

requirements as durational residency and feeholder status for voting have heretofore prevailed over general law as cumulative provisions for local municipal voting. *Armstrong v. City of Edgewater, supra*, and *Town of Jupiter Island v. Gautier, supra*.

Chapter 166, F. S., as revised by Ch. 73-129, Laws of Florida, cited as the "Municipal Home Rule Powers Act," now provides:

166.032 Electors.—Any person who is a resident of a municipality, who has qualified as an elector of this state, and who registers in the *procedural manner prescribed by general law and ordinance of the municipality*, shall be a qualified elector of the municipality. (Emphasis supplied.)

However the reference in said §166.032 to registration in the procedural manner prescribed by ordinance of the municipality must give way to the preemptive provisions of Ch. 73-155, *supra*, on matters of voter qualifications and registration. Moreover, §166.021(3)(c), F. S., provides that a municipality has the power to enact any legislation concerning any subject matter upon which the state legislature may act except, *inter alia*, any subject "*expressly preempted to state or county government by the constitution or by general law.*" (Emphasis supplied.)

It is clear that the legislature, by Ch. 73-155, *supra*, intended that special acts and charter provisions shall not prevail over the general election laws of this state relating to the registration of electors in this state qualified to vote in municipal elections.

In consideration of the foregoing, I am therefore of the opinion that the provisions of Ch. 73-155, *supra*, requiring utilization of a permanent single registration system prior to January 1, 1974, for the registration of electors to qualify them to vote in all county and municipal elections, supersede all other existing laws, special acts, or charter provisions on the subject of municipal voter qualifications and registration.

073-427—November 21, 1973

RETIREMENT

ALTERATION OF EMPLOYEE BENEFITS BY MUNICIPALITY

To: Jerry Melvin, Chairman, House Committee on Retirement, Personnel, and Claims, Tallahassee

Prepared by: Jan Dunn, Assistant Attorney General

QUESTION:

May a municipality alter its employee pension benefits under Ch. 73-129, Laws of Florida, without a referendum of the electorate?

SUMMARY:

A pension plan set out in a city charter is a right of a municipal employee under Ch. 73-129, Laws of Florida. It, therefore, cannot be changed by municipal ordinance without a referendum of the electorate, as to existing employees. It should be noted, however, that a voluntary pension plan, since it confers a vested contractual right, cannot be changed in any manner by either the legislature or municipality, as to existing employees. A municipality may, without a referendum, set up a different system for future employees which present employees could elect to join.

Section 166.021(4), F. S., created by Ch. 73-129, Laws of Florida, prohibits

changes in a special law or municipal charter which affect any rights of municipal employees without approval by referendum of the electors. The question then becomes whether, in the context of this law, the benefits derived from the municipal pension plan are considered a "right" of the city employees.

The term "any rights" referred to in §166.021(4), *supra*, is not defined in any section of Ch. 73-129. Therefore, the term will have to be construed in light of dictionary and judicial definition, and pursuant to standard rules of statutory construction. Generally, words in a statute should be given their ordinary or common meaning unless they are used in some technical or fixed legal sense, or unless the context of the statute dictates a different connotation. According to Webster's Third New International Dictionary, right is a legally enforceable claim. Similar definitions are also found in 37A Words & Phrases, "Right; Rights." For example:

A "right" has been defined to be a well founded claim which means nothing more or less than a claim recognized or secured by law. Rights which pertain to persons, other than such as are termed "natural rights," are essentially the creation of municipal law, written or unwritten, and it must necessarily be held that a "right," in the legal sense, exists, when in consequence of given facts, the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another.

I am, therefore, of the opinion that in the context of Ch. 73-129, Laws of Florida, the word right should be defined to mean anything conferred on municipal employees by the charter act or special act which is legally enforceable.

A municipal pension plan set out in a city charter—whether voluntary or mandatory—is a right of municipal employees since it presents an enforceable legal claim. A mandatory plan may be enforced by anyone entitled to its benefits and, therefore, such a plan may not be changed by municipal ordinance without a referendum of the electorate, as to existing employees. However, a voluntary plan, because it confers a vested contractual right, cannot be changed in any manner by the legislature or by a municipality, as to existing employees. *State v. Jacksonville Beach*, 142 So.2d 349 (1 D.C.A. Fla., 1962); *Anders v. Nicholson*, 150 So.639 (Fla. 1933). It may be noted that under either type of pension plan, the municipality can set up a different system for future employees (who have no right in any plan), which present employees could elect to join. This could be accomplished without a referendum.

Florida cases have held that a voluntary pension plan confers a vested right on the employees enrolled in the plan.

[B]enefits provided for employees under a voluntary pension or retirement plan created by an act of the legislature may not be modified or reduced by subsequent amendatory legislation for the reason that those electing to participate in such voluntary plans acquire vested rights of contract to the benefits provided therein upon acceptance of the plan, which rights may not be impaired by subsequent amendments to the act. [*State v. City of Jacksonville Beach, supra*, at 353.]

In *Anders v. Nicholson, supra*, at 643 wherein a municipal employee elected to participate in a pension plan which was subsequently changed, the Florida Supreme Court said "[T]he law applicable in this case, it appears to us, is that which applies to beneficial associations."

"Alterations made in the constitution and by-laws of a fraternal benefit society, whether by amendment or repeal of existing provisions or by the enactment of new provisions, will be given a prospective operation unless it clearly appears that they were intended to operate retrospec-

tively, even though the laws of the society expressly authorize alterations therein, and although the member agrees to be bound by future changes; and, where a retrospective operation was intended, the alterations do not govern the rights and liabilities of preexisting members and their beneficiaries if vested rights would thereby be defeated or the obligation of contracts be impaired."

The *Anders* case quotes from a New Jersey case concerning a voluntary retirement plan:

"The legal relation between the plaintiff and the defendants is that of contract. . . . when this agreement was once made, it could not be altered without the consent of both parties thereto, and upon sufficient consideration. The fact that the terms of the agreement were embodied in an act of the Legislature does not change its essential character as a contract, and it was beyond the power of the Legislature to impair the obligation of this contract by subsequent legislation." [Anders at 644, quoting from *Ball v. Board of Trustees of Teachers' Retirement Fund*, 58 A. 111 (N.J. 1904).]

Therefore, although the legislature can "alter, change, amend, and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit," such changes "can apply only to conditions in the future and never to the past." *State v. City of Jacksonville Beach*, *supra*, at 354. In a voluntary pension plan then, changes can be made which will affect future participants; however, the legislature has no power to make any change which will affect the contractual rights of existing participants. This would be in violation of Federal and Florida constitutional provisions which provide that no state shall pass any law impairing the obligation of contracts, Art. I, §10, U.S. Const.; Art. I, §10, State Const. Since the legislature is limited in this respect, so is many municipal government, which under Ch. 73-129, *supra*, can have only such power to enact local legislation as the state legislature has. It may be noted that employees participating in a voluntary plan may *elect* to join an amended or different plan set up by the legislature or municipal government. Since future municipal employees or future participants in a pension plan have, at present, no rights of any kind in such plan, any present changes would have no effect upon them. It follows, therefore, that a voluntary pension plan system can be changed by municipal ordinance without a referendum under §166.021(4), F. S. [Ch. 73-129, Laws of Florida], as to future participants.

A mandatory pension plan can be changed. Such plan confers a right on municipal employees since it can be enforced by any person entitled to its benefits; therefore, no change in this type of pension plan can be made without a referendum of the electorate. However, as in a voluntary plan, a municipality may set up a different mandatory plan for future employees which present employees could elect to join. This could be accomplished without a referendum.

073-428—November 21, 1973

STANDARDS OF CONDUCT

PUBLIC AND PRIVATE EMPLOYMENT INVOLVING SAME TYPE OF BUSINESS

To: County Nursing Home Administrator

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

May the administrator of a county nursing home serve as the