

CITY OF FORT PIERCE - OFFICE OF THE CITY ATTORNEY

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**M E M O R A N D U M**

**TO:** Thomas K. Perona, Retirement Board Chair

**FROM:** James T. Walker, Assistant City Attorney

**RE:** Options for Code Amendment Relating to Disability Retirement

**DATE:** July 30, 2014

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This memorandum serves as response in reply to request made by the Board at its July hearing that there be suggestion of amendatory options that might have the effect of reducing the actuarial burden placed on the Retirement Fund by disability benefit entitlement. The subject is currently governed by our Code sections 13-36, 13-37 and 13-38. See generally “General principles governing award of non-duty and duty-related disability retirement through the Fort Pierce Retirement System”, **Board Members’ Handbook for Fort Pierce Retirement Board**, pg. 58.

There is much that can be done. Ours is a “Local Plan”. This means that, for the most part, its details are left to the governing body to determine. So long as there is compliance with requirements of Section 401 of the Internal Revenue Code, there is relatively little substantive regulation imposed by state law, particularly Fla.Ch.112. This general rule is subject to these constraints:

1. any provision affecting the amount a vested member may expect to receive in benefit entitlement is subject to the collective bargaining process;
2. Fla. Stat. sec. 440.21 provides that a city may not deduct from the employee’s income a contribution to pay workers’ compensation benefits. See *City of Miami v. Bell*, 634 So.2d 163, 165 (Fla. 1994);
3. Fla. Stat. sec. 112.18 provides that, as to police officers, certain conditions including but not limited to heart disease are presumed to arise out of employment for purposes of in-line disability entitlement, provided that an initial physical examination fails to disclose the condition;

4. the sum of an employee's disability benefit and any workers' compensation indemnity payment may not exceed an employee's average monthly wage, with any right of offset being subtracted from the WC payment, see ex. Fla. Stat. sec. 440.21(2); see ex. **Terry v. Board of Trustees**, 885 So.2d 916(Fla 4<sup>th</sup> DCA 2004), except that the WC payment becomes primary and the disability payor is entitled to any offset when the pension plan is funded at least in part with the employee's contributions. See ex. **City of Hollywood v. Lombardi**, 770 So.2d 1196, 1203 (Fla 2000).

In the course of preparing this memorandum, effort was made to examine the disability retirement code provisions of certain other cities to see what they have. They included Miami, Jacksonville, Tallahassee and Tampa. Of these jurisdictions, it appears that the City of Gainesville has gone farthest in the direction of crafting a tight, precise ordinance calculated to more narrowly focus entitlement to disability retirement benefits. Hence, a copy is enclosed herewith. I should like to draw attention to these specific provisions, each of which is much more narrowly drawn than are this City's own very generalized standards:

Sec. 2-547(definitions) *In line of duty* means an injury or illness arising out of and in the actual performance of duties required by a member's employment, during his or her regularly scheduled working hours or irregular working hours as required by the city. The administrator may require such proof as he or she deems necessary as to the time, date, and cause of any such injury or illness, including evidence from any available witnesses. **Workers compensation records may also be used. Disability resulting from drug or alcohol abuse or use of tobacco products shall not be considered in the line of duty.**  
**Comment:** the bold language has no counterpart in our sec. 13-37;

Sec. 2-553 (disability benefits) (a) *Disabled employees*. A regular employee of the city who becomes, in the opinion of the city commission, totally and permanently unable to perform **substantial work for pay within a 50-mile radius of his/her residence, or the distance between his/her residence and city hall (whichever is greater), and is wholly and continuously unable to perform any and every essential duty of his/her employment, with or without a reasonable accommodation, or of a position to which he/she may be assigned on the recommendation of the disability review committee as approved by the administrative department head. ... It is the intent of this section to provide whenever practical and feasible for placement within the city of employees who may become unable to perform the duties of a particular job. If placement on another position is not practical or possible, this fact does not in itself determine disability.** And see also Gainesville Code sec. 2-553(b)(4).

**Comment:** The bold language finds no counterpart in Fort Pierce sec. 13-36. It is a much narrower definition. Under the Fort Pierce code, the disability inquiry essentially

ends if there is no work available with the City within the member's limitations. But under Gainesville's code the search area covers any employment within a 50-mile radius. I might add that a similar distance radius is imposed in the case of disability for workers compensation purposes. See Fla. Stat. sec. 440.15(1)(b);

Sec. 2-553(disability benefits) (b)(proof of disability) (1) Such proof shall include the certification of the member's total and permanent disability by a physician or other qualified medical practitioner(s), **and such other evidence of disability as the administrator may require, including reports from vocational rehabilitation, evaluation, or testing specialists who have evaluated the applicant for employment.**

**Comment:** the bold print, again, has no counterpart in our own City's code, which essentially makes this just a medical question, passed on by two doctors. In traditional disability law, medical evidence is only one factor among many to be considered. Gainesville's code allows for a much more sophisticated assessment, where it involves use of vocational and rehabilitative evaluation;

Sec. 2-553(disability benefits) (b)(proof of disability) (2) It must be documented that: a. **the member's medical condition occurred or became symptomatic during the time the member was employed as a regular employee of the city. b. the member was totally and permanently disabled at the time he or she terminated covered employment; and c. the member has not engaged in any activity or employment or self-employment inconsistent with the request for disability after such termination.**

**Comment:** some few years back, 'tho the details are not now recalled, it will be remembered that the City ended up paying disability to a retirant who was apparently in good health when he left but who became ill roughly a year after retiring. The medical evidence related the ensuing disability back to the employment. Such a result would not be possible under Gainesville's code which, unlike this City's, requires that the disability arise at or before the initial date of retirement or termination. See also Gainesville Code section 2.553(b)(4);

Sec. 2-553(disability benefits)(5) **The unavailability of an employment position with the city that the member is physically and mentally capable of performing will not be considered as proof of disability, nor shall a finding of permanent total disability under the workers compensation system be proof of permanent and total disability under the plan or that the injury or illness was incurred in-line-of-duty.**

**Comment:** this clarifies that mere unavailability of a job at city hall will not, by itself, suffice to establish entitlement. It also clarifies that permanent total disability for purposes of workers compensation does not govern whether a member is permanently and totally disability for purposes of the City's disability retirement plan.

Sec. 2-553 (disability benefits)(3) *Disability review committee.* **A disability review committee is hereby created consisting of the risk management director, the human resources director, the plan administrator (who will serve as chair), the appropriate charter officer, and the appropriate administrative department head. This committee shall review all requests for disability payments, review and reexamine the entitlement of pensioners to the continuance of the pension, and shall act as an advisory committee to the city commission as to all matters provided for or related to this division. The committee shall investigate each case, thoroughly considering all pertinent medical evidence which is available or may be requested. The committee shall establish the policies and procedures necessary to carry out the provisions of this section, including, but not limited to the utilization of outside consultants and medical experts. After the investigation is complete in each instance, a written recommendation will be prepared and submitted to the commission.**

**Comment:** Fort Pierce has no equivalent investigative mechanism. The committee provided by this section is additionally given responsibility for monitoring the benefit recipient's continuing entitlement.

Sec. 2-554 (amount of disability payments)(b) (3) **The employee's basic disability benefit will be reduced by: a. the portion of any early or normal retirement benefits he/she may receive, which are attributable to employer contributions. b. his/her disability benefit percent up to a maximum of 50 percent multiplied by the monthly Social Security primary insurance amount (PIA) which he/she is initially receiving as a disabled worker, or the amount to which he or she would initially be entitled as a disabled worker if the employee has willfully failed or refused to apply for, and in good faith pursue, obtaining such benefit, unless this latter requirement is waived by the plan administrator for good cause. The reduction, once determined, shall not be further adjusted by subsequent increases in Social Security PIA amounts.**

**Comment:** This borrows a provision from the Workers' Compensation Act, which allows an offset against any social security being reduced. If the employee refuses to apply for social security, for whatever reason, the employer may take a credit against the amount of SS that would have been payable had the member applied.

Sec. 2-554(amount of disability payments) (4) **In no event shall the disability benefit payable to the city to a disabled employee exceed the lesser of \$3,750.00 per month or an amount equal to his/her maximum benefit percent, less (3)(a) and (b) and the initially determined wage replacement benefit made to the employee under worker's compensation laws. The deductions for workers' compensation payments shall not be made if the city commission determines that the disability for which benefits are payable is not, directly or indirectly, related to the injury for which workers' compensation payments were made. Unless otherwise provided by law, the**

**reduction attributable to workers compensation payments shall not reduce the disability benefit below the amount which, when such is combined Social Security disability and workers compensation benefits received by the employee, equals 80 percent of the employee's AWW or 80 percent of the employee's ACE (on a weekly basis), whichever is greater. A disabled employee's maximum benefit percent will be 80 percent if the employee's disability is due to a job related injury in the course of employment with the city resulting in payment of worker's compensation, and otherwise shall be 70 percent.**

**Comment:** this provides for coordination of city disability benefits with social security, so that the combination may not exceed 80% of the employee's "average current earnings". This provision is borrowed from Florida's Workers Compensation Act. There is not understood to be any Fort Pierce equivalent.

Sec. 2-555 (limitations on payment of disability payments) **Benefits are not payable for disability due to: (1) self-inflicted injuries if intentional; (2) participation in or in consequence of having participated in the commission of a crime, or while willfully participating in a riot, and insurrection, or other act of violence; (3) service in uniformed services; (4) in the case of other than in-line-of-duty disabilities, a condition existing prior to employment or re-employment by the city (a) which condition, as it existed at that time, is the major contributory cause of the claimed disability, or (b) for which medical advice, or diagnosis, care, or treatment was recommended, or received during the one year period immediately preceding employment or re-employment, or (c) when during any medical examination authorized under this division or otherwise, including pre-employment and post-employment medical examinations described in section 5-560, the applicant, member or former employee, makes false representations regarding previous injuries, impairments, anomalies or disease, upon which the city has relied in making employment or benefit decisions.**

**Comment:** This provision, likewise, borrows heavily from the Workers Compensation Act. For the purposes of that Act, the term "major contributory cause" is defined to mean that coverage applies only if the workplace injury contributes more to the disability, or to the need for treatment, than any other single cause (i.e. contributes to 51% or more of the overall disability). See *Closet Maid v. Sykes*, 763 So.2d 377 (Fla 1<sup>st</sup> DCA 2000). Our own Code does not exclude coverage for disability arising out of the enumerated causes, nor does it include any provision excluding or apportioning pre-existing conditions for purposes of in-line-of-duty disability.

It is hoped that the foregoing discussion of Gainesville's ordinance is a fair response to this Board's request for ideas on what sort of measures might, if adopted would operate

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to reduce the Retirement System's actuarial liability for disability benefit entitlement. In the event the Board wishes to move forward with the idea of incorporating similar provisions in our Code, the Board should consider recommending any such provisions to the Commission which will then determine whether it should pursue them or not. Most would probably trigger a collective bargaining obligation since they do have the effect of reducing the scope of benefit entitlement. The creation of a "disability review committee" would not, however, since that is merely an administrative tool effecting the procedural means of processing a benefit application. The Commission could move immediately to formally amend the Code if it liked the idea. Please let me know of any further comments or questions requiring additional attention.

*s/ James T. Walker*

James T. Walker, Esq.  
Assistant City Attorney

/mlp

cc: Robert V. Schwerer, City Attorney

**Sec. 2-547. Definitions.**

Except as otherwise stated in this division, where the purpose and intent of this division is consistent with the definitions contained in section 2-521, as amended, the definitions as contained in section 2-521, as amended, shall have the same meaning when used in this division.

*ACE* means "average current earnings," as utilized to determine benefit under 42 U.S.C. §§ 402 and 423.

*AWW* means "average weekly wages" as utilized under Chapter 440, F.S., to determine compensation for disability.

*In line of duty* means an injury or illness arising out of and in the actual performance of duties required by a member's employment, during his or her regularly scheduled working hours or irregular working hours as required by the city. The administrator may require such proof as he or she deems necessary as to the time, date, and cause of any such injury or illness, including evidence from any available witnesses. Workers' compensation records under the provisions of chapter 440 may also be used. Disability resulting from drug or alcohol abuse or use of tobacco products shall not be considered in the line of duty.

(Code 1960, § 20-71; Ord. No. 060863, § 1, 2-12-07)

*Cross reference*— Definitions and rules of construction generally, § 1-2.

**Sec. 2-551. Funding; administration of fund.**

- (a) *Funding.* Disability benefits shall be financed by annual appropriations made to a designated fund. The amount of the appropriation shall be determined each year by the city commission on an estimate of a sum which shall be sufficient to fund the disability plan on a sound basis.
- (b) *Administration of fund.* The finance director shall be responsible for the safekeeping of the funds. The director shall transfer to the disability benefit fund all monies appropriated by the city commission on at least a quarterly basis. The director shall be responsible for making all payments and disbursements from the disability fund.

(Code 1960, § 20-75; Ord. No. 060863, § 5, 2-12-07)

**Sec. 2-552. Eligibility for both solely years of service-based retirement and for disability payments.**

In no event shall an employee be eligible to receive disability benefits, if, at the date such benefits would commence, as provided in subsection 2-554(a), the employee would then be eligible for a normal retirement under the General Employees Pension Plan, based upon the completion of 20 or more years of credited service, as defined under that plan, at any age.

(Code 1960, § 20-76; Ord. No. 030094, § 1, 7-28-03; Ord. No. 060863, § 6, 2-12-07)

**Sec. 2-553. Disability benefits.**

- (a) *Disabled employees.* A regular employee of the city who becomes, in the opinion of the city commission, totally and permanently unable to perform substantial work for pay within a 50-mile radius of his/her residence, or the distance between his/her residence and city hall;

whichever is greater), and is wholly and continuously unable to perform any and every essential duty of his/her employment, with or without a reasonable accommodation, or of a position to which he/she may be assigned on the recommendation of the disability review committee as approved by the administrative department head, by reason of a medically determinable physical or mental impairment, shall be entitled to disability payments in accordance with the disability plan. It is the intent of this section to provide whenever practical and feasible for placement within the city of employees who may become unable to perform the duties of a particular job. If placement on another position is not practical or possible, this fact does not in itself determine disability.

- (b) *Proof of disability.* Before payment of any disability retirement benefit, the administrator shall require proof that the member is totally and permanently disabled as provided herein:
- (1) Such proof shall include the certification of the member's total and permanent disability by a physician or other qualified medical practitioner(s), and such other evidence of disability as the administrator may require, including reports from vocational rehabilitation, evaluation, or testing specialists who have evaluated the applicant for employment.
  - (2) It must be documented that:
    - a. The member's medical condition occurred or became symptomatic during the time the member was employed as a regular employee of the city.
    - b. The member was totally and permanently disabled at the time he or she terminated covered employment; and
    - c. The member has not engaged in any activity or employment or self-employment inconsistent with the request for disability, after such termination.
  - (3) If the application is for "in-line-of-duty" disability, in addition to the requirements of subsection (2), it must be documented by competent medical evidence that the disability was caused as defined in section 2-547.
  - (4) If the application is for other than "in-line-of-duty" disability the employee must have met the eligibility requirements of section 2-550 on or before the workday immediately preceding the occurrence or manifestation of the injury or illness which caused the disability.
  - (5) The unavailability of an employment position with the city that the member is physically and mentally capable of performing will not be considered as proof of disability, nor shall a finding of permanent total disability under the workers compensation system be proof of permanent and total disability under the plan or that the injury or illness was incurred in-line-of-duty.
- (c) *Disability review committee.* A disability review committee is hereby created consisting of the risk management director, the human resources director, the plan administrator (who will serve as chair), the appropriate charter officer, and the appropriate administrative department head. This committee shall review all requests for disability payments, review and reexamine the entitlement of pensioners to the continuance of the pension, and shall act as an advisory committee to the city commission as to all matters provided for or related to this division. The committee shall investigate each case, thoroughly considering all pertinent medical evidence which is available or may be requested. The committee shall establish the policies and procedures necessary to carry out the provisions of this section, including, but not limited to, the utilization of outside consultants and medical experts. After the investigation is complete in each instance, a written recommendation will be prepared and submitted to the city commission.
- (d)

*Determination of eligibility.* The city commission shall then consider the written recommendation of the disability review committee and may secure such other information as the commission desires and determines appropriate. Following thorough consideration, the city commission will then determine the eligibility of the employee for benefits as provided in this plan. The city commission may attach such conditions and safeguards to its findings and determinations as may be deemed appropriate in order to carry out the intent and purpose of this division. The determination of the city commission on any matters related to this division, its interpretation or the entitlement of one to its benefits shall rest solely with the city commission, and its determination shall be final.

(Code 1960, § 20-77; Ord. No. 980128, § 3, 7-27-98; Ord. No. 020731, § 1, 6-23-03; Ord. No. 060863, § 7, 2-12-07)

### **Sec. 2-554. Amount of disability payments.**

- (a) *Time payments begin.* A disabled employee shall receive a monthly benefit beginning latter of the month following the occurrence of the disability or the month following the termination of any and all accumulated paid leave. Employees with accumulated paid leave to their credit at the time of disability must exhaust leave credit prior to being placed on disability retirement.
- (b) *Calculation of amount.* The amount of monthly benefit to which a disabled employee will be entitled will be calculated as follows:
- (1) An employee's basic disability benefit percent will be equal to the greater of his/her years of creditable service times two percent with a minimum 42 percent for in-line-of-duty disability and a minimum 25 percent for other than in-line-of duty disability.
  - (2) An employee's basic disability benefit will be equal to his/her disability benefit percent multiplied by his/her final average earnings as would be calculated under the General Employees Pension Plan and using his/her total period of creditable service if such is less than three years.
  - (3) The employee's basic disability benefit will be reduced by:
    - a. The portion of any early or normal retirement benefits he/she may receive, which are attributable to employer contributions.
    - b. His/her disability benefit percent up to a maximum of 50 percent multiplied by the monthly Social Security primary insurance amount (PIA) which he/she is initially receiving as a disabled worker, or the amount to which he or she would initially be entitled as a disabled worker if the employee has willfully failed or refused to apply for, and in good faith pursue, obtaining such benefit, unless this latter requirement is waived by the plan administrator for good cause. This reduction, once determined, shall not be further adjusted by subsequent increases in Social Security PIA amounts.
  - (4) In no event shall the disability benefit payable by the city to a disabled employee exceed the lesser of \$3,750.00 per month or an amount equal to his/her maximum benefit percent, less (3)(a) and (b) and the initially determined wage replacement benefit made to the employee under worker's compensation laws. The deductions for worker's compensation payments shall not be made if the city commission determines that the disability for which benefits are payable is not, directly or indirectly, related to the injury for which worker's compensation payments were made. Unless otherwise provided by law, the reduction attributable to workers compensation payments shall not reduce the disability benefit below the amount which, when such is combined with Social Security disability and workers compensation benefits received by the employee, equals 80 percent of the employee's AWW or 80 percent of the employee's

ACE (on a weekly basis), whichever is greater. A disabled employee's maximum benefit percent will be 80 percent if the employee's disability is due to a job related injury in the course of employment with the city resulting in payment of worker's compensation, and otherwise shall be 70 percent.

- (c) *Duration of payment.* Disability payments shall continue until death of the employee or until termination of disability pension as provided in section 2-556.

(Code 1960, § 20-83; Ord. No. 030094, § 2, 7-28-03; Ord. No. 060863, § 8, 2-12-07)

### **Sec. 2-555. Limitations on payment of disability payments.**

Benefits are not payable for disability due to:

- (1) Self-inflicted injuries if intentional;
- (2) Participation in or in consequence of having participated in the commission of a crime, or while willfully participating in a riot, and insurrection, or other act of violence;
- (3) Service in uniformed services.
- (4) In the case of other than in-line-of-duty disabilities, a condition existing prior to employment or re-employment by the city (a) which condition, as it existed at that time, is the major contributory cause of the claimed disability, or (b) for which medical advice, diagnosis, care, or treatment was recommended, or received during the one year period immediately preceding employment or re-employment, or (c) when during any medical examination authorized under this division or otherwise, including pre-employment and post-employment medical examinations described in section 2-560, the applicant, member or former employee, makes false representations regarding previous injuries, impairments, anomalies or disease, upon which the city has relied in making employment or benefit decisions.

(Code 1960, § 20-79; Ord. No. 060863, § 9, 2-12-07)

### **Sec. 2-556. Termination or reduction of disability pension.**

- (a) In the event that a former employee is determined by the administrator to be no longer disabled as provided for in the plan, his/her disability pension shall be discontinued as follows. In the event that he/she has been offered regular employment with the city, the disability pension shall cease within 30 days of the date of the offer, unless extended by the administrator for good cause shown, or the date of beginning such employment, whichever sooner occurs. In any other case the disability pension shall be discontinued six months after the date of such determination.
- (b) A disabled pensioner shall be considered as no longer disabled nor entitled to the benefits of this division when the pensioner becomes able to satisfactorily perform duties similar to those required by the position from which he/she was retired, or duties of a position which shall become and is available to the person and deemed suitable by the city commission. Such determination shall be made by the city commission upon the recommendation of the disability review committee concurred in by the appropriate administrative department head. If the disability pensioner refuses to accept an offer of reemployment or reinstatement made in accordance with this section, his/her disability benefits shall cease immediately. The city commission shall make such termination of recovery based upon information provided by the disability review committee and other appropriate sources, and the determination shall be final and conclusive.
- (c)

In the event that a disabled pensioner is able to engage in full or part-time employment for other employers, and/or substantial self-employment, resulting in current employment earnings, disability payments made to such former employee shall be reduced as follows. The pensioner's monthly reported (city employment and approved outside employment) employment earnings at the date the disability occurred will be adjusted for seasonal or other reasonable variations, and then adjusted by cost of living increases to date of reduction. This amount (adjusted earnings) shall be compared with the pensioner's current employment earnings. If the pensioner's current employment earnings exceed 25 percent of his/her adjusted earnings, then for each three percent in excess of that level, the disability pension shall be reduced by one percent. For example, if his/her current earnings become 55 percent of his/her adjusted earnings, then the disability pension payment shall be reduced by ten percent. Such recovery of earning capacity shall not affect the determination of disability unless the city specifically determines to discontinue pension payments upon the basis that the pensioner is no longer disabled as provided for herein. Any reduction authorized by this section shall be imposed in addition, and subsequent to, any offsets authorized by section 2-554.

*(Code 1960, § 20-78; Ord. No. 060863, § 10, 2-12-07)*

**Secs. 2-561—2-575. Reserved.**