

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA LEAGUE OF CITIES,	)	
INC.,; CITY OF CASELBERRY;	)	
CITY OF DEERFIELD BEACH;	)	
CITY OF GREENACRES;	)	
CITY OF KISSIMMEE; AND	)	
CITY OF NEW PORT RICHEY,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 03-1117RP
	)	
DEPARTMENT OF MANAGEMENT	)	
SERVICES, DIVISION OF	)	
RETIREMENT,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
FLORIDA PROFESSIONAL	)	
FIREFIGHTERS, INC.,	)	
FLORIDA POLICE BENEVOLENT	)	
ASSOCIATION, INC.,	)	
	)	
Intervenors.	)	
_____	)	

FINAL ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a final hearing in the above-styled cause on July 29, 2003, in Tallahassee, Florida.

APPEARANCES

For Petitioners Florida League of Cities, Inc., City of Casselberry, City of Deerfield Beach, City of Greenacres, City of Kissimmee, and City of New Port Richey:

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STATEMENT OF THE ISSUE

Whether the proposed rules, 60Z-1.026 and 60Z-2.017,  
Florida Administrative Code, published in the Florida  
Administrative Weekly on March 7, 2003 (Volume 29, No. 10, at  
pages 979-80), constitute an invalid exercise of delegated  
legislative authority.

PRELIMINARY STATEMENT

On March 28, 2003, the Florida League of Cities, City of Casselberry, City of Deerfield Beach, City of Greenacres, City of Kissimmee, and City of New Port Richey (Petitioners) filed a petition challenging proposed rules 60Z-1.026 and 60Z-2.017 of the State of Florida, Department of Management Services, Division of Retirement.

At the final hearing, Petitioners presented the testimony of Michael J. Tierney, expert witness—enrolled actuary, and Kraig Conn, Deputy General Counsel for the Florida League of Cities. Additionally, stipulated testimony was received for the following Petitioners' witnesses: Jeffrey Dreier, Financial Director, City of Casselberry; Sally Siegel, Finance Director, City of Deerfield Beach; Wadie Atallah, City Manager, City of Greenacres; Mark E. Durbin, City Manager, City of Kissimmee; and Richard Snyder, Finance Director, City of New Port Richey. Respondent, State of Florida, Department of Management Services, Division of Retirement, presented the testimony of Charles Slavin, Actuary, Division of Retirement and Patricia Shoemaker, Benefits Administrator, Division of Retirement. Intervenors presented no witnesses. Petitioners' Exhibits 1-15 were received into evidence.

A transcript of the final hearing proceeding was filed with DOAH on August 12, 2003. The parties requested and were granted leave to file proposed final orders more than 10 days following the receipt of the transcript. All parties submitted proposed final orders or adopted a proposed final order submitted by either Petitioners or Respondent. A review of those post-hearing submittals has been completed and utilized where practicable in the composition of this final order. References to Sections of Florida Statutes are to Florida Statutes 2003, unless otherwise noted.

#### FINDINGS OF FACT

1. Petitioner, Florida League of Cities, Inc. ("League"), is a not-for-profit Florida corporation located at 301 South Bronough Street, Suite 300, Tallahassee, Florida 32301. The League is a wholly owned instrumentality of its 405 member cities. The League's purpose is to work for the general improvement of municipal government and its effective administration in this state, and to represent its members before the legislative, executive and judicial branches of Florida's state government on issues pertaining to the welfare of its members. The League's members include 175 cities with pension plans for firefighters established pursuant to Chapter 175; and 184 cities with pension plans for police officers established pursuant to Chapter 185.

2. Petitioner Casselberry maintains a local law pension plan for its firefighters and police officers pursuant to Chapters 175 and 185. Casselberry's pension plan was in effect on October 1, 1998. Casselberry's pension plan meets all the minimum benefit requirements of Chapters 175 and 185.

3. Casselberry's police/fire pension plan provides benefits in addition to or greater than the pension benefits it provides to general employees that cost as much or more than the total amount of premium taxes received by the City of Casselberry.

4. Petitioner Deerfield Beach maintains a local law pension plan for its police officers pursuant to Chapter 185, Florida Statutes. Deerfield Beach's pension plan meets all the minimum benefit requirements of Chapter 185. Further, Deerfield Beach's police pension plan provides benefits in addition to or greater than the pension benefits it provides to general employees that cost as much or more than the total amount of premium taxes received by the City of Deerfield Beach.

5. Petitioner Greenacres maintains a local law pension plan for its firefighters and police officers pursuant to Chapters 175 and 185, Florida Statutes. Greenacres' pension plan meets all the minimum benefit requirements of Chapters 175 and 185.

6. Greenacres' police/fire pension plan provides benefits in addition to or greater than the pension benefits it provides to general employees that cost as much or more than the total amount of premium taxes received by the City of Greenacres.

7. Petitioner Kissimmee maintains a local law pension plan for its firefighters pursuant to Chapter 175. Kissimmee's firefighter pension plan meets all the minimum benefit requirements of Chapter 175.

8. Kissimmee's firefighter pension plan provides benefits in addition to or greater than the pension benefits it provides to general employees that cost as much or more than the total amount of premium taxes received by the City of Kissimmee.

9. Petitioner New Port Richey maintains a local law pension plan for its firefighters pursuant to Chapter 175. New Port Richey's firefighter pension plan meets all the minimum benefit requirements of Chapter 175, and provides benefits in addition to or greater than the pension benefits it provides to general employees. These benefits cost as much or more than the total amount of premium taxes received by the City of New Port Richey.

10. Chapters 175 and 185, govern the establishment and operation of defined benefit retirement plans for municipal police officers and firefighters employed by cities and special districts. These Chapters also contain a revenue sharing

program that allows participating cities and districts to receive a portion of the state excise tax on property and casualty insurance premiums collected on policies covering property within each jurisdiction.

11. In order to qualify for the annual distribution of premium tax revenues provided by Chapters 175 and 185, the local government pension plan must comply with the applicable provisions of those statutes. Sections 175.351(1) and 185.35(1), respectively, of those Chapters were amended in 1999 by Chapter 99-1, Laws of Florida. The two Sections are virtually identical and can be treated interchangeably for the purposes of this proceeding. Section 175.351(1), in pertinent part, reads as follows:

1) PREMIUM TAX INCOME.--If a municipality has a pension plan for firefighters, or a pension plan for firefighters and police officers, where included, which in the opinion of the division meets the minimum benefits and minimum standards set forth in this chapter, the board of trustees of the pension plan, as approved by a majority of firefighters of the municipality, may:

(a) Place the income from the premium tax in Section 175.101 in such pension plan for the sole and exclusive use of its firefighters, or for firefighters and police officers, where included, where it shall become an integral part of that pension plan and shall be used to pay extra benefits to the firefighters included in that pension plan; or

(b) Place the income from the premium tax in Section 175.101 in a separate supplemental plan to pay extra benefits to firefighters, or to firefighters and police officers where included, participating in such separate supplemental plan.

The premium tax provided by this Chapter shall in all cases be used in its entirety to provide extra benefits to firefighters, or to firefighters and police officers, 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 as provided in Section 175.162(2)(a). When a plan is in compliance with such minimum benefit provisions, as subsequent additional premium tax revenues become available, they shall be used to provide extra benefits. For the purpose of this chapter, 'additional premium tax revenues' means revenues received by a municipality or special fire control district pursuant to Section 175.121 that exceed that 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. Local law plans created by special act before May 23, 1939, shall be deemed to comply with this chapter.

(Underscored language was enacted by Chapter 99-1, Laws of Florida.)

12. The above-quoted underscored language of Sections 175.351 and 185.35 became effective March 12, 1999. The Division of Retirement advised all cities and districts that they could use additional premium tax revenues received in excess of the amount received for 1997 solely to pay for new



extra benefits adopted after March 12, 1999. The additional premium tax revenues could not be used to pay for extra benefits adopted before March 12, 1999. Consequently, responsibility for the cost to local governments for extra benefits adopted prior to March 12, 1999, is not defrayed by additional premium tax benefits and must be absorbed by the particular local government.

13. As established by testimony of Respondent's Actuary, Charles Slavin, along with Article X, Section 14 of the Florida Constitution and Part VII, Chapter 112, governmental pension plans must be funded on a "sound actuarial basis." A plan is actuarially funded when funded by contributions which, when expressed as a percent of active member payrolls or a fixed dollar amount, will remain approximately level from year to year and will not have to be increased in the future, in the absence of benefit improvements. Actuarial funding is based on reasonable assumptions, predictable events and variables so that all the funds necessary to pay employees' future benefits are accumulated by the expected date of benefit payments.

14. A pension plan is funded on a sound actuarial basis when a funding program has been established which, with the payment of level contributions and investment returns over the lifetime of the participants, will fund the difference between the value of expected promised benefits and the available

assets. Although pension benefits increase in future years from increased salaries and other facts, pension plans are usually funded on a constant level percentage of payroll. Such funding pays the normal fiscal cost and amortizes unfunded liabilities as required by Chapter 112, Part VII. Payroll growth helps pay for increases in the cost of benefits because employee contributions, based on a level percentage of payroll produce increased funding. Liability increases are offset by payroll growth.

15. Extra benefits for firefighters and police officers in excess of those provided general employees, that were enacted by local governments, prior to or after March 12, 1999, were required by law to be funded on a sound actuarial basis. Premium tax revenues to the local governments are not within the control of those local governments since the amount of tax levied is set by the legislature through statutory enactment. Accordingly, inclusion of future revenues in future years from the premium tax is not a proper actuarial assumption in the funding of extra benefits. Some local governments, despite this categorization of the premium tax revenue, enacted special benefits in reliance upon possible future increases in revenues from the tax to fund special benefits.

16. All local government Petitioners in the present proceeding meet the minimum benefit requirements of Sections 175.162 and 185.16. The cost of extra benefits enacted by Petitioners prior to the effective date of Chapter 99-1 (March 12, 1999), generally exceeded the amount of the premium tax received by Petitioners. Respondent's requirement that Petitioners set aside additional premium tax revenues to fund solely future benefit increases prevented the reduction of future funds for future benefits.

17. Respondent's proposed rules, 60Z-1.026 and 60Z-2.017, are identical with exception that one is applicable to Sections 175.351(1) and 185.35(1), respectively, and read as follows:

Use of premium tax revenues:

(1) For pension plans that were in effect on October 1, 1998, that have not met the minimum benefit requirements described in Section 185.16, benefits shall be increased incrementally as additional premium tax revenues become available.

(2) For pension plans that were in effect on October 1, 1998, that provide benefits that meet or exceed the minimum benefits described in Section 185.16, increases in premium tax revenues over the amount collected for calendar year 1997, must be used in their entirety to provide extra benefits in addition to those benefits provided prior to the effective date of Chapter 99-1, Laws of Florida.

(3) For plans that were not in existence on October 1, 1998, premium tax revenues must be used in their entirety to provide extra benefits.

18. Respondent interprets "additional premium benefits" as defined in Sections 175.351 and 185.35 to mean premium tax benefits greater than those received in 1997 and distributed to cities in 1998, prior to enactment of Chapter 99-1. "Extra benefits" means benefits greater than those afforded general employees and in addition to or greater than those benefits enacted prior to the effective date of Chapter 99-1. These definitions presume that amendments in Chapter 99-1 are to be applied prospectively, or after the effective date of that legislative enactment. Extra benefits enacted prior to that date must be funded from premium tax dollars received prior to that date.

19. No evidence was presented by Petitioners of legislative intent that "additional premium tax revenues" should or could be used to fund existing extra benefits enacted prior to Chapter 99-1.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over this proceeding. See Section 120.56. The rule challenge in this proceeding was properly filed, having complied with the requirements of Section 120.56.

21. Petitioners have standing to challenge the proposed rule. Each city Petitioner administers on behalf of its police officers, firefighters or both, a pension plan governed by

Chapters 175 and 185, and will be affected by the proposed rules.

22. Each city Petitioner is a member of the Florida League of Cities. The League meets the criteria for association standing as set forth in Florida Homebuilders Association v. Florida Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982), because the League has shown that (1) a substantial number of its members are affected, (2) that the subject matter is within the League's general scope of interest and activity, and (3) that the relief sought is appropriate for the League to receive on behalf of its members. See also Rule 28-106.205, Florida Administrative Code.

23. A proposed rule is an invalid exercise of delegated legislative authority if, among other infirmities:

The rule enlarges, modifies, or contravenes the specific provisions of law implemented;

\* \* \*

The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

See Section 120.52(8)(c), (e), and (f).

24. Respondent has rulemaking authority to implement, interpret, or explain the use of "additional premium tax revenues" to fund "extra benefits" as expressed in Sections 175.351 and 178.35. (See Sections 120.536(1), 120.54, 175.341(2), and 185.23(2)); Cf. Southwest Florida Water Management District v. Save the Manatee Club, 773 So. 2d. 594 (Fla. 1st DCA 2000). Petitioners have not challenged Respondent's rulemaking authority.

25. Petitioners challenge Respondent's construction of Sections 175.351 and 185.35, as expressed in Respondent's proposed rules. Chapter 175 applies to municipalities and special fire control districts that elect to receive insurance premium tax revenues to subsidize pension plans for firefighters. Chapter 185 applies to municipal police officers' pension funds. Participation in the revenue programs in Chapters 175 and 185 is entirely voluntary. The provisions of the two chapters are essentially identical.

26. Respondent's proposed rules, 60Z-1.026 and 60Z-2.017 are essentially identical as well.

27. Respondent's proposed rules do not enlarge, modify, or contravene the specific provisions of law implemented. The proposed rules are not arbitrary or capricious. Further, the proposed rules do not impose regulatory costs which could be

reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

28. Respondent's proposed rules are clear. Future extra benefit increases are funded through future increases in premium tax revenues. Petitioners seek to have amendments enacted via Chapter 99-1 applied retro-actively. Such an action is contrary to well established principles of statutory interpretation that absent explicit provisions to the contrary, a legislative enactment is to be applied prospectively. See Supreme Court of Florida v. Lavazzoli, 434 So 2d 321 (Fla. 1983).

ORDERED

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners' challenge to proposed rules 60Z-1.026 and 60Z-2.017 is dismissed.

DONE AND ORDERED this 23rd day of September, 2003, in Tallahassee, Leon County, Florida.



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Administrative Law Judge  
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Filed with the Clerk of the  
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this 23rd day of September, 2003.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.