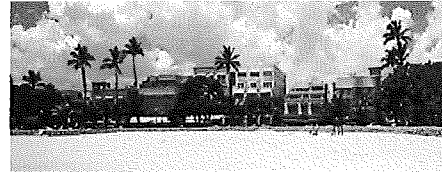


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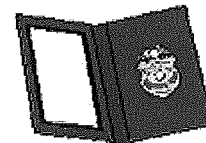
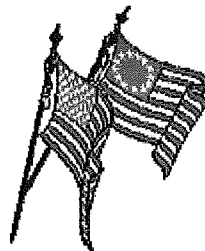
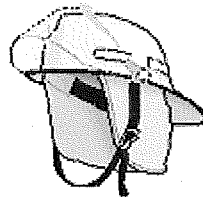
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**Cypen & Cypen
SPECIAL SUPPLEMENT
for
OCTOBER 4, 2007**

Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001



LAKE PARK FIRE TRUSTEES SCORE BIG VICTORY:

In a unanimous decision dated October 3, 2007, the Florida Fourth District Court of Appeal reversed a summary judgment in favor of the Town of Lake Park against the Board of Trustees of the Town of Lake Park Firefighters' Pension Plan. In short, the trial court ruled that the Town had no obligation to make any further payment to Town of Lake Park Firefighters' Pension Plan. The decision is of such significance that we feel compelled to deal with it at length here.

The Town sought declaratory judgment of its rights and responsibilities upon termination of the Town's defined benefit pension plan for firefighters. The Plan was established by municipal ordinance in compliance with Chapter 175, Florida Statutes. Upon employment, all firefighters became mandatory members of the Plan and were required to make contributions to the Plan.

The Town entered into an Agreement with Palm Beach County for the latter to provide the Town with fire and emergency medical services. As a result, the Town terminated its firefighting staff and Palm Beach County simultaneously hired the same staff, as County employees. Upon such hiring, the firefighters became mandatory members of the Florida Retirement System.

Inasmuch as all Plan members had terminated employment with the Town, the Plan was officially terminated and all contributions ceased. Upon Plan termination, the Board had sole authority to determine how Plan assets were to be distributed. As a result, the Board decided that accrued benefits should be paid out to Plan members in the form of lump sum

distributions. The Board thereupon directed its actuary to determine the value of all accrued benefits. Not unexpectedly, the Plan's asset value was less than the accrued benefits as of termination date. The Board asserted that the Town was obligated to pay the difference between the Plan's asset value and accrued benefits as of date of termination. Because the Town disagreed, it filed a complaint for declaratory relief. The Board subsequently approved the following distribution of Plan assets: (1) one Plan member, who was eligible for retirement, received full value of his accrued benefit; (2) three Plan members, who had 10 or more years of service, but who were not yet eligible for retirement, received a portion of their accrued benefit; and (3) the remaining nine Plan members, each with less than 10 years of service, received no distribution from the Plan.

Section 175.091, Florida Statutes, governs creation and maintenance of firefighter pension funds. The main funding sources for firefighter pension funds are (1) a mandatory contribution by each firefighter; (2) an excise tax on certain fire insurance premium payments; and (3) a mandatory payment by the municipality of "a sum equal to the normal cost of and the amount required to fund any actuarial deficiency shown by an actuarial valuation as provided in part VII of chapter 112." Undisputably, prior to termination of the Plan, mandatory contributions were made to the Plan by the Town, on an annual basis, in accordance with contribution amounts determined by the Plan's actuary required to fund actuarial deficiencies.

Section 175.361, Florida Statutes, specifically pertains to termination of pension plans, and provides, in pertinent part:

Upon termination of the plan by the municipality or special fire control district for any reason or because of a transfer, merger, or consolidation of governmental units, services, or functions as provided in chapter 121, or upon written notice by the municipality or special fire control district to the board of trustees that contributions under the plan are being permanently discontinued, the rights of all employees to benefits accrued to the date of such termination and the amounts credited to the employees' accounts are nonforfeitable. [emphasis supplied]

Section 175.361(3), Florida Statutes, also sets forth a methodology to be followed for apportionment and distribution of the Plan's "asset value" as of date of Plan termination.

Section 112.0515, Florida Statutes, also applies to the case at bar:

It is hereby declared to be the policy of this state that in any consolidation or merger of governments or the transfer of functions between units of governments either at the state or local level or between state and local units, the rights of all public employees in any retirement or pension fund shall be fully protected. No consolidation or merger of governments or governmental services, either state or local, accomplished in this state shall diminish or impair the rights of any public employee in any retirement or pension fund or plan which existed at the date of such consolidation or merger and in which the employee was participating, nor shall such consolidation or merger result in any impairment or reduction in benefits or other pension rights accruing to such employee.

In other words, the Legislature has specifically declared that consolidations, mergers or transfers of government or governmental functions may not diminish or impair employees' rights or benefits in a retirement or pension plan or fund in which the employee was participating at time of such consolidation, merger or transfer.

The lower court found that the Board appropriately followed the method of distribution of the Plan's assets in accordance with Section 175.361, Florida Statutes, upon termination of the Plan. However, the trial court also found that the statutorily-mandated distribution methodology required by that section provided for less than full payment to certain Plan members, if Plan assets were inadequate to pay every firefighter member in full. As such, the trial court concluded that "[i]f all assets are exhausted by payments to higher-ranking categories, then members of any lower category receive nothing. The Statute contains no provision for the municipality to make up for a deficit so that all members receive all their benefits in full." Inexplicably, the trial court did not apply the "nonforfeitable" clause in Section 175.361, Florida Statutes. The lower court's ruling resulted in nine Plan members

receiving absolutely no distribution from the Plan upon termination, despite such members having made mandatory contributions to the Plan out of their earnings! Such ruling further resulted in other Plan members receiving payments less than their accrued benefits at time of termination.

The appellate court concluded that the trial court erred when it found, as a matter of law, that the Town had no obligation to fund the Plan's actuarial shortfall present at the time the Town's actions resulted in termination of the Plan. It is undisputed that prior to termination of the Plan, the Town funded, on a yearly basis, actuarial deficiencies of the Plan determined by its actuary, as required by the Plan and by Section 175.091(1)(d), Florida Statutes. Certainly, if the Town had not entered into the Agreement with the County, the Town would have had a continuing obligation to fund actuarial deficiencies in the Plan.

Once the Board, in accordance with its authority, elected the asset distribution method to be employed, the Plan's actuary calculated an actuarial deficiency. Hence, Section 175.091(1)(d), Florida Statutes, required the Town to make a mandatory payment equal to that actuarial deficiency. The Town's argument that it had no obligation to fund the actuarial deficiency because the Board elected to distribute the Plan assets in a way more costly than other available alternatives does not have basis in law. The Board had sole authority to choose the method of distribution of Plan assets at termination, and once it did, the Board appropriately followed the statutory procedure for distribution. As stated, benefits accrued to date of termination were "nonforfeitable." Additionally, inasmuch as the Town's decision to enter into the Agreement with the County resulted in termination of the Plan, there could be no impairment or reduction in benefits or other pension rights accruing to any firefighter Plan member. The district court thereupon reversed the trial court's entry of final summary judgment in favor of the Town and against the Board, and remanded for further proceedings consistent with the opinion. In light of the opinion, it would seem that the higher court could have directed summary judgment in favor of the Board, but has left that seemingly-ministerial task to the lower court. Board of Trustees of the Town of Lake Park Firefighters' Pension Plan v. Town of Lake Park, Florida, Case No. 4D06-4179 (Fla. 4th DCA October 3, 2007).

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