

METROPOLITAN GOVERNMENT NASHVILLE AND DAVIDSON COUNTY



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Legal Opinion 2008-02

To: Chief Stephen Halford
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Date: March 4, 2008

You recently contacted this office and requested a legal analysis to answer the following question:

QUESTION

Should the position of Metropolitan Fire Chief be included in the Police and Fire Pension Plan or the Pension Plan for the general employees of the Metropolitan Government?

ANSWER

It is the opinion of the Department of Law that the position of Metropolitan Fire Chief should be included in the Police and Fire Pension Plan.

ANALYSIS

The Metropolitan Code of Laws (Code) in § 3.12.031 provides that the system of benefits created for employees of the Metropolitan Government is divided into Division A and Division B. As the Code states, "All eligible employees with an effective hire date of July 1, 1995 or later shall only be eligible to be participants in Division B."¹

In § 3.08.012 of the Code, the requirements for eligibility of Fire Department employees for the Police and Fire Pension Plan are established. Specifically, the Code provides:

Fire fighter "means an eligible employee in the "uniformed fire services" of any division of the department of fire, including those persons in the

¹ For the purposes of this opinion, it is assumed that an individual holding the position of Fire Chief has an effective hire date of July 1, 1995 or later.

ambulance division who are certified EMT's or paramedics. "Uniformed fire services" include those positions within the fire department dealing with fire suppression, fire prevention, fire training and fire inspection. Any questions as to whether an eligible employee will belong to the police and fire plan (Chapter 3.37) or the plan for credited employee service (Chapter 3.33) will be determined by the board. "Civilian positions" within the department shall not be deemed to be fire fighters. A fire fighter shall not lose his standing by virtue of a voluntary transfer into a civilian position, once having established credited service as a fire fighter, provided written application to continue such designation is approved by the board. Such applications filed with the board will only be approved by the board on a showing that the fire fighter has sustained a disability that prevents him from maintaining his position as a fire fighter, and stating that the fire fighter wants to move to a civilian position rather than take disability retirement.

Based upon this Code section, an eligible employee is one who works within the "uniformed fire services" of any division of the Fire Department (including the ambulance division) in a position "...dealing with fire suppression, fire prevention, fire training and fire inspection." The position of Fire Chief is not dedicated to any one particular function. Therefore, it must be determined if the job duties for the position of Fire Chief meet the requirement of "dealing with" the listed fire functions.

The Metropolitan Fire Department is currently organized into five bureaus. These bureaus include Fire/EMS, Paramedic/EMS, Services, Community Services, and Administrative. The Organizational Chart of the Metropolitan Fire Department shows that the position of Fire Chief oversees all of these bureaus.

The job description for the position of Fire Chief was most recently amended on July 11, 2000. It is clear from the job description that the position has many administrative and managerial duties. However, the position of Fire Chief also has several identified "Major Job Responsibilities" that deal directly with fire suppression, prevention, training, and inspection. These responsibilities include:

1. Oversees fire fighting operations and fire prevention programs.
2. Analyzes fire fighting and prevention policies.
3. May assume command at multiple-alarm fires.
4. May assist in planning fire defenses.
5. Coordinates fire protection plans with surrounding communities
6. Keeps abreast of new methods and/or equipment used in fire control and/or fire prevention.
7. May assume command of major disaster situations.
8. Meets with division heads to plan and organize programs and design implementation plans.

In addition to "Major Job Responsibilities", the job description also establishes "Performance Standards" that must be met by the individual holding the position of Fire

Chief. Several of these “Performance Standards” deal with fire suppression, fire prevention, and training issues. Included among these standards are:

1. Knowledge of the principles of fire administration.
2. Knowledge of fire prevention methods and the laws and codes applying to fire prevention.
3. Knowledge of fire suppression techniques and the capacities of fire fighting equipment.
4. Ability to train others.

Unfortunately, the term “dealing with” is not defined in the Code. Therefore, it is necessary to look at both the accepted definition of the term as well as any judicial interpretation that may exist.

According to Merriam-Webster’s Collegiate Dictionary, Tenth Edition, accepted definitions of “deal” include “to concern oneself or itself” or “to take action with regard to someone or something.” Application of these definitions to the Code provisions results in the requirement that the position of Fire Chief must be responsible to take action with regard to fire suppression, fire prevention, fire training, or fire inspection.

Case law provides additional understanding of the term “dealing with.” Although not addressing a pension issue, the Fourth Circuit Court of Appeals in N.L.R.B. v. Peninsula General Hosp. Medical Center, 36 F. 3d 1262, 1271-1272 (1994) stated:

In summary, these principles are: (1) while the term “dealing with” connotes activity which is broader than collective bargaining, an employer does not necessarily “deal with” its employees merely by communicating with them, even if the matters addressed concern working conditions; (2) “dealing” occurs only if there is a “pattern or practice” over time of employee proposals concerning working conditions, coupled with management consideration thereof; (3) isolated instances of the conduct described in number two do not constitute “dealing;...”

As found in N.L.R.B. v. Webcor Packaging, Inc., 118 F. 3d 1115, 1121 (1997), the Sixth Circuit Court of Appeals adopted an identical construction of the term “dealing with.”

Applying the cited case law with the accepted dictionary definition of the word “deal,” in order to qualify for a Police and Fire Pension, the position of Fire Chief must be responsible, as a matter of pattern and practice over a period of time, to take action with regard to fire suppression, fire prevention, fire training, or fire inspection. Based upon the “Major Job Responsibilities” and “Performance Standards” stated above, it is the opinion of the Department of Law that an individual serving as Fire Chief meets this standard simply by fulfilling the duties of the job. Although the Fire Chief is expected to perform many tasks that do not fit within the specific Code requirements, expressed duties involving fire suppression, prevention, training, or inspection would be sufficient to satisfy the “pattern and practice” interpretation.


Although it is the opinion of the Department of Law that the position of Fire Chief fits within the Police and Fire Pension Plan, such opinion is not determinative of the matter. According to § 13.05(d) of the Metropolitan Charter, it is the responsibility of the Metropolitan Employee Benefit Board to resolve "...questions relating to the eligibility of any person employed by the metropolitan government to become a member of any such employee benefit plan and the amount of benefit to which such person ... may become entitled to thereunder." Therefore, any question about the pension plan under which the position of Fire Chief is placed must ultimately be determined by the Employee Benefit Board.

To the extent the opinion stated in this letter conflicts with any prior opinion from the Department of Law concerning this matter, said prior opinion is hereby expressly amended to conform to the conclusions stated herein.

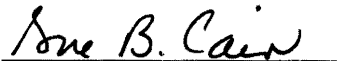
CONCLUSION

It is the opinion of the Department of Law that the position of Metropolitan Fire Chief should be included in the Police and Fire Pension Plan.

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY


Wm. Michael Safley
Deputy Director of Law

Approved By:



Sue B. Cain
Director of Law

cc: Mayor Karl Dean
Vice Mayor Diane Neighbors