

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF WILTON MANORS, FLORIDA,	)	
FOR THE BENEFIT OF THE CITY OF	)	
WILTON MANORS PENSION PLAN FOR	)	
GENERAL EMPLOYEES AND POLICE,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 08-4766
	)	
DEPARTMENT OF MANAGEMENT	)	
SERVICES, DIVISION OF	)	
RETIREMENT,	)	
	)	
Respondent.	)	
	)	
<hr/>	)	
CITY OF WILTON MANORS POLICE	)	
(2000),	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 09-0933
	)	09-0934
	)	09-0935
DEPARTMENT OF MANAGEMENT	)	09-0936
SERVICES, DIVISION OF	)	09-0937
RETIREMENT,	)	09-0938
	)	
Respondent.	)	
	)	
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RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on April 16, 2009, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Robert D. Klausner, Esquire  
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For Respondent: Thomas E. Wright, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether a city, which sponsors a retirement plan covering its general employees and police officers, became ineligible to receive funds that the state distributes for the benefit of police pensions when, in 1999, the board of trustees for the retirement plan failed to hold an election affording the member police officers a chance to vote on whether a new plan for police officers only should be established.

PRELIMINARY STATEMENT

By letter dated November 29, 2000, Respondent Department of Management Services, Division of Retirement, notified Petitioner City of Wilton Manors that premium tax revenues collected in the 1999 tax year for the purpose of providing funds for the benefit of the local pension plan covering Petitioner's general employees and police officers would not be distributed as in previous years, because (Respondent alleged) the pension plan

was no longer in compliance with Chapter 185 of the Florida Statutes. Petitioner timely requested a formal hearing to contest the withholding of such funds.

Respondent did not immediately grant the request for hearing because the parties agreed that all reasonable efforts to resolve the dispute besides litigation should be exhausted. In time, various solutions were proposed, but the parties were unable to settle the matter. Meantime, years passed, and Respondent continued annually to withhold the premium tax distribution that otherwise would have been payable for the benefit of Petitioner's pension plan, were Respondent to deem the plan in compliance with Chapter 185.

On September 23, 2008, Respondent forwarded the case to the Division of Administrative Hearings ("DOAH"), where it was assigned Case No. 08-4766. While Case No. 08-4766 was pending, Respondent transmitted to DOAH six additional requests for hearing, which Petitioner had timely filed, on an annual basis, in connection with Respondent's withholding of the monetary distributions associated with tax years 2000 through 2005. These cases—assigned Case Nos. 09-0933, 09-0934, 09-0935, 09-0936, 09-0937, and 09-0938—were consolidated, together with Case No. 08-4766. Each case presented the very same dispute, and this Recommended Order applies to all of them.

The final hearing on the consolidated cases took place as scheduled, after several continuances, on April 16, 2009.

Petitioner called as its witnesses Theora Braccialarghe, Brenda Clanton, and Patricia Shoemaker. Petitioner's Exhibits 1, 4-7, 9-12, and 14-16 were received in evidence as well. Respondent elicited testimony from Patricia Shoemaker and Joseph Gallegos. In addition, Respondent's Exhibits 1-28 were admitted into evidence.

The final hearing transcript, comprising two volumes, was filed on May 4, 2009. Each party submitted a Proposed Recommended Order in compliance with the deadline (May 26, 2009) that had been established at hearing.

#### FINDINGS OF FACT

1. The City of Wilton Manors (the "City") is an incorporated municipality located in Broward County, Florida. The City has a population of about 12,000 and occupies approximately two square miles.

2. In its capacity as an employer, the City established a General Employees' And Police Officers' Retirement Plan (the "Plan"). The Plan is a defined benefits pension plan covering both the City's general employees and police officers. (Hereafter, the categorical description of the Plan will be "combined local law plan.") The terms and conditions of the Plan are set forth in ordinances adopted by the City Commission.

3. Exercising an authority conferred by statute on municipalities that provide retirement benefits to police officers, the City imposed on insurance companies an excise tax against premiums earned on casualty insurance policies covering property situated within its municipal boundaries. Such premium taxes are remitted to the Florida Department of Revenue and transferred to the Police and Firefighters' Premium Tax Trust Fund, which is overseen by the Division of Retirement (the "Division"). The Division is responsible for making annual distributions of the tax revenues to municipalities, such as the City, which impose the premium tax. The premium tax revenues are to be used exclusively to fund retirement benefits for police officers. (There is a companion premium tax program for the benefit of municipal firefighter pensions.)

4. In 1999, the Florida Legislature substantially amended Chapter 185 of the Florida Statutes.<sup>1</sup> (Chapter 175, Florida Statutes, which governs municipal firefighter pensions, was similarly amended in 1999, in the same legislation that amended Chapter 185.)

5. One of the newly enacted statutory provisions, namely Section 185.05(b)3., Florida Statutes (1999), gave instructions regarding the composition of boards of trustees—the bodies responsible for administering pension plans subject to the requirements of Chapter 185. The relevant statutory language

will be examined in detail below. One sentence, however, must be quoted in full here to provide context for the findings of fact which follow:

Any board of trustees operating a local law plan on July 1, 1999, which is combined with a plan for general employees shall hold an election of the police officers, or police officers and firefighters if included, to determine whether a plan is to be established for police officers only, or for police officers and firefighters where included.

§ 185.05(b)3., Fla. Stat. (1999).

6. The Division interpreted (and continues to understand) Section 185.05(b)3 as requiring municipalities, such as the City, whose combined local law plans as of July 1, 1999, covered both general employees and police officers (or police officers and firefighters), to establish a new plan for police officers (or police officers and firefighters) *only, i.e.* no general employees included—or forfeit the opportunity to continue receiving distributions of premium tax revenue.

7. By letter dated April 27, 1999, the Division notified the Plan's board of trustees (the "Board") of the new law, under which the Board would need to "hold an election of the police officers" if, as the Division believed (and as was in fact the case), the Plan covered both general employees and police officers.

8. The Board did not hold an "election of the police officers."<sup>2</sup> The evidence is insufficient to support a finding as to *why* the Board failed to carry out this particular statutory duty. Ultimately, however, while it would be interesting to know this fact, the reason for the Board's inaction is irrelevant.

9. The City Commission never created a retirement plan for police officers only, which would have entailed amending the existing Plan (to remove the police officers) in addition to establishing a new pension (for the police officers). Efforts to set up a police-only plan ultimately failed due to concerns that administering two plans in place of the existing one would be too expensive.

10. By letter dated November 29, 2000, the Division informed the City's mayor that the Division was withholding payment of the City's share of the premium tax revenue for 1999, based on the Division's determination that the Plan was no longer in compliance with Chapter 185, Florida Statutes, due to its inclusion of general employees. It was (and remains) the Division's position that combined local law plans, which provide benefits for general employees in addition to police officers (or police officers and firefighters), do not conform to minimum statutory requirements—and hence are ineligible to receive funding pursuant to the premium tax program, even though such

plans had been acceptable before 1999 and, like the Plan, had received premium tax monies for years preceding that date. Consistent with its position, the Division since 2000 has refused annually to distribute premium tax revenue to the City.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

12. As the party asserting that the City's rights and benefits under Chapter 185, Florida Statutes, are forfeit, the Division bears the burden of proof in this proceeding. See, e.g., Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981). Because none of the material historical facts relevant to the instant case is genuinely in dispute, however, neither the burden of proof nor the standard of proof (preponderance of the evidence) is outcome determinative.

13. The statutory framework supporting the premium tax program for assisting municipalities with the funding of police pensions is composed of several statutes which can be understood without explanation. Key provisions will be quoted below.

14. To begin, the power to adopt a new retirement plan, or to amend an existing plan, belongs to the municipality (or, in



some cases, but not this one, the legislature). Section 185.35(2), Florida Statutes (1999)<sup>3</sup>, provides as follows:

No retirement plan or amendment to a retirement plan shall be proposed for adoption unless the proposed plan or amendment contains an actuarial estimate of the costs involved. No such proposed plan or proposed plan change shall be adopted without the approval of the municipality or, where permitted, the Legislature. Copies of the proposed plan or proposed plan change and the actuarial impact statement of the proposed plan or proposed plan change shall be furnished to the division prior to the last public hearing thereon. Such statement shall also indicate whether the proposed plan or proposed plan change is in compliance with s. 14, Art. X of the State Constitution and those provisions of part VII of chapter 112 which are not expressly provided in this chapter.

(Emphasis added.)

15. If a municipality establishes a pension plan for police officers, Chapter 185 applies, according to its plain language:

This act applies to all municipalities, chapter plans, local law municipalities, or local law plans presently existing or to be created pursuant to this chapter. Those plans presently existing pursuant to s. 185.35 and not in compliance with the provisions of this act must comply no later than December 31, 1999. However, the plan sponsor of any plan established by special act of the Legislature shall have until July 1, 2000, to comply with the provisions of this act, except as otherwise provided in this act with regard to establishment and election of board members. The provisions of this act shall be construed to establish

minimum standards and minimum benefit levels, and nothing contained in this act or in chapter 185 shall operate to reduce presently existing rights or benefits of any police officer, directly, indirectly, or otherwise.

§ 185.39, Fla. Stat. (There is no dispute that the Plan is a "local law plan" as that term is used in Chapter 185.)

16. The authority to assess a premium tax is grounded in Section 185.08(1), Florida Statutes, which provides as follows:

Each incorporated municipality . . . may assess and impose on every insurance company, corporation, or other insurer now engaged in or carrying on, or who shall hereafter engage in or carry on, the business of casualty insurance as shown by records of the Department of Insurance, an excise tax in addition to any lawful license or excise tax now levied by each of the said municipalities, respectively, amounting to .85 percent of the gross amount of receipts of premiums from policyholders on all premiums collected on casualty insurance policies covering property within the corporate limits of such municipalities, respectively.

17. To receive distributions of premium tax revenue, the plan sponsor must ensure that its plan conforms to the minimum "benefits and standards" prescribed in Chapter 185:

For any municipality, chapter plan, local law municipality, or local law plan under this chapter, in order for municipalities with their own pension plans for police officers, or for police officers and firefighters where included, to participate in the distribution of the tax fund established pursuant to s. 185.08, local law plans must meet the minimum benefits and

minimum standards set forth in this chapter[.]

§ 185.35, Fla. Stat.

18. Regarding the collection and distribution of revenue obtained via the premium tax, Section 185.10, Florida Statutes, provides:

(1) The Department of Revenue shall keep a separate account of all moneys collected for each municipality under the provisions of this chapter. All moneys so collected must be transferred to the Police and Firefighters' Premium Tax Trust Fund and shall be separately accounted for by the division. The moneys budgeted as necessary to pay the expenses of the division for the daily oversight and monitoring of the police officers' retirement plans under this chapter and for the oversight and actuarial reviews conducted under part VII of chapter 112 are annually appropriated from the interest and investment income earned on the moneys collected for each municipality or special fire control district and deposited in the Police and Firefighters' Premium Tax Trust Fund. Interest and investment income remaining thereafter in the trust fund which is unexpended and otherwise unallocated by law shall revert to the General Revenue Fund on June 30 of each year.

(2) The Comptroller shall, on or before July 1 of each year, and at such other times as authorized by the division, draw his or her warrants on the full net amount of money then on deposit pursuant to this chapter in the Police and Firefighters' Premium Tax Trust Fund, specifying the municipalities to which the moneys must be paid and the net amount collected for and to be paid to each municipality, respectively. The sum payable to each municipality is appropriated annually out of the Police and Firefighters' Premium Tax Trust Fund. The warrants of the

Comptroller shall be payable to the respective municipalities entitled to receive them and shall be remitted annually by the division to the respective municipalities. In lieu thereof, the municipality may provide authorization to the division for the direct payment of the premium tax to the board of trustees. In order for a municipality and its retirement fund to participate in the distribution of premium tax moneys under this chapter, all the provisions shall be complied with annually, including state acceptance pursuant to part VII of chapter 112.

(Emphasis added.)

19. Municipalities are not required to participate in the premium tax program. Section 185.60, Florida Statutes, states:

A municipality may revoke its participation under this chapter by rescinding the legislative act, or ordinance which assesses and imposes taxes authorized in s. 185.08, and by furnishing a certified copy of such legislative act, or ordinance to the division. Thereafter, the municipality shall be prohibited from participating under this chapter, and shall not be eligible for future premium tax moneys. Premium tax moneys previously received shall continue to be used for the sole and exclusive benefit of police officers, or police officers and firefighters where included, and no amendment, legislative act, or ordinance shall be adopted which shall have the effect of reducing the then-vested accrued benefits of the police officers, retirees, or their beneficiaries. The municipality shall continue to furnish an annual report to the division as provided in s. 185.221. If the municipality subsequently terminates the defined benefit plan, they shall do so in compliance with the provisions of s. 185.37.

20. Boards of trustees have particular powers and duties, including the following:

The sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement trust fund and for making effective the provisions of this chapter are vested in the board of trustees; however, nothing herein shall empower a board of trustees to amend the provisions of a retirement plan without the approval of the municipality. The board of trustees shall keep in convenient form such data as shall be necessary for an actuarial valuation of the retirement trust fund and for checking the actual experience of the fund.

§ 185.06(4), Fla. Stat. (emphasis added).

21. Boards of trustees, moreover, are empowered to operate independently. Section 185.31 provides as follows:

In the enforcement and interpretation of the provisions of this chapter for any municipality, chapter plan, local law municipality, or local law plan under this chapter, each municipality shall be independent of any other municipality, and the board of trustees of the municipal police officers' retirement trust fund of each municipality shall function for the municipality which they are to serve as trustees. Each board of trustees shall be independent of each municipality for which it serves as board of trustees to the extent required to accomplish the intent, requirements, and responsibilities provided for in this chapter.

(Emphasis added.)

22. Section 185.05, Florida Statutes, addresses the subject, among others, of the composition of boards of trustees.

Paragraph (b) of this Section—specifically subparagraph 3 of such paragraph—is at the heart of the instant dispute and provides as follows:

(b) The membership of boards of trustees for local law plans shall be as follows:

1. If a municipality has a pension plan for police officers only, the provisions of paragraph (a) shall apply.

2. If a municipality has a pension plan for police officers and firefighters, the provisions of paragraph (a) shall apply, except that one member of the board shall be a police officer as defined in s. 185.02 and one member shall be a firefighter as defined in s. 175.032, respectively, elected by a majority of the active firefighters and police officers who are members of the plan.

3. Any board of trustees operating a local law plan on July 1, 1999, which is combined with a plan for general employees shall hold an election of the police officers, or police officers and firefighters if included, to determine whether a plan is to be established for police officers only, or for police officers and firefighters where included. Based on the election results, a new board shall be established as provided in subparagraph 1. or subparagraph 2., as appropriate. The municipality shall enact an ordinance to implement the new board by October 1, 1999. The newly established board shall take whatever action is necessary to determine the amount of assets which is attributable to police officers, or police officers and firefighters where included. Such assets shall include all employer, employee, and state contributions made by or on behalf of police officers, or police officers and firefighters where included, and any investment income derived from such contributions. All such moneys

shall be transferred into the newly established retirement plan, as directed by the board.

With respect to any board of trustees operating a local law plan on June 30, 1986, nothing in this paragraph shall permit the reduction of the membership percentage of police officers or police officers and firefighters.

23. As mentioned earlier, the Division understands Section 185.05(b)3., Florida Statutes, to require, when it applies, that a municipality timely create a new retirement plan, one which does not cover general employees. Further, according to the Division, if the municipality fails to comply with this supposed mandate, then the Division must deem the municipality's existing plan noncompliant with Chapter 185—and bar the municipality from participating in the premium tax program.

24. Neither Section 185.05(b)3, however, nor any other provision of Chapter 185, explicitly mandates that a combined local law plan must be split in all circumstances on pain of forfeiting future distributions of tax revenue. The undersigned concludes that the Division, in attempting to implement the plain language of Section 185.05(b)3, has misread the statute, which, though not the best written law in the books, is nevertheless comprehensible according to the everyday meaning of the words comprising it, without resorting to legal interpretation. This conclusion will be supported by a closer

examination of the Division's position, which follows, and by a discussion of the statute's unambiguous meaning, further below.

25. The Division's interpretation of Section 185.05(b)3 runs into trouble almost immediately, inasmuch as the clear directive to the affected boards of trustees—which is, to "hold an election" to "determine whether a new plan is to be established"—is seemingly at odds with the idea that the legislature intended to mandate that every combined local law plan be split (or lose the tax revenue). After all, if the legislature had meant to require that a new plan be established, why would it have compelled any board of trustees to hold an election to determine whether the required new plan is to be established? Such an election would appear to serve no useful purpose.

26. Nevertheless, according to the Division,<sup>4</sup> if the existing combined local law plan covered general employees and police officers, but not firefighters, as does the Plan, then the police officer-members needed to vote in an election held by the board of trustees. Their only government-approved choice, however, would be to cast their ballots in favor of establishing a new plan for police officers only. If the police officer-members voted yes to such a plan, then the city would be required to establish the new plan, or be precluded from receiving future distributions of tax revenue. If, on the other



hand, the police officer-members voted *no* to the notion of a new, police-only plan, then the city would be required to establish the new plan anyway (thereby thwarting the will of the voters), or be precluded from receiving future distributions of tax revenue.

27. The election was to offer additional state-sanctioned choices, contends the Division, if the existing combined local law plan covered general employees, police officers, and firefighters. In that event, the police officer-members and firefighters together would vote on whether to establish: (a) a new plan for police officers only; (b) a new plan for firefighters only<sup>5</sup>; (c) a new plan for police officers and firefighters combined; or (d) a new plan for police officers only *and* a new plan for firefighters only. If "option c" claimed the most votes, then the city would be required to establish a new plan for police officers and firefighters, or be precluded from receiving future distributions of tax revenue. If "option d" received a majority (or plurality) of the votes, then the city would need to set up two new plans, one for police only and another for firefighters only, unless it preferred to combine the police officers and firefighters in a single plan, which the Division would approve.

28. But if the voters preferred "option a" or "option b," then the city would be in a quandary because, according to the

Division, local law plans covering both general employees and police officers (or firefighters) would not be in compliance with Chapter 185 (or Chapter 175). Thus, if the voters elected either "option a" or "option b"—which comprise half of the statutorily permissible outcomes according to the Division—the city would have to ignore the election results and proceed with "option c" or "option d," or be precluded from receiving future distributions of tax revenue.

29. Finally, if a majority (or plurality) of the police officer-members and firefighter-members voted for *no* change in the status quo, then the city would be required, under the Division's interpretation, to establish a new plan anyway, or be precluded from receiving future distributions of tax revenue.

30. As the Division conceives the "election" called for in Section 185.05(b)3., Florida Statutes, then, it is a proceeding in which the government tells the voters how they *should* vote, if not quite how they *must* vote. But this is not how elections are commonly understood to work in this country. The inescapable conclusion is that the Division's interpretation of the statute subverts the plain and ordinary meaning of the word "election," which is ordinarily used to describe a proceeding wherein voters freely and without governmental coercion or control make meaningful choices concerning public policies and

personnel. The Florida Legislature would not likely have used the term "election" as the Division would apply it.

31. The Division's interpretation also reverses the meaning of the subordinate clause which introduces the second sentence of Section 185.05(b)3, namely: "Based on the election results . . . ." The Division effectively reads this to mean: *regardless of* the election results. There are two insurmountable problems with the Division's position. First, in everyday discourse, the words "based on" *connect* one thing to another, whereas the term "regardless of" *severs* or *disassociates* things. No one fluent in the English language, therefore, would use the words "based on" to denote the concept "regardless of." Second, to allude to an earlier point, the clause *regardless of the election results* is jarring, because in this country election returns are understood to count, *always*, not merely when the outcomes please the politicians.<sup>6</sup> To direct that an election be held whose outcome was to be of no practical use would make a mockery of the electoral process; the Florida Legislature would not have done that.

32. So, what does Section 185.05(b)3., Florida Statutes, plainly mean, if not what the Division contends? Recall the first sentence:

Any board of trustees operating a local law plan on July 1, 1999, which is combined with a plan for general employees shall hold an

election of the police officers, or police officers and firefighters if included, to determine whether a plan is to be established for police officers only, or for police officers and firefighters where included.

This sentence tells clearly that certain *boards of trustees* (but not, significantly, *municipalities*)—i.e. those boards operating combined local law plans as of July 1, 1999—must hold an election.

33. The purpose of the election is unambiguously stated as being "to determine whether a plan is to be established . . . ." The term *whether* is a conjunction that plainly signifies a question involving alternatives. The alternatives here are clear: whether or not to voice approval for the establishment of a new plan.<sup>7</sup>

34. The voters in this election are to be "police officers, or police officers and firefighters if included . . . ." The statutory language is somewhat awkward on this point. At first blush, the phrase "if included" might be taken to mean that firefighters can vote in the election if the board of trustees decides to include them. This, however, is plainly *not* what was meant, as the context makes clear. The intended meaning is that firefighters will get to vote if they are included (together with police officers and general employees) in the combined local law plan. If firefighters are not

included in the combined local law plan, then they do not get to vote on the question at hand, which in that event does not concern them.

35. The new plan under consideration in the election is one to be established for the benefit of "police officers only, or for police officers and firefighters where included." Here, again, the language is a bit clumsy, but ultimately unambiguous. The potential for confusion arises from the tendency to associate the conjunction *or* with the earlier appearing conjunction *whether*, which a casual reader might reasonably be inclined to do given that "whether" and "or" are correlative conjunctions. Making such an association here would lead one to believe that the question to be put before the electorate is a choice between either (a) approving a new plan for police officers only or (b) approving a new plan for police+firefighters. In other words, one might think that the voters should be asked to express a preference for one of two possible new plans—as opposed to voting on whether or not there should be a new plan.

36. The problem with associating *whether* and *or* in this instance is that doing so ignores the phrase "where included" at the end of the sentence. Indeed, if the choice for the voters were whether to approve (a) a new plan for police officers only or (b) a new plan for police+firefighters, then the phrase

"where included" would be surplusage, adding nothing but the potential to cause confusion. In contrast, the words "where included" make sense, and are not mere surplusage, when understood to correlate with the preceding conjunction *or*. Under this reading, which is the correct one, the word *or* signals an alternative which applies only where firefighters are "included." Hence, the intended meaning of the words "where included" clearly is: "where firefighters are included in the electorate because they are covered under the existing combined local law plan." In that event, a new plan, if established, would cover, not police officers only, but, alternatively, both police officers and firefighters together.

37. In sum, in any given election under Section 185.05(b)3., Florida Statutes, there is only one new-plan option on the table, and that option is intended to match the electorate, which will consist either of police officers or police+firefighters, depending on whether firefighters are covered under the existing combined local law plan. If police *only* are voting (because firefighters are not included in the combined local law plan), their choice is between these two alternatives: approve/disapprove a new plan for police only. If, on the other hand, the voters are police+firefighters (because firefighters, being covered under the combined local law plan, are included in the electorate), then their choice is

between these two alternatives: approve/disapprove a new plan for police+firefighters.<sup>8</sup>

38. The second and third sentences of Section 185.05(b)3., Florida Statutes, address the consequences of an election, as follows:

Based on the election results, a new board shall be established as provided in subparagraph 1. or subparagraph 2., as appropriate. The municipality shall enact an ordinance to implement the new board by October 1, 1999.

39. The subordinate clause "[b]ased on the election results" was examined above, where the Division's interpretation of the language was shown to be incorrect. What this adverbial clause actually does, according to its plain terms, is tell under what condition a new board is to be established. The draftsmanship here, to be sure, is not as precise as it might have been. The statute, however, plainly describes a governmental response to the will of the electorate that, if "[b]ased on the election results" as required, makes sense only if the voters approved a new plan. (Obviously, if the voters elected *not* to support the establishment of a new plan, then a new board for such *rejected* plan could not be formed "[b]ased on the election results," but only in contravention of the election results.)

40. Properly understood in context, therefore, the sense of the words "based on" here is: *depending on* or *contingent on*. Thus, a new board shall be established based on the election results *if the voters approved a new plan*. The idea behind the foregoing italicized proviso is necessarily implicit in the statutory language.

41. The statute, regrettably, is silent as to what must happen next after the voters *disapprove* the creation of a new plan. The logical response to such an outcome, however, would be, *not* to move full steam ahead with creating a new plan, but to take no further action to implement the rejected idea. The legislature might have considered this so obvious as to render superfluous any instruction on the matter.<sup>9</sup>

42. The third sentence requires the municipality to adopt, on or before October 1, 1999, an ordinance "implementing" the new board. (Presumably this also requires the municipality to enact ordinances amending the existing combined local law plan and establishing the new police-only or police+firefighters plan). Clearly, however, the statutory duty to enact such ordinances belongs to a municipality only if a new board must be established based on the election results.

43. The remaining sentences address actions to be taken by the newly established board. These sentences do not bear on the disposition of the instant dispute.



44. The operation of Section 185.05(b)3., Florida Statutes, can be summarized as follows. Each board of trustees operating a combined local law plan on July 1, 1999, was required to hold an election. In this election, the police officer-members of the combined local law plan would vote to approve or disapprove the establishment of a new retirement plan for police only. (If firefighters, too, were covered under the combined local law plan, then the police officer- and firefighter-members, collectively, would vote to approve or disapprove the establishment of a new retirement plan for police+firefighters.) If the voters approved the establishment of a new plan, then, based on the election results, the municipality would be required to create a new plan and form a new board of trustees, by October 1, 1999. If, on the other hand, the voters disapproved the establishment of a new plan, then, based on the election results, the municipality could do nothing and be fully in compliance with the statute.

45. As found above, it is a fact that the Board never held an election as required under Section 185.05(b)3. It was plainly the *Board's* independent duty to conduct the election, however, not the *City's*. Whether the Board's failure to carry out its responsibility to hold an election exposed the Board to civil or administrative sanctions is of no moment here, for that question was not presented and need not be decided. What

matters is that nothing in Chapter 185 or elsewhere in the Florida Statutes authorizes the Division to take punitive action, such as withholding premium tax revenue, against the City for the Board's noncompliance with the statute.<sup>10</sup>

46. The City, for its part, was under no obligation to hold an election, nor was it required, much less authorized, to take action against the Board to compel the Board to perform its duty in this regard. Indeed, the City had no duty to take any action with regard to the establishment of a new board or plan except based upon the election results, which results (if favorable to the establishment of a new plan) clearly and unambiguously constitute a condition precedent to the City's statutory obligation to split its combined local law plan (or possibly forfeit the premium tax revenue). Because there was no election (due to the Board's neglect of duty), the City never needed to form a new board or establish a new plan. Consequently, the City did not violate Chapter 185 by not establishing a new plan.

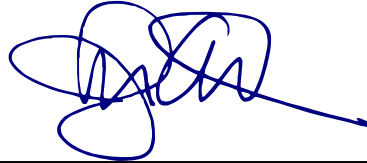
47. Because the City, in the absence of an election held in accordance with Section 185.05(b)3., Florida Statutes, was not obligated to split its Plan, the Plan itself cannot be deemed noncompliant with Chapter 185, even though the Plan continues to extend benefits to general employees as well as police officers.

48. In sum, the City has demonstrated that its Plan remained in compliance with Chapter 185 at all times in dispute.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a Final Order determining that the General Employees' and Police Officers' Retirement Plan of the City of Wilton Manors is in compliance with Chapter 185, Florida Statutes, and that the City is now, and at all times relevant to this dispute has been, eligible to participate in the distribution of premium tax revenue. It is further recommended that the Division of Retirement cause all of the premium tax revenue that has been withheld from the City of Wilton Manors to be released for the benefit of the General Employees' and Police Officers' Retirement Plan. Finally, because the prevailing party in this proceeding is entitled to recover litigation costs and reasonable attorney's fees pursuant to Section 185.05(5), Florida Statutes, it is recommended that the Division of Retirement, in its Final Order, make an appropriate award thereof, unless a genuine dispute of material fact arises concerning the amount of such award, in which event the matter should be referred to the Division of Administrative Hearings for a formal hearing.

DONE AND ENTERED this 15th day of June, 2009, in  
Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of June, 2009.

ENDNOTES

<sup>1/</sup> See 1999 Fla. Laws ch. 99-1.

<sup>2/</sup> In or around December 2004, the Broward County Police Benevolent Association ("PBA") apparently polled the City's police officers, who reportedly voted in favor of a police-only pension plan. There is no evidence suggesting that this "election" was held under the aegis of the Board—or that the Board had anything to do with it. The PBA's poll therefore did not, in fact, satisfy the Board's obligation to conduct an election.

<sup>3/</sup> Hereafter, unless otherwise provided, all statutory citations will reference the 1999 Florida Statutes.

<sup>4/</sup> The undersigned has attempted to describe the Division's position fairly and accurately. The testimony offered by the Division at hearing on this subject, however, was equivocal and sometimes inconsistent, making it difficult for the undersigned to nail down with precision the Division's understanding of the statute.

<sup>5/</sup> See § 175.061(b)3., Fla. Stat.

<sup>6/</sup> There is, to be sure, such a thing as a non-binding election or referendum, the outcome of which is advisory or consultative in nature. When this type of an election is held, however, it is (or should be) clearly described as such. Thus, if the legislature had intended that the election called for under Section 185.05(b)3., Fla. Stat., be a non-binding referendum, it surely would have said so explicitly. And even if this were the legislature's intent, conducting a non-binding election on a policy matter that had already been decided (as here, according to the Division) would be frivolous, and directing a municipality to take a particular action *regardless of* a non-binding election would be an insult to the electorate. At bottom, even a non-binding election is supposed to be meaningful.

<sup>7/</sup> In view of the Division's interpretation of the statute, it should be noted that the indefinite article "a" is used before the noun *plan*, which signifies that such plan is unspecified. If the legislature were *requiring* the establishment of a new plan (as the Division maintains), it would have made better sense, grammatically, to use the definite article "*the*" before the word *plan*, because in that event there would have been a specific referent, namely the *statutorily required plan*.

<sup>8/</sup> At the risk of belaboring the point, it can be added that, if police officers only are voting, they do not have the option of voting in favor of (or against) a new plan for police+firefighters. Likewise, if the electorate consists of police+firefighters, the voters in that event do not have the option of voting in favor of (or against) a new plan for police officers only.

<sup>9/</sup> Another reason, perhaps, for the legislature's silence on the matter of what to do if the voters reject the new-plan option is that the legislature wanted to avoid encouraging (or appearing to require) inaction on the municipality's part. Keep in mind that, notwithstanding the election results, the municipality would still be free at any time to establish a new plan on its own initiative, if it wanted to—not because of a statutory duty, but for reasons of its own.

<sup>10/</sup> There can be no doubt that the withholding of premium tax distributions penalizes the City, not the Board or the members of the Plan. This is because, as the Plan sponsor, the City is ultimately responsible for funding all promised benefits and paying the associated administrative expenses. See, e.g., Art.

X, § 14, Fla. Const.; § 185.04, Fla. Stat.; § 185.07(1)(d), Fla. Stat.; § 112.64, Fla. Stat.; § 112.66(8), Fla. Stat. When deprived of the premium tax money, therefore, the City must use other revenue in its budget to cover the shortfall.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.