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December 11, 2018

Mr. Jody Carreiro
Osborn, Carreiro

Re: City of Little Rock Retirement Plan statutory benefit questions

Dear Jody:

By letter dated November 5, 2018, you asked me the following questions concerning the statutory benefits for certain city officials:

1. QUESTION:

I have mentioned to you the question concerning the employee contributions that are a part of the city provided plan in which the mayor already participates. This is not a written plan. Stacey Witherell will provide documents that are available. In brief, the department directors and up including the mayor are provided with a higher contribution rate for pension purposes. If they choose to participate in the defined benefit plan the city contribution above the 9% employer, 4.5% employee still goes into a 401(a) "defined contribution" plan. If they choose not to participate in the defined benefit, the entire employer and employee contribution goes to the 401(a) account. The current mayor has chosen to stay in this DC arrangement and has not participated in the DB plan.

Therefore, when it comes to needing to make a choice between the city provided plan and the statutory benefit to comply with ACA §14-42-117, are the employee contributions part of the city provided plan or are they employee contributions that would be returned to the employee? In other words,are the city contributions to be returned to the employee or can the city maintain these funds to offset the cost of the statutory benefit?

RESPONSE

I would note, first, that the statutory benefit plans do not require that the elected official make contributions to receive the statutory benefit. If the City elects into the statutory benefit, therefore, it would appear to me that the City could not impose an employee contribution to receive the statutory benefit. That does not entirely answer the question, however. It might be possible for the City to impose a requirement that the official contribute to the alternative plan in order to participate in such plan, and even provide in that alternative plan a requirement that the employee contributions are forfeited if the official elects the statutory plan. (This is discussed further below.) Further, there is the question of the application of ACA 14-42-117, which provides:

DRAFT

> Notwithstanding any other law to the contrary, any employee of a city of the first class, city of the second class, or incorporated town, and any elected official of a city of the first class, city of the second class, or incorporated town who is entitled by an act of the General Assembly to retirement benefits for service as such an employee or elected official and who also participates in another retirement plan established by the city for the same period of service shall be entitled to only one (1) retirement benefit for the same period of service to the municipality, provided that no elected official may withdraw in a lump sum or roll over into a private account any accumulated benefits established by the municipality for which the official was employed and at the same time receive a pension as provided for under an act of the General Assembly, and the employee or elected official may choose whether to receive the retirement benefit provided by law or provided by the plan offered by the municipality.

There should not be any question that the official would be prohibited from drawing the statutory benefit if the official received any portion of the employer contribution from the alternative plan, as such benefit would be for the same period of service. The question, of course, is whether the employee's receiving the employee contributions would be considered to have "participated in another retirement plan established by the city for the same period of service" or have "withdrawn in a lump sum or rolled over into a private account any accumulated benefits established by the municipality."

I note that the money purchase plan in which the current Mayor participates provides in the basis plan document, section 4.8(a), that mandatory contributions are "fully vested." Therefore, unless the language of ACA 14-42-117 prevents it, such employee contributions would not be forfeitable.

It would of course be possible to obtain an attorney general's opinion on this subject, but such opinion is not binding in court, and I would need to defer to the City as to the legal and political value of seeking such opinion. It may also be possible to file some sort of declaratory action to obtain an answer. Or, the City could take the position that the above statute precludes the payment of the employee contribution account, in which case the official may contest such action in litigation. At least that course of action would preclude any taxpayer action on the grounds of an illegal exaction or similar lawsuit. I cannot predict what the results of such litigation might be.

2. QUESTION

Can the current defined benefit plan be amended to include the mayor's statutory benefit without harming the qualified standing of the plan?

RESPONSE

The current defined benefit plan can be amended to provide the statutory benefit without harming the qualified standing of the plan under IRC sections 401(a) and 501(a).

3. QUESTION

If the plan can be amended in this fashion, could we amend the plan now to accommodate any future statutory benefit that may be needed? For example, the benefit would be the greater of the multiplier formula or the statutory formula.

RESPONSE

The current defined benefit plan can be amended to provide for the election of either the statutory benefit or the multiplier formula. An important question is the question referenced in question #1 above-can employee contributions be used to help in funding the statutory benefit, if the statutory benefit is provided under the defined benefit plan? As I indicated, the statutory benefit does not require employee contributions. To the extent that the statutory benefits are elective with the City (certain benefits are elective), the City could elect NOT to provide such statutory benefits, and instead provide a benefit under the City's plan, subject to whatever conditions the City desires to impose. However, to the extent that the statutory benefits are NOT elective, any attempt to impose conditions not contained in the statute could be subject to challenge by the official. This principle may impact the answers to the remaining questions in your letter. But getting back to your question in #3, instead of providing that the official receives the greater of the statutory benefit or the multiplier formula, I propose that you continue to provide the official with an election, since the benefits can be slightly different and are not always determinable by quantity.

4. QUESTION

If the future statutory benefits are provided in this way, how would the excess contributions (currently another 4.5% of pay) need to be addressed? Any additional benefit would have to be viewed through the lens of ACA §14-42-117.

RESPONSE

We may not be able to eliminate any doubt on whether employee contributions can be retained by the City. As indicated above, in the event where an official qualified for the statutory benefit, the official could argue that employee contributions are not provided by the City for the same service, and a court would ultimately determine that question. I believe that we can, however, make it clearer in the City's plan that a condition to participating in the City's plan is making employee contributions, and that without such employee contributions, an official in a position that may receive a statutory benefit would not participate at all. Failure to agree to make forfeitable employee contributions would result in the official being excluded from the City's plan, so that if the official did not ultimately qualify for the statutory benefit, the official would not receive any benefit at all. Whether a court would construe this as an indirect attempt to impose an employee contribution for the statutory benefit is a question I cannot answer. What I do know is that there is not a requirement to provide a benefit for such elected officials in the City's plan in the first place, so that the City ought to be able to impose the conditions it desires.

5. QUESTION

Could we add a sentence to the COLA language to ensure that any unfunded portion of the statutory benefit would not affect the COLA for all other employees? The plan is over 95%funded and this is not an immediate concern at all, but better to address it now.

RESPONSE

The City can amend its plan to provide that the determination of whether the COLA applies will be determined without regard to the funded status of the statutory benefits. I know you can determine the liabilities associated with the statutory benefit. I will be interested in seeing how you account for any assets attributable to the statutory benefit within the City's plan.

6. QUESTION

All of this assumes that the city's board of directors elected to provide a COLA to the statutory benefit. If they chose not to provide a COLA (or one different that the one provided in the current plan), does that change the ability to provide the benefit through the current plan?

RESPONSE

The COLAs for the statutory benefit and the City plan can be calculated differently, provided that language in the plan provides for such separate calculation.

7. QUESTION

And on a similar note, can the city board provide the optional spousal protection of ACA12-12-123(b)(1) by putting them in the current plan and giving them the same options as other retirees? This would result in a monthly benefit amount that is less than the defined monthly benefit amount in this section. In other words, if the city board decides to provide the optional spousal benefit must they do so without a reduction in the monthly benefit?

As indicated above, with respect to the nonelective portions of the statutory benefit, any reduction in such benefits is subject to question in court, and at this time I am unable to say that such reductions would be effective.

Very truly yours,

Craig Westbrook
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