



A PARTNERSHIP OF PROFESSIONAL ASSOCIATIONS
ATTORNEYS AT LAW

MEMORANDUM

To: Board of Trustees
West Palm Beach Police Pension Fund

From: Robert D. Klausner

Subject: Improvements in pension benefits for employed DROP participants

Date: June 11, 2021

At the last meeting, the Trustees requested that Ms. Jensen opine on whether the collective bargaining parties could agree to increased benefits for employed DROP participants. The short answer is yes, the collective bargaining agreement could provide for increased benefits for participants in the DROP who have not yet terminated employment.

FACTS:

The City of West Palm Beach ("City") and the Florida State Lodge, Fraternal Order of Police, Inc. ("FOP") have agreed in collective bargaining to increase the pension accrual rate for members to 3% for all years of service between October 1, 2011 and September 30, 2017. Actively employed DROP participants are excluded from this benefit. The Trustees were approached by affected DROP participants and the FOP to determine whether the actively employed DROP participants can be included.

PENSION PLAN PROVISIONS:

ARTICLE I. - PENSION AND RELIEF FUNDS of the City Charter provides at Section 16:

Sec. 16. - West Palm Beach Police Pension Fund.

- (13) Deferred retirement option plan (DROP).
 - (a) Eligibility to participate in the DROP.

* * *

4. Upon a member's election to participate in the DROP, he or she shall cease to be a member and shall no longer accrue any benefits under the pension fund except for the benefits provided under subsection (11), chapter 185 share accounts. For all fund purposes, the member becomes a retirant, except that a DROP participant shall continue to receive shares of the chapter moneys in accordance with subsection (11), chapter 185 share accounts. DROP members shall also be eligible to vote as members for purpose of election of the member-trustee. The amount of credited service and final average salary shall freeze as of the date of entry into the DROP.

ANALYSIS:

Actively employed DROP participants are a hybrid of retiree and active employee. This is recognized both in Florida law and in the West Palm Beach Police Pension Fund ("Fund") pension plan document.

There are three general areas of the Florida law which recognize this hybrid status:

- DROP participants are active employees and covered by the collective bargaining agreement. Florida Statutes Chapter 447, Part II. Retirees are not included in the bargaining unit.
- DROP participants are considered retired for purposes of the pension plan, yet still subject to forfeiture of benefits under Florida Statutes §112.3173 because they are active employees. *Simcox v. City of Hollywood Police Officers' Retirement System*, 988 So.2d 731 (Fla. 4th DCA 2008). Convictions for crimes committed after retirement are not subject to forfeiture.¹
- DROP participants are active employees and "extra compensation" is not barred by Florida Statutes §215.425 as it is for individuals who have retired.

The plan document also considers the actively employed DROP participant both

¹Unless the individual is subsequently employed as a public officer or employee in another Florida governmental entity and forfeiture is determined to apply there. See *Childers v. State Department of Management Services*, 989 So.2d 716 (Fla. 4th DCA 2008)

retired and active. Upon entry into the DROP, the police officer is no longer considered a member and no longer accruing benefits, except like active non-DROP members:

- They are entitled to receive shares of the 185 money; and
- They can vote for election of the member trustees to the Board.

A. DROP PARTICIPANTS ARE ACTIVE EMPLOYEES AND COVERED BY THE COLLECTIVE BARGAINING AGREEMENT

Certifications 1985 and 1986 from the Florida Public Employee Relations Commission define the bargaining unit as including all sworn law enforcement officers in classifications of police officer and sergeant² (Certification 1985) and police lieutenant (Certification 1986). As part of the bargaining unit, these employees have the right to “negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment.” See Florida Statutes §447.301(2); see also article I, section 6 of the Florida Constitution. Retirement pensions and benefits are mandatory subjects of public collective bargaining. See *City of Tallahassee v. PERC*, 393 So.2d 1147, 1150 (Fla. 1st DCA 1981), aff’d 410 So.2d 487 (Fla.1981).

The DROP participants addressed here are actively employed as law enforcement officers of the City and are therefore part of the bargaining unit and entitled to negotiate collectively for retirement benefits. Retirees are not included in the bargaining unit.

It should be noted here that Florida Statutes provides that benefits must be provided in a non-discriminatory way and must be based on length of service and compensation. Florida Statutes §185.341(3). Therefore, the Fund benefits are the same to all employees regardless of classification.

The City and the Union can agree in collective bargaining to increase³ the retirement benefits to include actively employed DROP participants.

²Certification 1985 also includes employees in classifications of crime scene investigator and police aide who are not eligible to participate in the Fund.

³Since retirement benefits in Florida vest at the time of retirement, retirement benefits could not be reduced for the actively employed DROP participants. See, for example, *State ex. Rel O’Donald v. City of Jacksonville Beach*, 142 So.2d 349 (Fla. 1st DCA 1962).

B. DROP PARTICIPANTS ARE CONSIDERED “RETIRED” FOR PURPOSES OF THE PENSION PLAN, YET STILL SUBJECT TO FORFEITURE OF BENEFITS UNDER FLORIDA STATUTES §112.3173 BECAUSE THEY ARE ACTIVE EMPLOYEES

Recognizing the hybrid nature of an actively employed DROP participant, the *Simcox* court upheld the forfeiture of Simcox’s benefit because he was actively employed as a police officer when he committed the crime for which he was convicted. The decision discussed the particular definition of DROP retirement versus the common meaning of retirement as follows:

DROP is a retirement program that allows certain state and county employees, including police officers, to retire without terminating their employment while retirement benefits accumulate and earn interest in an account. DROP does not change the employee's conditions of employment. When the employee's DROP period ends, he must still terminate employment. A DROP “retirement” is not a true retirement, since the employee continues to work in his job. Rather, a DROP “retirement” is an employment status that triggers entitlement to certain benefits.

We conclude that “retirement” for the purpose of DROP is different and separate from “retirement” as used in section 112.3173. Section 185.02(6), Florida Statutes (2007), defines DROP retirement solely for the “purposes of the plan.” On the other hand, section 112.3173 employs the common meaning of the word “retirement.” That definition is usually associated with an employee's voluntary termination of his own employment or career. Black's Law Dictionary (8th ed. 2004); see *735 also *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So.2d 201, 205 (Fla.2003) (“When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.”). Here, Simcox remained employed as a police officer until he officially resigned in February 22, 2007, months after he committed the federal felony. He therefore was not retired for purposes of section 112.3173.

Simcox v. City of Hollywood Police Officers' Retirement System, 988 So.2d 731, 734–35 (Fla. 4th DCA 2008)

The actively employed DROP participants here are not actually “retired” in the common meaning. The benefit accrual during the actively employed period of DROP participation is changed for these individuals. They no longer accrue a benefit which

increases the monthly benefit based on final average salary times years of service times the multiplier - their monthly benefit is calculated and accumulated in a nominal account, with interest, for the period of their actively employed DROP participation period. The actual retirement does not occur until the DROP participant terminates employment and begins to actually receive the retirement benefit. As stated in the *Simcox* case, they have changed their status to be entitled to certain benefits.

In collective bargaining, the parties can agree to change these benefits.

C. DROP PARTICIPANTS ARE ACTIVE EMPLOYEES AND "EXTRA COMPENSATION" IS NOT BARRED BY FLORIDA STATUTES §215.425 AS IT IS FOR INDIVIDUALS WHO HAVE ALREADY RENDERED THEIR SERVICE

Another area where the Florida law recognizes the hybrid status of the DROP participants versus individuals who are actually retired is Florida Statutes 215.425. This law prohibits the payment of "extra compensation" to individuals who have already rendered their service, including retirees, unless there is a super majority vote of the governing authority. However, this law does not apply to active duty employees, including actively employed DROP participants. Therefore, the parties may collectively bargain to increase the benefits of the members, including the DROP participants.

D. THE PENSION PLAN DOCUMENT HAS PREVIOUSLY BEEN AMENDED BY THE PARTIES TO INCREASE BENEFITS FOR DROP PARTICIPANTS

The City and the bargaining unit as represented by the predecessor Union has a history of modifying the DROP to benefit the actively employed DROP participants. These benefits were not extended to the terminated DROP participants. These prior modifications demonstrate the hybrid active/retired status of the actively employed DROP participants.

In 1993, Laws of Florida Chapter 93-373 created the DROP. The above cited DROP section in the plan document provided:

Sec. 16. - West Palm Beach Police Pension Fund.

* * *

(13) Deferred Retirement Option Plan (DROP).-

(a) Eligibility to participate in the DROP.-

* * *

4. Upon a member's election to participate in the DROP, he or she shall cease to be a member and shall no longer accrue any benefits under the pension fund. For all fund purposes, the member becomes a retirant. The amount of credited service and final average salary shall freeze as of the date of entry into the DROP.

In 2002, Laws of Florida Chapter 2002-359 amended the DROP to allow the DROP participants to continue to receive shares of the Chapter 185 share accounts.

Sec. 16. - West Palm Beach Police Pension Fund.

* * *

- (13) Deferred Retirement Option Plan (DROP).-
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* * *

4. Upon a member's election to participate in the DROP, he or she shall cease to be a member and shall no longer accrue any benefits under the Pension Fund, except for the benefits provided under subsection (11), Chapter 185 share accounts. For all Fund purposes, the member becomes a retirant, except that a DROP participant shall continue to receive shares of the chapter moneys in accordance with subsection (11), Chapter 185 share accounts. The amount of credited service shall freeze as of the date of entry into the DROP.

Finally, in 2003, Laws of Florida Chapter 2003-331 amended the DROP to allow the DROP participants to vote as members for purposes of election for the member trustees. The below is the provision as amended then and it remains the provision in the current document.

Section 16. West Palm Beach Police Pension Fund.—

* * *

- (13) Deferred Retirement Option Plan (DROP).—

(a) Eligibility to participate in the DROP.—

* * *

4. Upon a member's election to participate in the DROP, he or she shall cease to be a member and shall no longer accrue any benefits under the Pension Fund, except for the benefits provided under subsection (11), Chapter 185 share accounts. For all Fund purposes, the member becomes a retirant, except that a DROP participant shall continue to receive shares of the chapter moneys in accordance with subsection (11), Chapter 185 share accounts. DROP members shall also be eligible to vote as members for purposes of election of the member-trustee. The amount of credited service shall freeze as of the date of entry into the DROP.

Historically, the DROP plan has been amended to increase benefits for the actively employed DROP participants.

CONCLUSION:

Based on Florida law and the past practice of the bargaining parties, the collective bargaining agreement could provide for increased benefits for participants in the DROP who have not yet terminated employment.