



# OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH  
*Attorney General  
State of Florida*

July 20, 1994

Mr. Stanley T. Rzad  
Finance Manager  
Utility Board of Key West  
Post Office Drawer 6100  
Key West, Florida 33041-6100

Dear Mr. Rzad:

On behalf of the Utility Board of the City of Key West, you ask whether the utility board may adopt an early retirement option for current employees which would offer certain employees either a fixed sum of money or supplemental retirement option.

The Utility Board of the City of Key West was created by special act of the Legislature with the power to manage, operate and control the city's electric public utility.<sup>1</sup> Section 14 of the special act grants the utility board the authority to establish and maintain "a pension system or plan for the relief or social security of disabled or retired officers and employees of said Utility Board . . . ."<sup>2</sup>

Under the board's present retirement system, every employee who has attained the age of sixty or has completed thirty years of credited service is entitled to receive a normal retirement benefit upon his or her termination of service.<sup>3</sup> Employees who terminate service prior to becoming eligible for the normal retirement benefit are entitled to an annual termination retirement benefit.<sup>4</sup>

The utility board is interested in offering employees an "early retirement" option. Employees attaining the age of sixty or having thirty years of credited service would be offered a fixed sum of money in addition to their current level of base pay provided such individuals retired at the end of a definite period of time and waived any right to continued employment. Employees with at least twenty years of credited service would be offered a supplemental retirement benefit in addition to their termination retirement benefit provided such employees retired at the end of a definite period of time and waived any right to continued employment.

Section 215.425, Florida Statutes, provides in part:

No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by bill passed by two-thirds of the members elected to each house of the Legislature. . . . The provisions of this section also do not apply to extra compensation given to county or municipal employees pursuant to policies adopted by county or municipal ordinance.<sup>5</sup>

This office has stated that the purpose of this prohibition against compensation for work already performed "is to carry out a basic and fundamental principle that public funds may be used only for a public purpose and it is contrary to this policy to use public funds to give extra compensation for work which has already been performed for an agreed upon wage."<sup>6</sup>

Generally, a pension is not regarded as increased compensation to public employees that is forbidden by statute.<sup>7</sup> Moreover, pension laws, as a general rule, may be amended by the appropriate legislative body.<sup>8</sup>

This office, however, has stated that section 215.425, precludes a public entity from establishing an annuity for a retired city employee who was already receiving pension benefits under an existing retirement fund.<sup>9</sup> The purchase of the annuity in such a case was not a part of the city's retirement plan but rather constituted extra compensation to an employee who had performed the services and had been compensated for such services at an agreed upon wage.<sup>10</sup>

Similarly, in Attorney General Opinion 92-49, this office stated that in the absence of a provision in the special act creating a pension fund, the board of trustees of the pension fund could not grant a cost of living allowance to retirees receiving benefits from the fund.

Your inquiry, however, does not involve the increase of benefits to persons already receiving benefits under the retirement system. Accordingly, the concerns raised in the foregoing opinions would not appear to be applicable.

In Attorney General Opinion 91-51 this office concluded that the payment of "wages in lieu of notice," i.e., an employee is terminated immediately but continues to be paid wages for a

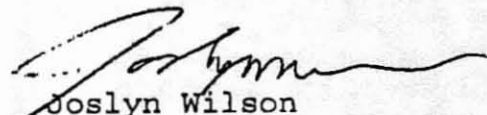
specified term, violated section 215.425, Florida Statutes. The opinion stated that the employee "renders no service after his or her termination nor is the payment representative of compensation earned during service but received after service is terminated." Unlike the above opinion, however, the employees of the utility board would continue to work for a specified period of time.

This office also stated in Attorney General Opinion 91-51 that the payment of bonuses to public employees would violate section 215.425, Florida Statutes, in the absence of a preexisting employment contract making such bonuses a part of their salary. You state, however, that the proposed payments are not "bonuses" but rather constitute increased benefits to currently employed employees through an early retirement option.

Accordingly, the provisions of section 215.425, Florida Statutes, would not appear to prohibit the utility board from changing its current pension plan and offering increased benefits to current employees of the board who are not receiving benefits under the retirement system.

I trust that the above informal advisory comments which should not be considered a formal opinion of the Attorney General may be of assistance to the utility board in resolving this matter.

Sincerely,



Joslyn Wilson  
Assistant Attorney General

JW/t

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<sup>1</sup> See, ch. 69-1191, Laws of Florida, as amended.

<sup>2</sup> Section 14, ch. 69-1191, supra.

<sup>3</sup> The normal retirement benefit is payable as an annuity equal to two percent of the employee's average final compensation multiplied by the employee's number of years of credited service. The average final compensation is defined as the average of the employee's actual base pay during the highest five of the last ten years preceding the employee's termination of service.



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<sup>4</sup> The termination benefit is equal to two percent of the terminating employee's average final compensation multiplied by the terminating employee's years of credited service multiplied by the employee's vested percentage.

<sup>5</sup> Section 215.425, Florida Statutes, was formerly Article XVI, section 10, Florida Constitution 1885, as amended, and was converted into statutory law by Article XII, section 10, Florida Constitution 1968.

<sup>6</sup> See, Op. Att'y Gen. Fla. 82-28 (1982).

<sup>7</sup> See, Voorhees v. City of Miami, 199 So. 313 (Fla. 1940), stating that pensions laws are generally valid on the grounds that pensions are in the nature of "compensation" for services previously rendered and for which pay was withheld and are not regarded in the nature of increased compensation within meaning of prohibition). And see, State ex rel. Watson v. Lee, 24 So. 2d 798 (Fla. 1946) (retirement act is not violative of prohibition against extra or increased compensation; delayed payments are part of participant's compensation for services already performed); Green v. Galvin, 114 So. 2d 187 (Fla. 1959)

<sup>8</sup> See generally, McQuillin, 3 Municipal Corporations s. 12.141 et seq. (3d rev. ed. 1990).

<sup>9</sup> See, Op. Att'y Gen. Fla. 89-53 (1989).

<sup>10</sup> See also Op. Att'y Gen. Fla. 81-98 (1981) (city may not reimburse retired city employees for purchase of additional past service credit).