT A**.

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For adjustments that should have been made prior to July 6, 2015, the retirement benefit enhancement is a percentage of the member's benefits that is based on the annual premium tax revenue as reflected in that year's actuarial valuation report

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³ The Minutes of the Board's September 22, 1999 Meeting, is attached hereto, as **EXHIBIT B**.

7. Finally, in a decision of the First District Court of Appeal, in Department of Management Services v. City of Delray Beach, 40 So.3d 835 (Fla. 1st DCA 2010), the Court rejected the CITY's position, and upheld the administrative determination of the Florida Department of Management Services, finding that there was no impairment of vested pension rights, by upholding the provisions of the 1999 ordinance, whereby disability retirement annuitants, retiring prior to 1999, were indeed entitled to the pension benefit enhancement. The Petitioner maintains that the same analysis should apply in the instant case before the Plan Board of Trustees.⁴
8. On January 14, 2022, undersigned counsel for the Petitioner contacted the Plan Administrator, Ms. Lisa Castronovo, regarding the pending pension enhancement issue, pertaining to the Petitioner, and describing the nature of his claim, in an effort to secure the enhanced pension benefits for the Petitioner.⁵ However, there has been no response to our inquiry, from the Plan Administrator.
9. Therefore, the Petitioner, herein, seeks the placement of his Petition to Receive Enhanced Disability Pension Benefits on the Board of Trustees' Agenda, before the City of Delray Beach, Police Pension Board, on the earliest possible date with the requisite notice, to all parties, for due and proper consideration of this Petition and the substantive relief requested herein.

⁴ A copy of the decision of the First District Court of Appeal, is attached hereto, as **EXHIBIT C**.

⁵ The January 14, 2022, e-mail communication to Ms. Castronovo, as Plan Administrator, is attached hereto, as **EXHIBIT D**. The correspondence was originally sent to Ms. Ruskin, however, Ms. Ruskin indicated that she was no longer counsel for the Plan Board of Trustees, and therefore, the correspondence was sent to the Plan Administrator.

Disability Retirement Benefits

**Request for a Hearing before
the City Police Retirement System Board of Trustees**

Dear Ms. Gelin:

Please see the attached correspondence, which is being sent on behalf of Mr. Fred Ziegler.

submitted,

Respectfully

Mark J. Berkowitz, P.A.
(954) 527-0570 (o)
(954) 294-9132 (c)

WHEREFORE, the Petitioner, herein, FRED ZIEGLAR, respectfully requests that the Board of Trustees, City of Delray Beach, Police Retirement System, grant his Petition for Disability Retirement Benefits Enhancement, Pursuant to the Applicable Plan Documents, under the 1999 Ordinance, and proceed to recalculate his disability pension retirement benefits, given the circumstances, that he retired prior to the date of the applicable 1999 Ordinance, and further that relief be granted in accordance with the Opinion of Plan Counsel and the prior Board Minutes; hence, Petitioner requests that applicable relief, be granted, including the recovery of reasonable costs and interest.

Respectfully submitted,

Mark J. Berkowitz, P.A.
Attorney for Petitioner,
Fred Ziegler
One Ten Tower
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Suite 1700
Ft. Lauderdale, Florida 33316
(954) 527-0570 Telephone
(954) 281-5881 Telecopier
E-Mail: labor@markjberkowitz.com
Fla. Bar No. 369391

/s/ Mark J. Berkowitz
By: Mark J. Berkowitz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by certified mail, on this 8th day of February, 2022, to Lisa Castronovo, Plan Administrator, City of Delray Beach, Police Retirement System, City Hall, 100 NW 1st Avenue, Delray Beach, Florida 33444, and to

Lynn Gelin, City Attorney, for the City of Delray Beach, City Hall, 100 NW 1st Avenue, Delray Beach, Florida 33444.

/s/ Mark J. Berkowitz
By: Mark J. Berkowitz

EXHIBIT A

Reply To: West Palm Beach office

MEMORANDUM

TO: Board of Trustees, Police Officers Retirement System

FROM: Janice Rustin, Esq.

DATE: May 15, 2020

SUBJECT: Retirement benefit enhancement for beneficiaries of disability retirees

At the February 25, 2020 Board meeting, a question was raised as to whether the beneficiaries of two disability retirees who retired between 1993 and 1999 are entitled to a retirement benefit enhancement. Upon review of the history of the Plan and the minutes from past Board meetings, it is our opinion that these beneficiaries are entitled to the retirement benefit enhancement, and that they should have had their retirement benefit adjusted annually on the anniversary of the disability retiree's first benefit payment. The adjustment should be equal to the benefit enhancement percentage that was in effect at the date they were due to receive it and should be compounded annually.

Background

On August 17, 1999, Plan Section 33.689 was amended to expressly state that disability retirees and their beneficiaries are not eligible to receive a retirement benefit enhancement. See Ord 29-99. However, at its meeting on September 22, 1999, the Plan Board of Trustees interpreted the relevant section of Ordinance 29-99 to mean that all members who retired prior to the effective date of the 1999 ordinance, including disability retirees, were eligible for the benefit enhancement. Although the minutes do not describe the full details of the Board's motion, the memo from the Plan administrator to City clarifies that the Board's motion included beneficiaries of disability retirees. See Memo dated June 16, 2000.

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See Things Differently®

In 2016, the Plan section defining the amount of the retirement benefit enhancement was revised to limit the adjustment to 1% of benefits. This change became effective July 7, 2015. Prior to that date, the annual benefit amount was tied to the annual premium tax revenues, but not to exceed 4%. This amount was reflected in the annual actuarial valuation report.

Calculating the amount due

Based on the Plan documents stated above, the beneficiaries of the two disability retirees are entitled to the retirement benefit enhancement adjustment that should have been paid to them on the anniversary of the disability retirees' first benefit payment. The adjustment should be based on the benefits received by the beneficiary at the end of the preceding plan year. See Ord. 29-99. The adjustment percentage should be equal to the benefit enhancement percentage in effect on the date they were due to receive it:

- For adjustments that should have been made on or after July 7, 2015, the retirement benefit enhancement is 1% of the member's benefits.
- For adjustments that should have been made prior to July 6, 2015, the retirement benefit enhancement is a percentage of the member's benefits that is based on the annual premium tax revenues as reflected in that year's actuarial valuation report.

The adjustment amount should also include interest at a rate determined by the Board. The Plan does not address the rate of interest for a payment correction of this nature, but it does provide that interest paid to members for a refund of their contributions is either 3% or 5% depending on the member's years of continuing service. See Section 33.62(G)(1). The Board may want to consider this section when determining the rate of interest to apply to an adjustment of a retirement benefit enhancement.

A copy of the Board minutes from 1999, the text of Plan Section 33.689 adopted in 1999 (and as amended in 2012 and 2015), and the June 16, 2006 memo from the Pension administrator to the City are attached to this memo for your convenience.

EXHIBIT B

CITY OF DELRAY BEACH
POLICE & FIREFIGHTERS RETIREMENT SYSTEM

MINUTES OF
SEPTEMBER 22, 1999

MEMBERS: Off. Jeroloman, Lt. Ligouri, Jack Frysinger, Robert Levitt, Capt. Davis, Chief Wigderson, Off. Arena

Steve Cypen, Board Counsel

ABSENT: Chief Adams, Mayor Alperin

GUESTS: Joe Safford, Finance Director, Lt. Tabeek & Chief Henriques, F.D.; Al Lewis & Bob Slyvestor (Retirees)

Capt. Davis, Vice Chairman, called the meeting to order at 3:05pm. A roll call was taken of members and guests.

Capt. Davis suggested that the agenda be amended to add the following: Approve DROP Disbursement to Douglas Trawick (\$215,739.53) and Alfred Damato (\$169,810.42). Approve Warrants 407 and 408. 2 memos from Finance: Grant exception for the first year of the change (adjustment date) so 1999 benefit enhancement would not be missed; and Retirement benefit enhancement applicable to current disability retirees.

Mr. Frysinger made the motion to accept the amended agenda. Mr. Levitt seconded the motion. None opposed.

1. APPROVE JUNE 23 AND AUGUST 13, 1999 MINUTES:

The minutes of the June 23, 1999 meeting were reviewed and only grammatical changes will be necessary. Mr. Frysinger made the motion to accept the minutes. Off. Jeroloman seconded the motion. None opposed.

The minutes of the August 13, 1999 meeting were reviewed and only grammatical changes will be necessary. Mr. Levitt made the motion to accept the minutes. Mr. Frysinger seconded the motion. None opposed.

2. RETIREMENT ENHANCEMENT (FIRST YEAR):

Mr. Safford stated that on September 10th. he sent a memo to Chief Adams concerning the applicability of the retirement benefit enhancement the first year of implementation where the effective date was changed from October 1st. following 25 years from date of hire; the date was changed to read anniversary date of the employees first retirement payment. He is requesting that the Board make the determination as to whether an exception should be granted for the first year of the change in the adjustment date so retirees do not miss their 1999 Retirement Benefit Enhancement. (See attached memo)

Mr. Cypen stated that at the August meeting he had made the Board aware that by changing the wording of the ordinance, as suggested by the City, there would always be someone that would be affected by not receiving their enhancement on a specific date. He stated that he requested the City Attorney add a clause that would give the Board, in the first year, the discretion that if in the event the new date unjustly affects someone the Board would have the authority to make an adjustment. The City refused and told him that

2. RETIREMENT ENHANCEMENT (FIRST YEAR): cont'd...

this change was negotiated and agreed upon by both sides. He made the Board aware that after the fact there would be nothing that they could do to remedy the problem.

Lt. Ligouri stated that the original intent was to have the benefit enhancement commence one month after the person reached the 25 anniversary date not payment anniversary.

Mr. Safford suggested that he would draft a memo to the City Attorney requesting that the Board be given the authority to prorate the retirement benefit enhancement only for those people who are retired and would have received the enhancement on October 1.

Off. Arena made a motion authorizing Mr. Safford to draft the memo to the City Attorney and present it to the Board for their approval at the October meeting. Lt. Ligouri seconded the motion. None opposed.

3. RETIREMENT ENHANCEMENT (DISABILITY RETIREES):

Mr. Safford stated that Ordinance 29-99 has eliminated any retirement benefit enhancements to disability retirees. In the backups of the ordinance which was presented to the City Commission that the change was a clarification of the 175-185 Agreement (1993). Up to the time of the passage of the ordinance, no disability retiree had ever received a benefit enhancement. The City now feels, with the passage of Ordinance 29-99 clarification of the true intent of 175-185 agreement has been made and no one has been affected because there were no eligible recipients.

Mr. Safford is requesting that the Board advise whether or not the Retirement Benefit Enhancement should be applied to those disability retirees that retired prior to the clarification provided in Ordinance 29-99.

Mr. Cypen stated that the original agreement the benefit enhancement did not apply to disability. However, when the ordinance was adopted it did not have the exclusion of disability retirees, making it applicable to everyone. The Board immediately requested that the City change the wording of the ordinance. The City's response was that pensions were no longer negotiable. Clarification is not necessary because there is nothing that is unclear.

Mr. Frysinger made the motion that on the advice of counsel the Board reaffirms that anyone who retired prior to the effective date of Ordinance 29-99, including disability retirees, not affected by the change which would otherwise prohibit disability retirees after that date from receiving the benefit enhancement. The Board has previously, on more than one occasion, brought this issue to the City's attention in order to seal the number of retirees who went out prior to the ordinance change. Off. Arena seconded the motion. Mr. Levitt opposed. Motion passes.

4. THIRD PARTY ADMINISTRATION:

Mr. Safford stated that the General Employee Pension Plan is utilizing the ICMA as a third party administrator for the DROP Plan participants. By utilizing the ICMA, a person can control his own investment, call on a daily basis and receive balance information, and the account will be under the control of the retiree.

NOT
TRUE
PAID TO
93
RECD 5%
DISABILITY
RETIREES

4. THIRD PARTY ADMINISTRATION: cont'd...

Mr. Cypen stated that ICMA is a well known company in this field. However, the ordinance would have to be amended because presently, the ordinance states that the DROP Plan is invested in the same manner as the rest of the fund. He suggested that the Board wait for further information on the history of ICMA.

Mr. Safford again informed the Board that the problems with First Union and Genysis still exist and there seems to be no end to the monthly problems.

Mr. Safford stated that First Union is planning on making a change soon and he will keep the Board apprised of the situation. If the change has no affect on their performance, then he will make the recommendation that the process be moved in-house (Finance Department).

5. OTHER BUSINESS:

-Accept Disability Retirement Application: Sgt. William Berry (PD) & Firefighter Ronald Pangburn (FD) - Mr. Frysinger made the motion to accept the submitted applications. Chief Wigderson seconded the motion. None opposed

(Note: Mr. Pangburn submitted his application prior to the effective date (September 1st.) of Ordinance 29-99. If granted, the 75% disability would apply.)

-Approve Disbursements of DROP Account to Douglas Trawick (\$215,739.53) and Alfred Damato (169,810.42) (Warrants 405 & 406): Off. Arena made the motion to approve the disbursement and warrants. Mr. Frysinger seconded the motion. None opposed.

-Approve Warrants 404, 407 & 408: Officer Arena made the motion to approve payment of warrants. Mr. Frysinger seconded the motion. None opposed.

The meeting adjourned 4:50pm.

CITY OF DELRAY BEACH POLICE & FIREFIGHTERS RETIREMENT SYSTEM

The undersigned are the Secretary and Chairman of the Police and Firefighters Retirement System, Board of Trustees, and the information provided herein are the Minutes of the Meeting of said body for September 22, 1999, which minutes were formally approved and adopted by the Police and Firefighters Retirement System, Board of Trustees on October 20, 1999, Battalion Chief William Adams, Chairman and Officer Salvatore Arena, Secretary.

Bill Adams (acu)
Battalion Chief William Adams, Chairman

Sgt Arena (acu)
Officer Salvatore Arena, Secretary

NOTE TO THE READER: If the minutes that you have received are not complete as indicated above, then this means that these are not the official minutes of the Police and Firefighters Retirement System, Board of Trustees. They will become official minutes only after they have been reviewed and approved, which may involve some amendments, additions or deletions to the minutes as set forth above.

COPIES TO:

Members of the Board
City Commissioners
City Manager, David Harden
City Attorney, Susan Ruby

Asst. Finance Director, Melina Walinski
Finance Department, Sherry Muchlburg
Finance Director, Joe Safford
Police & Fire Bulletin Boards

EXHIBIT C

Document:

Dep't of Mgmt. Servs. v. City of Delray Beach, 40 So. 3d 835

Actions

      Go to Page Page # ^ v Search Document**Dep't of Mgmt. Servs. v. City of Delray Beach, 40 So. 3d 835**[Copy Citation](#)

Court of Appeal of Florida, First District

July 13, 2010, Opinion Filed

CASE NO. 1D09-2854

Reporter

40 So. 3d 835 * | 2010 Fla. App. LEXIS 10143 ** | 35 Fla. L. Weekly D 1543

STATE OF FLORIDA, DEPARTMENT OF MANAGEMENT SERVICES and POLICE BENEVOLENT ASSOCIATION, Appellants, v. CITY OF DELRAY BEACH, FLORIDA, Appellee.

Subsequent History: Released for Publication July 29, 2010.**Prior History:** [\[**1\]](#) An appeal from the Circuit Court for Leon County. [Frank Sheffield](#) ▼, Judge.**Core Terms**

premium, tax revenue, benefits, police officer, enhancement, supplemental, retirement benefits, retirement, firefighters, annual, pension plan, municipality, pensionable, retroactive, vested right, overtime, impairs, benefit increase, earnings, rights, funds, contingent, grant summary judgment, summary judgment, circuit court, local law, calculation, declaratory, compliance

Case Summary**Procedural Posture**

Appellants, Department of Management Services, Division of Retirement, and police union, appealed a grant of summary judgment in favor of appellee city by the Circuit Court for Leon County (Florida) in the city's challenge of the Division's determination that the city's police and firefighter pension plan had to comply with ch. 99-1, Laws of Florida.

Overview

After the Division advised the city regarding the effect of ch. 99-1 on the city's police and firefighter pension plan, the city filed a complaint for declaratory judgment, asserting that the Division's application of ch. 99-1 violated [Art. I, § 10, Fla. Const.](#) The appellate court found, *inter alia*, that retirees under the plan only had a vested right to the annual increment in benefits made possible by premium tax revenue received by the city. Because the retirees' right to receive the additional annual benefit increase was dependent on continued legislative appropriations and the plan's compliance with current law, it was either an expectant or a contingent right. The Division's application of ch. 99-1 to the plan did not impair retirees' vested rights under the prior agreement. Nothing in the record showed that the city maintained a separate supplemental plan in conjunction with its defined benefit plan in accordance with [§ 185.35\(1\)\(b\), Fla. Stat.](#) (1999). Consequently, because the city was required to pay overtime in accordance with [§ 185.02\(4\), Fla. Stat.](#) (1999), the trial court erred in granting its motion for summary judgment.

Outcome

The grant of summary judgment was reversed.

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HN1 **Governmental Employees, Fire Department Pensions**

Chs. 175 and 185, Fla. Stat., provide for uniform retirement systems for firefighters and municipal police officers, respectively. Both set forth standards for operating and funding pension plans for those local public safety officers. Under both chapters, municipalities may elect to fund their pension plans with state-collected excise taxes imposed on property and casualty insurance premiums. But to be eligible to receive this premium tax revenue, municipal pension plans must meet certain criteria established by the Legislature. [More like this Headnote](#)

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HN2 **Governmental Employees, Fire Department Pensions**

Effective March 12, 1999, the Legislature overhauled chs. 175 and 185, Fla. Stat. Among other things, the Legislature instituted minimum retirement benefits for firefighters and police officers and amended §§ [175.351](#) and [185.35, Fla. Stat.](#), to make receipt of premium tax revenue contingent on meeting both the minimum operating standards and the minimum benefits. The Legislature also specified that municipalities must use premium tax revenue solely to pay extra retirement benefits to police officers and firefighters, whether the revenue is placed in the pension fund for their exclusive use or in a separate supplemental plan. [More like this Headnote](#)

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HN3 **Governmental Employees, Fire Department Pensions**

See ch. 99-1, § 74, at 61, Laws of Fla. and ch. 99-1, § 35, at 29. [More like this Headnote](#)

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HN4 **Governmental Employees, Police Pensions**

As to police officers, minimum benefits include at least 300 hours of overtime pay in the annual compensation figure used to calculate pensionable earnings. § [185.02\(4\), Fla. Stat.](#) (1999). But "supplemental plan municipalities" defined under § [185.02\(15\), \(16\), Fla. Stat.](#) (1999) may continue to use their definition of compensation or salary in existence on the effective date of ch. 99-1, Laws of Fla. § [185.35\(3\)\(a\), Fla. Stat.](#) (1999). [More like this Headnote](#)

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HN5 **Governmental Employees, Fire Department Pensions**

The Department of Management Services, Division of Retirement is responsible for the oversight and monitoring of local government retirement plans for firefighters and police officers established pursuant to chs. 175, 185, Fla. Stat. (1999). The Division determines whether police and firefighter pension plans are meeting the minimum standards and minimum benefits set forth in those chapters, and if so, disburses premium tax revenues to the compliant municipalities. [More like this Headnote](#)

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HN6 **Standards of Review, De Novo Review**

Appellate courts review a trial court's order granting summary judgment de novo. [More like this Headnote](#)

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HN7 **Case or Controversy, Constitutionality of Legislation**

In Florida, the general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively. However, even where such legislative intent exists, the statute cannot be constitutionally applied if it impairs vested rights, creates new obligations, or imposes new penalties. [More like this Headnote](#)

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HN8 **Effect & Operation, Retrospective Operation**

Where the contemplated application of the statute to a particular case is judged to be retroactive, a court must determine whether there is a sufficient basis in the relevant statute to justify the retroactive application. [More like this Headnote](#)

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HN9 Case or Controversy, Constitutionality of Legislation

If a statute is construed as being properly given retroactive effect, it must be determined if such application is inconsistent with any constitutional limitation. [More like this Headnote](#)

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HN10 Effect & Operation, Retrospective Operation

Whether a statute has been retroactively applied depends on whether it ascribes new legal consequences to events predating the statute. [More like this Headnote](#)

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HN11 Effect & Operation, Retrospective Operation

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment. [More like this Headnote](#)

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HN12 Effect & Operation, Retrospective Operation

The concept of vested rights plays a central role in the analysis of retroactivity issues. [More like this Headnote](#)

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HN13 Effect & Operation, Retrospective Operation

In the context of a retrospective application of a statute, to be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. Vested rights are distinguished not only from expectant rights but also from contingent rights. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting. [More like this Headnote](#)

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HN14 Presumptions, Rebuttal of Presumptions

If a statute has been applied retroactively, a court looks for an expression of clear legislative intent rebutting the presumption of prospective operation. [More like this Headnote](#)

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HN15 Case or Controversy, Constitutionality of Legislation

If the Legislature intended retroactive application of a civil statute, a court determines if the statute violates due process rights or impairs contractual rights and/or obligations. [More like this Headnote](#)

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HN16 Scope & Coverage, Overtime & Work Periods

See [§ 185.02\(4\), Fla. Stat. \(1999\)](#). [More like this Headnote](#)

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HN17 [Scope & Coverage, Overtime & Work Periods](#)

See § 185.35(3)(a), Fla. Stat. (1999). [More like this Headnote](#)

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Labor & Employment Law > [Wage & Hour Laws](#) ▼ > [Scope & Definitions](#) ▼ > [General Overview](#) ▼

HN18 [Wage & Hour Laws, Scope & Definitions](#)

A "supplemental plan municipality" is a local law municipality in which there existed a supplemental plan as of January 1, 1997. § 185.02(16), Fla. Stat. (1999). [More like this Headnote](#)

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HN19 [Wage & Hour Laws, Scope & Definitions](#)

See § 185.02(15), Fla. Stat. (1999). [More like this Headnote](#)

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HN20 [Governmental Employees, Fire Department Pensions](#)

In a police and firefighter pension context, under § 185.35(1)(b), Fla. Stat. (1999), premium tax revenue may be either placed in the pension plan exclusively to pay extra benefits to police officers, or placed in a separate supplemental plan to pay extra benefits to police officers. [More like this Headnote](#)

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Counsel: Thomas E. Wright, Assistant General Counsel, Tallahassee, for Appellant, Department of Management Services, and G. "Hal" Johnson ▼, Tallahassee, and Bonni S. Jenson, West Palm Beach, for Appellant, Police Benevolent Association.

James W. Linn ▼ and Glenn E. Thomas ▼, of Lewis, Longman & Walker, P.A. ▼, Tallahassee, for Appellee.

Judges: MARSTILLER ▼, J. DAVIS ▼, J., CONCURS; BENTON ▼, J., CONCURS WITH OPINION, in which DAVIS ▼, J., CONCURS.

Opinion by: MARSTILLER ▼

Opinion

[*836] MARSTILLER ▼, J.

The summary judgment on appeal was entered in a declaratory action filed by the City of Delray Beach ("City") challenging a determination by the Department of Management Services, Division of Retirement ("Division"), that the City's police and firefighter pension plan must comply with chapter 99-1, Laws of Florida, which amended [sections 175.351\(1\) and 185.35\(1\), Florida Statutes](#). The issues for our review are (1) whether the Division's application of chapter 99-1 unconstitutionally impaired the rights of retired police officers receiving benefits under the City's pre-existing pension plan, and (2) whether the City is a "supplemental plan municipality" exempt from the minimum [\[**2\]](#) benefit requirement **[*837]** in chapter 185, Florida Statutes, pertaining to pensionable earnings calculations for police officers. We reverse the summary judgment entered in favor of the City, finding that no vested rights were impaired by the Division's application of chapter 99-1 to the Plan, and there is no evidence in the record showing the City maintains a supplemental plan.

I. BACKGROUND AND FACTS

A. Chapters 175 and 185, Florida Statutes; Chapter 99-1, Laws of Florida; Premium Tax Revenue; and Minimum Benefits

HN1 Chapters 175 and 185, Florida Statutes, provide for uniform retirement systems for firefighters and municipal police officers, respectively. Both set forth standards for operating and funding pension plans for those local public safety officers. Under both chapters municipalities may elect to fund their pension plans with state-collected excise taxes imposed on property and casualty insurance premiums. But to be eligible to receive this premium tax revenue, municipal pension plans must meet certain criteria established by the Legislature.

Prior to 1999, a city opting to take advantage of the premium tax distribution scheme had to demonstrate its retirement fund(s) met the operating [\[**3\]](#) standards set out in [sections 175.351 and 185.35](#), as applicable. See §§ 175.351(1), 185.35(1), Fla. Stat. (1997). If deemed by the Division to be in compliance with those standards, a city could put the premium tax revenue in its pension fund for the exclusive use of firefighters and police officers, or it could use the revenue to pay extra benefits to retired officers and firefighters. See §§ 175.351(13), 185.35(2), Fla. Stat. (1997).

HN2 Effective March 12, 1999, the Legislature overhauled chapters 175 and 185. See Ch. 99-1, Laws of Fla. Among other things, the Legislature instituted minimum retirement benefits for firefighters and police officers and amended [sections 175.351 and 185.35](#) to make receipt of premium tax revenue contingent on meeting both the minimum operating standards *and* the minimum benefits. See Ch. 99-1, §§ 35,

74, Laws of Fla. The Legislature also specified that municipalities must use premium tax revenue solely to pay extra retirement benefits to police officers and firefighters, whether the revenue is placed in the pension fund for their exclusive use or in a separate supplemental plan. See *id.* The Legislature mandated further:

HN3 The premium tax provided by this chapter [**4] shall in all cases be used in its entirety to provide extra benefits to police officers, or to police officers and firefighters, where included. *However, local law plans in effect on October 1, 1998, shall be required to comply with the minimum benefit provisions of this chapter only to the extent that additional premium tax revenues become available to incrementally fund the cost of such compliance* When a plan is in compliance with such minimum benefit provisions, as subsequent additional tax revenues become available, they shall be used to provide extra benefits. . . . "[A]dditional premium tax revenues" means revenues received by a municipality . . . that exceed the amount received for calendar year 1997 and the term "extra benefits" means benefits in addition to or greater than those provided to general employees of the municipality.

Ch. 99-1, § 74, at 61, Laws of Fla. (amending section 185.35) (emphasis added). *Cf.* Ch. 99-1, § 35, at 29, Laws of Fla. (amending section 175.351 with virtually identical language regarding firefighter pension plans). **HN4** As to police officers, minimum benefits now include at least 300 hours of overtime pay in the annual compensation **[*838]** figure used [**5] to calculate pensionable earnings. See § 185.02(4), Fla. Stat. (1999). But "supplemental plan municipalities" defined under sections 185.02(15) and (16), "may continue to use their definition of compensation or salary in existence on the effective date of [chapter 99-1]." § 185.35(3)(a), Fla. Stat. (1999):

B. The City's Pension Plan and the 1993 Agreement

The City for many years has maintained a defined benefit pension plan established pursuant to chapters 175 and 185 for its police officers and firefighters. The pension plan, officially known as the City of Delray Beach Police Officers and Firefighters Retirement System ("Plan"), is codified at sections 33.60 through 33.72 of the Delray Beach City Code.

In 1993, the City, its police and firefighter unions, and the Board of Trustees for the Plan reached an agreement concerning a "retirement benefit enhancement" and the use of premium tax revenues received by the City ("1993 Agreement"). The City agreed to use premium tax revenue "received . . . pursuant to chapter[s] 175 and 185, Florida Statutes" to provide a 1% annual increase in pension benefits to members retiring after September 30, 1993. This benefit increase would be provided "regardless [**6] of the amount of premium tax revenues received." The City further agreed that the premium tax revenue it receives each year in excess of the 1993 amount (\$ 504,922) would be used to increase the 1% annual benefit enhancement in increments of 0.1% to a maximum total annual benefit increase of 4%. Finally, the 1993 Agreement provided that "pension benefits will not be subject to the collective bargaining process in the future" but that "should premium tax revenues cease, the retirement benefit enhancement . . . will be subject to reopen negotiations." Pursuant to the terms of the 1993 Agreement, the City amended the Plan and codified the retirement benefit enhancement in City Ordinance No. 85-93. The enhancement went into effect October 1, 1994, and has been in effect continuously since that date.

After chapter 99-1 was enacted, it appears the City amended the Plan again to provide four "no-cost" minimum benefits required by that chapter. The only minimum benefit the Plan still does not provide is the inclusion of at least 300 hours of overtime pay annually in the pensionable earnings of police officers. Since the Plan's inception, the City has included only a member's regular-time [**7] wages in calculating pensionable earnings. Excluded are overtime wages, bonuses, and any other non-regular compensation.

C. The Division's Application of Chapter 99-1; the City's Declaratory Action; and the Order Granting Summary Judgment

HN5 The Division is responsible for the oversight and monitoring of local government retirement plans for firefighters and police officers established pursuant to chapters 175 and 185. The Division determines whether police and firefighter pension plans are meeting the minimum standards and minimum benefits set forth in those chapters, and if so, disburses premium tax revenues to the compliant municipalities.

In July 2003, the Division responded to an inquiry from the City regarding application of chapter 99-1 to the Plan and use of the increases in premium tax revenue. In its letter, the Division summarized the "retirement benefit enhancement" added to the Plan effective October 1, 1994, and advised the City, in pertinent part:

Since the 1% retirement benefit enhancement is guaranteed by the city regardless of the amount of premium tax increases received by the city, it appears **[*839]** that the remaining 3% may be funded, to the extent possible, by the dollar amount [**8] of increases between 1992 and 1997 (\$ 830,154.20 - 504,922.00 = \$ 325,232.20).

Pursuant to chapter 99-1, any increase over and above the 1997 amounts (Police - \$ 446,406.96, Fire - \$ 383,747.24, and Fire Supplemental - \$ 0) should be used first to meet the minimums. Once the minimums are met, as any subsequent additional tax revenues become available they could again be used to help fund the retirement benefit enhancement.

Additionally, since the retirement benefit enhancement is capped at 4%, once the increase in the state premium tax moneys exceeds the amount necessary to fund such enhancement, all such future increases must be used for some new extra benefit as provided in chapter 99-1.

This application appears to be consistent with the provisions found in Ordinance No. 85-93 and chapter 99-1, Laws of Florida.

With regard to the issue of "salary" for police officers and firefighters, please refer to the definition of "compensation" found in ss. 175.032(3) and 185.02(4), F.S.

(Emphasis in original.) Thus, according to the Division, the City could continue to fund the agreed-upon retirement benefit enhancement while meeting the new minimum benefit levels as required by chapter 99-1.

The [**9] City filed a Complaint for Declaratory Judgment **[1]** asserting that the Division is applying chapter 99-1 in a manner that violates Article I, section 10, of the Florida Constitution which prohibits the enactment of laws impairing contractual obligations. Specifically, the City alleged "[t]he Division is attempting to apply the 1999 legislation in a manner that impairs the City's rights and obligations under the 1993

Agreement, by requiring that premium tax revenues be shifted from the benefit enhancement provided to retirees by the 1993 Agreement, to pay for the inclusion of overtime in the pensionable compensation of current police officers." This, the City alleged further, also will "reduce the amount of the benefit enhancement received by retired police officers, in violation of those officers' vested rights."

Both parties moved for summary judgment. In its motion, the City argued its retirement benefit enhancement constitutes a "supplemental plan" under sections 175.032(17) and 185.02(15), Florida Statutes (1999), and thus the [**10] Plan need not comply with the mandate to include at least 300 overtime hours annually in police officers' pensionable earnings. On May 12, 2009, the circuit court granted summary judgment in favor of the City finding "retroactive application of the 1999 revision to chapters 175 and 185, Florida Statutes, has a substantial impact on the 1993 plan, and impairs the rights of recipients of retirement benefits under the plan." Relying on Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975), the court reasoned that the state's exercise of its police power, though valid, "collides with the constitutional ban on laws impairing contracts." The court further concluded the Plan, as amended by the 1993 Agreement, meets the requirements of a supplemental plan under sections 175.032(17) and 185.02(15), Florida Statutes, and that under section 185.35(3), Florida Statutes, the provisions of section 185.02(4)(a), including overtime pay in the **[*840]** calculation of police officers' earnings do not apply to the Plan.

II. ANALYSIS

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A. Whether [**11] the Division Retroactively Applied Chapter 99-1, Impairing Vested Rights

HN7 In Florida, "[t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." Metrop. Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494, 499 (Fla. 1999). However, even where such legislative intent exists, the statute cannot be constitutionally applied if it "impairs vested rights, creates new obligations, or imposes new penalties." State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 61 (Fla. 1995).

The analytical framework for retroactivity issues is discussed in R.A.M. of So. Fla., Inc. v. WCI Communities, Inc., 869 So. 2d 1210 (Fla. 2d DCA 2004).

The threshold question is whether the proposed application of the statute to a particular case constitutes a retroactive application.

HN8 Where the contemplated application is judged to be retroactive, the court must determine whether there is a sufficient basis in the relevant statute to justify the retroactive application. **HN9** If the statute is construed as being properly given retroactive effect, it must finally be determined if such application [**12] is inconsistent with any constitutional limitation.

Id. at 1215. **HN10** Whether a statute has been retroactively applied depends on whether it ascribes new legal consequences to events predating the statute. See Chase Fed. Hous. Corp., 737 So. 2d at 499. **HN11** "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment" Id. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 269-70, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). **HN12** "[T]he concept of vested rights [plays] a central role in the analysis of retroactivity issues." R.A.M., 869 So. 2d at 1216.

HN13 "[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. . . . Vested rights are distinguished not only from expectant rights but also from contingent rights. . . . They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening [**13] of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.

Id. at 1218 (citations and quotations omitted). **HN14** If a statute has been applied retroactively, the court looks for an expression of clear legislative intent rebutting the presumption of prospective operation. Id. at 1216. Finally, **HN15** if the Legislature intended retroactive application of a civil statute, the court determines if the statute violates due process rights or impairs contractual rights and/or obligations. Id. at 1217.

We conclude chapter 99-1 was not retroactively enforced so as to impair the vested rights of retirees receiving benefits under the Plan. The enhanced benefits at **[*841]** issue resulted from the 1993 Agreement, which provided for: (1) a 1% annual benefit increase "regardless of the amount of premium tax revenues received;" and (2) an additional annual benefit increase capped at 4%, "[t]o the extent annual premium tax revenues exceed" \$ 504,922. The 1% increase, as correctly noted by the Division in its July 10, 2003, letter to the City, "is guaranteed by the city." If premium tax [**14] revenue were to cease altogether, either because of legislative repeal or because the City opted to no longer participate in the premium tax funding program, the 1% annual benefit increase still must be paid. Retirement benefit recipients under the Plan therefore have a vested right to this enhancement. The Division's application of chapter 99-1 to the Plan does not in any way affect this vested right.

As to the additional annual benefit increase, the terms of the 1993 Agreement reveal that the parties contemplated the possible cessation of premium tax revenue:

The City, IAFF, and PBA agree that pension benefits will not be subject to the collective bargaining process in the future and that this agreement shall be binding on their successors and assigns; *provided, should premium tax revenues cease, the retirement benefit enhancement referred to in paragraph 3, above, will be subject to reopener negotiations.*

(Emphasis added.) Clearly the parties knew when the agreement was negotiated and executed that the law could change, and that the continued availability of premium tax revenue is "a matter of legislative grace that could be withdrawn by subsequent legislative action." R.A.M., 869 So. 2d at 1217. [**15] Indeed, the premium tax revenue is *state tax revenue* and the Legislature has sole authority to decide how those funds are to be spent. The City cannot bargain away the Legislature's appropriations power. See State v. Fla. Police Benevolent Ass'n, Inc., 613 So. 2d 415, 418-19 (Fla. 1992) (stating that requiring the Legislature to fully fund collective bargaining agreements would allow the executive

branch, by entering into such agreements, "to invade the legislative branch's exclusive right to appropriate funds."). Furthermore, receipt of the premium tax revenue is contingent upon the Division determining that the Plan is in compliance with the requirements of chapter 185. See § 185.23(1), Fla. Stat. Because the right to receive the additional annual benefit increase is dependent on continued legislative appropriations and the Plan's compliance with current law, it can be fairly characterized as either an expectant right or a contingent right. If the contingencies materialize, the right becomes vested.

Assuming the Plan satisfied the requirements of chapter 185 before the 1999 amendments - and this appears to be so -- retirees under the Plan only have a vested right to the annual increment § 185.23(1) in benefits made possible by premium tax revenue received by the City in excess of \$ 504,922 (the 1993 revenue) up to \$ 830,154.20 (the 1997 revenue). That amount totals \$ 325,232.20, and according to the Division, the City is entitled to use those funds to pay the additional benefit enhancement per the terms of the 1993 Agreement. But in accordance with chapter 99-1 the City must now use any premium tax revenue exceeding \$ 830,154.20 to meet the minimum benefit requirement to include at least 300 hours of overtime pay annually in the pensionable earnings of police officers. § 185.23(1) The Division's application of chapter 99-1 to the Plan does not impair retirees' vested § 185.23(1) rights under the 1993 Agreement. The trial court erred in concluding otherwise and granting summary judgment to the City on that basis.

B. Whether the City is a "Supplemental Plan City" Exempt From the 300-hour Minimum Benefit Requirement

As an additional ground for entering summary judgment for the City, the trial court determined the City § 185.23(1) is exempt under section 185.35(3)(a) from the 300 overtime hours minimum benefit requirement for police officer pension plans. This requirement is found in section 185.02(4) which reads:

HN16 "Compensation" or "salary" means the total cash remuneration including "overtime" paid by the primary employer to a police officer for services rendered, but not including any payments for extra duty or a special detail work performed on behalf of a second party employer. However, a local law plan may limit the amount of overtime payments which can be used for retirement benefit calculation purposes, but in no event shall such overtime limit be less than 300 hours per officer per calendar year.

§ 185.02(4), Fla. Stat. (1999) (emphasis added). Subsection (4)(a) provides further that

Any retirement trust fund or plan which now or hereafter meets the requirements of this chapter shall not, solely by virtue of this subsection, reduce or diminish the monthly retirement income otherwise payable to each police officer covered by the retirement trust fund or plan.

§ 185.02(4)(a), Fla. Stat. (1999). But section 185.35, which requires local pension plans to provide the minimum benefits set out in chapter 185, provides § 185.35(3)(a) an exception:

(HN17) 3) Notwithstanding any other provision, with respect to any supplemental plan municipality:

(a) Section 185.02(4)(a) shall not apply, and a local law plan and a supplemental plan may continue to use their definition of compensation or salary in existence on the effective date of this act.

§ 185.35(3)(a), Fla. Stat. (1999) (emphasis added). HN18 A "supplemental plan municipality" is a "local law municipality in which there existed a supplemental plan as of January 1, 1997." § 185.02(16), Fla. Stat. (1999).

The record does not support the trial court's conclusion that the City operates a supplemental plan. As amended by chapter 99-1, section 185.02 defines "supplemental plan" as

(HN19) A plan to which deposits of the premium tax moneys as provided in s. 185.08 are made to provide extra benefits to police officers . . . under this chapter. Such a plan is an element of a local law plan and exists in conjunction with a defined benefit plan that meets the minimum benefits and minimum standards of this chapter.

§ 185.02(15), Fla. Stat. (1999) (emphasis added). See also Ch. 99-1, § 42, Laws of Fla. at 40. Further, HN20 under section 185.35(1), premium tax revenue may be either placed in the pension § 185.35(1)(a) plan exclusively to pay extra benefits to police officers, or placed "in a separate supplemental plan to pay extra benefits to police officers." § 185.35(1)(b), Fla. Stat. (1999) (emphasis added). Nothing in the record shows that the City maintains a separate supplemental plan in conjunction with its defined benefit plan. Rather, City Ordinance No. 85-93, which codified the retirement benefit enhancement in the 1993 Agreement, states that premium tax revenue received pursuant to chapters 175 and 185 is put "in the existing pension fund for the exclusive use of plan members and beneficiaries." The trial court therefore incorrectly granted § 185.35(3)(a) summary judgment to the City based on the exemption in section 185.35(3)(a) for supplemental plan municipalities.

We REVERSE the Order Granting Summary Judgment and REMAND for entry of summary judgment for the Division.

DAVIS, J., CONCURS; BENTON, J., CONCURS WITH OPINION, in which DAVIS, J., CONCURS.

Concur by: BENTON ▼

Concur

BENTON, J., concurring.

I join the court's opinion and write only to make clear that its thorough and lucid treatment of the merits is no endorsement of the procedural path that brought the case here. In July of 2003, before the City filed in circuit § 185.35(1)(a) court seeking declaratory judgment, it had received what was in effect at least a declaratory statement, see § 120.565, Fla. Stat. (2009), from the Division of Retirement within the Department of Management Services, which the City apparently decided against appealing for dubious tactical reasons.

If the City had taken an appeal from the Division's July 2003 determination, there is, to be sure, no reason to believe the City would have met with any more success than the Florida League of Cities, Inc., met with in Florida League of Cities, Inc. v. Florida Department of Management

Services, 883 So. 2d 803 (Fla. 1st DCA 2004) (table). In its unsuccessful challenge to the Division's proposed rules 60Z-1.026 and 60Z-2.017, the League advanced the same arguments the City makes in the present case. See *Fla. League of Cities v. Dep't of Mgmt. Servs.*, No. 03-1117RP (DOAH Sept. 23, 2003) (upholding proposed rules on grounds the statutes to be implemented--notably sections 175.351(13) and 185.35(2), Florida Statutes (1997), as amended by sections 35 and 74, chapter 99-1, Laws of Florida--required that "[e]xtra benefits [already] enacted . . . must be funded from premium tax dollars [already being] . . . received") *aff'd*, *Fla. League of Cities, Inc. v. Fla. Dep't. of Mgmt. Servs.*, 883 So. 2d 803 (Fla. 1st DCA 2004).

Neither of the appellants in the present case has argued that the doctrine of exhaustion of administrative remedies required the City to appeal adverse agency action to a district court of appeal rather than litigating the propriety of the agency's position anew in circuit court, see generally *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 590 (Fla. 1st DCA 1977) (describing the Administrative Procedure Act of 1974 as providing an "arsenal of varied and abundant remedies for administrative error" including "judicial review of [agency] orders affecting a party's interests," which "lessened" "the occasions for [circuit court] intervention"), so we need not decide the issue here.

Nor for the same reason do we need to decide any issue of primary jurisdiction: neither appellant has contended that the doctrine of primary jurisdiction required the circuit court to defer to the Division's interpretation of the pertinent statutes (again, an interpretation that was no secret to the City). The doctrine of primary jurisdiction may come into play if a court is asked to resolve issues arising under a regulatory scheme that have been placed within the special competence of an administrative body like the Division of Retirement. See generally *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976); *United States v. W. Pac. R.R.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956); *Talton Telecomm. Corp. v. Coleman*, 665 So. 2d 914, 918 (Ala. 1995); *Austin v. Centerpoint Energy Arkla*, 365 Ark. 138, 226 S.W.3d 814, 817 (Ark. 2006); *Pub. Serv. Co. of Colorado v. Mile Hi Cable Partners L.P.*, 995 P.2d 310, 312 (Colo. Ct. App. 1999); *Atl. Satellite [*844] Commc'ns, Inc. v. Duffy*, 183 Misc. 2d 734, 705 N.Y.S.2d 170, 171 (N.Y.Sup. Ct. 2000); *Glover v. State*, 860 P.2d 1169, 1171 (Wyo. 1993).

In any event, considering the merits *de novo* today, we reach the same result as the Division of Retirement reached some years ago.

Footnotes

1

The complaint was filed in 2006 in the Fifteenth Circuit in Palm Beach County. In September 2008, venue was transferred to the Second Circuit in Leon County.

2

HNG We review the trial court's Order Granting Summary Judgment *de novo*. See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

3

Nothing in the record indicates how the City will use the \$ 504,922 in premium tax revenue not going either to the annual benefit increment or to fund the 300 overtime hour minimum benefit.

EXHIBIT D

Re: Fred Ziegler, Disability Retiree, Under the City of Delray Beach Police and Firefighters Pension Fund

1 message

Mark Berkowitz <labor@markjberkowitz.com>

Mon, Jan 17, 2022 at 6:29 PM

To: castronovol@mydekraybeach.com, zigesti1@aol.com, larry@judgelarryseidlin.com, Mark Berkowitz <markberk57@gmail.com>

Lisa Castronovo
Plan Administrator
City of Delray Beach Police and Firefighters Pension Fund

**Re: Status of Enhancement Benefit for
Fred Ziegler
[For the Purpose of Settlement]**

Dear Ms. Castronovo:

I had previously written to Janice Rustin, the former counsel for the City of Delray Beach Police and Firefighters Pension Fund. Ms. Rustin has informed me that her office is no longer counsel for the Pension Fund. Therefore, I am forwarding my prior letter, to Ms. Rustin, to your office, for further consideration.

Thank you for your courtesy and consideration.

Respectfully submitted,

Mark J. Berkowitz

Attorney, Labor and Employment Law at Mark J. Berkowitz, P.A.

P (954) 527-0570 W www.markjberkowitz.com

E labor@markjberkowitz.com

A One Ten Tower, 110 S.E. 6th Street Suite 1700 Ft. Lauderdale, FL 33301

**FredZieglerLetter.docx**

19K

Law Offices
MARK J. BERKOWITZ, P.A.

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E-mail: labor@markjberkowitz.com
Website: www.markjberkowitz.com

Via E-mail: jrustin@llw-law.com

Ms. Janice D. Rustin
Lewis, Longman & Walker, P.A.
360 S. Rosemary Avenue
Suite 1100
West Palm Beach, Florida 33401

January 14, 2022

Re: Retirement Benefit Enhancement
City of Delray Beach Police & Firefighters
Retirement System
Disability Retirement Beneficiary--Fred Ziegler
Confidential Settlement Communication

Dear Ms. Rustin:

My office has been retained to represent Mr. Fred Ziegler, who is a disability retiree, and a beneficiary, pursuant to the City of Delray Beach Police and Firefighters' Retirement System. It is my understanding that the most recent interpretation of Plan Section 33.689, concluded that for disability retiree beneficiaries, retiring prior to 1993, such as Mr. Ziegler, those beneficiaries are entitled to receive a benefits enhancement, under the terms of the Plan. Mr. Ziegler was only recently informed of this new development, regarding the applicability of a benefits enhancement, in his case.

It appears that for benefits adjustments, which should have been made prior to July 6, 2015, the retirement benefit enhancement should reflect a percentage of the beneficiary's benefits, which is based on the premium tax revenues, as set forth in that year's actuarial valuation report. In addition, the adjustment amount should also include an interest rate, as determined by the Police and Firefighters Retirement Board of Trustees. Apparently, according to the Plan Documents, at section 33.62(G)(1), references an interest rate of either 3% or 5%, depending on the retiree beneficiary member's continuing years of service.

Therefore, at this time, we are respectfully requesting that the Plan Actuary promptly calculate the enhanced benefit, for which Mr. Ziegler is entitled to receive, since he indeed retired prior to the effective date of the 1999 ordinance. After the applicable actuarial calculation is made, we would like to follow up and place the applicable enhancement calculation before the Delray Beach Police and Firefighters Retirement Board of Trustees, for their consideration and final approval, at the earliest possible date.

Thank you for your courtesy and consideration.

Respectfully submitted,

/s/ Mark J. Berkowitz
Mark J. Berkowitz, on behalf of
Fred Ziegler

cc: Fred Ziegler
Via e-mal

Law Offices
MARK J. BERKOWITZ, P.A.

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TELECOPIER (954) 281-5881
E-mail: labor@markjberkowitz.com
Website: www.markjberkowitz.com

Via E-mail: gelinl@mydelraybeach.com

Ms. Lynn D. Gelin
City Attorney's Office
City of Delray Beach
200 NW 1st Avenue
Delray Beach, Florida 33444

March 31, 2022

**Re: Mr. Fred Ziegler
Petition for Enhanced Disability Retirement Benefits,
Pursuant to the City of Delray Beach, Police Retirement
System, Dated February 8, 2022**

Dear Ms. Gelin:

On February 8, 2022, I provided your office with Mr. Fred Ziegler's Petition for Enhanced Disability Retirement Benefits, and we requested a prompt hearing, before the City of Delray Beach, Police Retirement System Board of Trustees. In addition, I called your office today, to follow-up on our request, and I left a voice mail message. Unfortunately, I have not received a response to our request for a hearing before the City Police Retirement System Board of Trustees.

Respectfully, we decline to be referred to your outside counsel, since we have experienced lengthy delays, in dealing with outside counsel, in other cases, in obtaining hearings and or relief, before other municipal pension boards. Please place my client's Petition as an agenda item on the next meeting of the City Police Retirement System Board of Trustees. In the absence of reasonable and prompt action by the Board of Trustees, we will need to consider formal legal action, to place my client's matter on the next meeting agenda.

Thank you for your anticipated cooperation.

Respectfully submitted,

/s/ Mark J. Berkowitz
Mark J. Berkowitz, on behalf of
Mr. Fred Ziegler

From: [Pedro Herrera](#)
To: [Mark Berkowitz](#)
Cc: [Jessica De la Torre Vila](#); [Gelin, Lynn](#); [Castronovo, Lisa](#)
Subject: RE: Petition for Enhanced Disability Benefits, filed by Mr. Fred Ziegler
Date: Thursday, March 31, 2022 3:02:45 PM

****Please be cautious****

This email originated from outside of The City of Delray Beach. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mr. Berkowitz,

Pursuant to my email from earlier today I am confirming that we have placed this matter on the agenda for the meeting currently scheduled for May 25, 2022 @ 9am. Should you wish to present any materials for the Board to review as part of your presentation, please forward to the Board's administrator (cc'ed here for your convenience) and she will include in the Trustee's backup materials. We would ask that any such materials be provided at least 2 weeks prior to the meeting to allow sufficient processing time.

Should you have any questions or comments, please do let me know.

Kindly,

Pedro

PEDRO A. HERRERA
PARTNER

SUGARMAN SUSSKIND BRASWELL & HERRERA
100 MIRACLE MILE
SUITE 300
CORAL GABLES, FL 33134
OFFICE: (305)529-2801
FAX: (305)447-8115

From: Pedro Herrera
Sent: Thursday, March 31, 2022 12:55 PM
To: Mark Berkowitz <labor@markjberkowitz.com>
Cc: Jessica De la Torre Vila <jess@sugarmansusskind.com>; Gelin, Lynn <GelinL@mydelraybeach.com>; Castronovo, Lisa <castronovol@mydelraybeach.com>
Subject: FW: Petition for Enhanced Disability Benefits, filed by Mr. Fred Ziegler

Mr. Berkowitz,

As you may be aware we were recently appointed as outside legal counsel for the City of Delray Beach Police Officers' Retirement System. We are in receipt of your petition for disability benefit enhancement filed with the Board on or about February 8, 2022. The Board next meets on May 25, 2022 at 9am. Although I have not yet confirmed with the Chairperson who is responsible for finalizing the agenda, the expectation is that this matter will be placed on that agenda for discussion. Once we have had an opportunity to finalize the agenda, the Retirement System's administrator will reach out to you to confirm.

Please feel free to reach out to me directly should you have any further questions or comments in the interim.

Kindly,

Pedro

PEDRO A. HERRERA
PARTNER

SUGARMAN SUSSKIND BRASWELL & HERRERA
100 MIRACLE MILE
SUITE 300
CORAL GABLES, FL 33134
OFFICE: (305)529-2801
FAX: (305)447-8115

From: Mark Berkowitz <labor@markjberkowitz.com>

Date: March 31, 2022 at 11:20:13 AM EDT

To: "Gelin, Lynn" <GelinL@mydelraybeach.com>, zigesti1@aol.com,
larry@judgelarryseidlin.com, Mark Berkowitz <markberk57@gmail.com>

Subject: Re: Petition for Enhanced Disability Benefits, filed by Mr. Fred Ziegler

****Please be cautious****

This email originated from outside of The City of Delray Beach. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Ms. Lynn D. Gelin
City Attorney
City of Delray Beach
200 NW 1st Avenue
Delray Beach, Florida 33444

Re: Mr. Fred Ziegler
Petition for Enhanced

Disability Retirement Benefits

**Request for a Hearing before
the City Police Retirement System Board of Trustees**

Dear Ms. Gelin:

Please see the attached correspondence, which is being sent on behalf of Mr. Fred Ziegler.

submitted,

Respectfully

Mark J. Berkowitz, P.A.
(954) 527-0570 (o)
(954) 294-9132 (c)