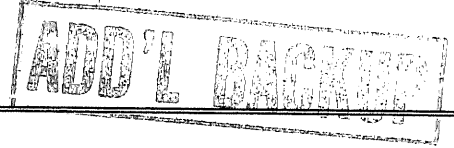


PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Agenda Item #: 6A-4



Meeting Date: September 27, 2016

[] Consent [X] Regular
[] Ordinance [] Public Hearing

Department: County Administration

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to maintain: current policy related to qualifications for Palm Beach County Ocean Rescue lifeguards and application of statutory provisions of the Florida Retirement System related to Special Risk membership.

Summary: At the May 3, 2016, meeting of the Board of County Commissioners, following several prior meetings and correspondence to individual Commissioners, an advisor with the USLA petitioned the Board to direct staff to execute Form FRS-405, which would advance the application of individuals classified as Ocean Lifeguards with EMT certification to obtain the approval of the Division of Retirement for certification as a Special Risk Member of the Florida Retirement System. At the September 13th meeting of the Board of County Commissioners, the request was repeated by several speakers under the Matters by the Public portion of the meeting, along with a request to increase the pay of Ocean Lifeguards in order to make the position more competitive with neighboring employers. While staff supports and recommends the compensation review currently in progress, staff does not support the request for execution of Form FRS-405, as there is no sound legal basis for staff to recommend this action. In 2009, a Final Order was issued by the State Retirement Commission denying the applications of two former Palm Beach County Ocean Lifeguards for Special Risk Classification on the basis that the Petitioners were voluntarily certified as EMTs, and their primary duties are not on-the-scene emergency care, but ocean rescue. This Order was affirmed by Florida's 4th District Court of Appeal in 2011. If staff were to execute Form FRS-405 on behalf of the EMT certified lifeguards, it would essentially be reversing itself with no legal basis to do so. EMT certification is voluntary, and there are currently 35 non-certified employees working in the same classification, and providing the same essential duties. Should the reversal be successful, in addition to a substantial financial exposure for back pay and benefits, staff would be required to make EMT certification mandatory, which would potentially displace the non-certified employees. Countywide (DO)

Background & Policy Issues: (Continued on Page 3)

Attachments:

1. Staff Response to USLA Request
2. State of Florida State Retirement Commission Final Order (Case No. R08-15528-MIA and R08-14635-MIA)

Recommended by: Nancy L. Bolton 9/26/16
Assistant County Administrator Date

Approved by: J. Baker 9/26/16
County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2016	2017	2018	2019	2020
Capital Expenditures	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
Operating Costs	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
External Revenues	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
Program Income (County)	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
In-Kind Match (County)	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
NET FISCAL IMPACT		<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>

ADDITIONAL FTE
POSITIONS (Cumulative)

Is Item Included in Current Budget? Yes, _____ No, _____


Budget Account No: Fund _____ Department _____ Unit _____ Object _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:


C. Departmental Fiscal Review:

III. REVIEW COMMENTS:

A. OFMB Fiscal and/or Contract Development & Control Comments:


ET 9/23 OFMB
Contract Dev. and Control 9/26/16
9/24/16 TW

B. Legal Sufficiency:


Assistant County Attorney

C. Other Department Review

Background & Policy Issues: (Continued on Page 3) The subject of the Special Risk Classification of membership for Ocean Lifeguards has been the subject of debate for many years. On August 14, 2009, a Final Order was issued by the State Retirement Commission denying the applications of two former Palm Beach County Ocean Lifeguards for Special Risk Classification. The Order (Case No. R08-15528-MIA and R08-14635-MIA) was affirmed by Florida's 4th District Court of Appeal. All prior and subsequent requests by subject employees for the Director of Human Resources to sign Form FRS-405, which would certify that the position of Ocean Lifeguard meets the criteria for Special Risk Class membership under the FRS, have been returned unsigned with the explanation that the County's position is, and has always been, that the Ocean Lifeguard job title does not meet the criteria for Special Risk Class membership as set forth in the Florida Statutes and Florida Retirement System Rules. The County has historically encouraged Ocean Lifeguard personnel to become certified as EMTs. Employees who obtain this certification are provided additional compensation. Currently, of the 94 positions in Ocean Rescue, 59 employees possess an EMT certification, while 35 do not. The Legislature has restricted the jobs and duties of those public employees entitled to special risk. Lifeguards, EMT certified or not, are not such an occupation. Although some Palm Beach County Ocean Lifeguard Personnel may be certified as EMTs, their job description and actual duties are those of a lifeguard, not an EMT.



PALM BEACH COUNTY ADMINISTRATION INTEROFFICE MEMORANDUM

September 27, 2016

To: Mayor Mary Lou Berger and Members of the Board of County Commissioners

From: County Administration

Subject: Retirement Classification and Compensation - Ocean Rescue Lifeguards

The following information is provided in response to the Board's directive at the September 13, 2016 BCC meeting regarding the referenced matter.

The issue of converting the retirement membership class of Ocean Lifeguards from Regular to Special Risk has been extensively reviewed numerous times over the past two decades. During this time, a number of individual Lifeguards have requested that County Administration sign Form FRS-405 certifying that the position of Ocean Lifeguard meets the criteria for Special Risk Class membership. Following a thorough review of these requests, including consultation with Florida Retirement System (FRS) representatives in Tallahassee and the County Attorney's Office, it was determined that the position does not meet the necessary criteria set forth in the Florida Statutes and the FRS Rules. Specifically, under Florida Statute 121.0515, the Ocean Lifeguard position is not included in the list of employment categories eligible for Special Risk membership (and previous legislative attempts to include them have been unsuccessful); and the Palm Beach County Ocean Lifeguard position does not require the employee to be certified as an Emergency Medical Technician (EMT) or Paramedic or that the primary duties of the position include on-the-scene emergency medical care. The County's determination not to convert the Lifeguard retirement class has been sustained on appeal to the State Retirement Commission in its Final Order for Case Nos. R08-15528-MIA and R08-14635-MIA dated August 14, 2009. This Final Order was affirmed by Florida's Fourth District Court of Appeals on February 2, 2011.

Staff recognizes and appreciates the inherent risks associated with the duties of the Ocean Lifeguard position, but does not feel the County is in a legal position to convert the retirement membership class from Regular to Special Risk. Legislative action amending the statutory language to include the Ocean Lifeguard position in the list of Special Risk occupations would need to occur to effect this change. If it is the direction of the Board, staff would support Legislative action in this regard.

Although the State does not currently recognize the Lifeguard position as Special Risk, the County encourages its Lifeguards to obtain an EMT certification and provides additional compensation to those that do. And in many instances, the County has reimbursed Lifeguards the cost of tuition for the EMT course through our Tuition Reimbursement Program. Presently, of the 94 positions in Ocean Rescue, 59 employees possess an EMT certification, while 35 do not.

Palm Beach County is one of 40 agencies in Florida that employ Ocean Lifeguards and 16 of these are directed by Parks and Recreation, Community Service or similar departments. Most of these agencies are comprised of beachfront parks and other amenities rather than stand alone beaches and are operated by Park and Recreation departments to ensure efficient and coordinated operations. None of these agencies classify their Lifeguards as Special Risk. Of the remaining 24 agencies, most of whom are directed by Fire Rescue, Public Safety or Emergency Services departments, only 7 agencies classify their Lifeguards as Special Risk. Each of these "Special Risk" agencies makes the EMT certification a requirement of the Lifeguard position and some even require a law enforcement certificate. It is also common practice for many of these agencies to require that their employees complete a number of ride-along hours on a Fire Rescue vehicle for enhanced training. None of these additional responsibilities and duties are required of Palm Beach County Ocean Rescue personnel.

It has always been the County's goal to provide a competitive starting salary and pay range; and state of the art equipment, supplies and training to Ocean Rescue personnel. Recently, the United States Lifesaving Association along with several County Ocean Lifeguards requested an increase in salary to be competitive with other similarly situated agencies. An analysis of salaries among the 41 Lifeguard agencies in Florida revealed that Palm Beach County currently ranks 14th in starting salary for Ocean Lifeguards, but is third highest for maximum salary. Additionally, as part of the collective bargaining process with the Communication Workers of America (CWA), staff agreed to complete a classification compensation study for all related positions, including the Ocean Lifeguard classification. To fulfill our goal of remaining competitive and to assist in attracting and retaining quality Ocean Lifeguards, staff will review the totality of salary survey data received and will be supportive, subject to the provisions of the CWA Collective Bargaining Agreement, of a 3% increase in salary for Ocean Lifeguard and Lieutenant positions and a corresponding upgrade for Ocean Lifeguards from pay grade 18 to 19. This would elevate the starting salary for Ocean Lifeguards and improve their rank to 11th highest among all Lifeguard agencies in Florida.

The fiscal impact of a pay increase as noted above in FY 2017 is estimated at \$91,897.

STATE OF FLORIDA
STATE RETIREMENT COMMISSION

Paul Drucker
and David Thorne,

Petitioners,

vs.

Case No. R08-15528-MIA
and R08-14635-MIA

Division of Retirement,

Respondent.

FINAL ORDER

This cause came before the State Retirement Commission upon appeals by Paul Drucker and David Thorne. They were represented by Denise Bleau. On March 16, 2009, the Commission consolidated these cases. Additionally Palm Beach County was permitted to intervene as an interested party, the employer. The parties agreed to hold the final hearing in Tallahassee on May 19, 2009, rather than schedule it near the end of the year at the Commissioner's next meeting in Ft. Lauderdale. Leon St. John, Esquire appeared as counsel for Palm Beach County. Respondent Division of Retirement was represented by Larry Scott, Esquire.

Both Petitioners were lifeguards but were certified as emergency medical technicians. They sought to be admitted into the special risk classification retroactive to October 1, 1999. Palm Beach County declined to classify them stating they were lifeguards not emergency medical technicians in the employment with the County. They then applied to the Division of Retirement and the State Retirement Director denied the applications. Petitioners sought a hearing in front of the State Retirement Commission.

Documents admitted into evidence are as follows:

For Petitioners

P-1. August 24, 2007 letter from Petitioner Thorne to Stephen Bardin, Division of Retirement.

P-2. August 24, 2007 Application for Special Risk Class Membership (Form FRS-405) of Petitioner Thorne, as Ocean Rescue Captain.

P-3. August 24, 2007 letter from Petitioner Thorne to Curt Jenkins, Palm Beach County Personnel Department.

P-4. August 24, 2007 Application for Special Risk Class Membership (Form FRS-405) of Petitioner Thorne, as Lifeguard II.

P-5. September 6, 2007 memorandum from Janice Gardner, Division of Retirement, to Debbie Dieter, Palm Beach County Board of County Commissioners.

P-6. October 16, 2007 letter from Stephen Bardin, Division of Retirement, to Debbie Dieter, Palm Beach County Board of County Commissioners.

P-7. December 10, 2007 Application (Revised) for Special Risk Class Membership (form FRS-405) of Petitioner Thorne for position title Captain.

P-8. December 10, 2007 Application (Revised) for Special Risk Class Membership (Form FRS-405) of Petitioner Thorne for position title Ocean Rescue Captain.

P-9. February 20, 2008 Affidavit of Grant Whitcomb.

P-10. February 25, 2008 Affidavit of Joel Narcowich.

P-11. February 29, 2008 Affidavit of Don May.

P-12. March 7, 2008 Affidavit of Bruce Shaw.

P-13. March 7, 2008 letter from Joyce W. Morgan, Division of Retirement, to Robert Weisman, Palm Beach County Board of County Commissioners.

P-14. March 21, 2008 letter from Janis Brunnell, Director of Human Resources, Palm Beach County Board of County Commissioners to Joyce W. Morgan, Division of Retirement.

P-15. April 18, 2008 letter from Sarabeth Snuggs, State Retirement Director, to Petitioner Thorne.

P-16. May 8, 2008 Petition for Administrative Hearing before the State Retirement Commission by David Thorne.

P-17. EMT License issued September 21, 2006 by Florida Department of Health to Petitioner Thorne.

P-18. November 30, 2007 Statement of Earnings from Palm Beach County Board of County Commissioners to Petitioner Thorne.

P-19. A Retirement Guide for Members of the Special Risk and Special Risk Administrative Support Classes of the Florida Retirement System Pension Plan. (2006)

P-20. May 8, 2008 Letter from Petitioner Drucker to Janis Brunnell, Director of Human Resources, Palm Beach County Board of County Commissioners.

P-21. May 9, 2008 Application for Special Risk Class Membership (Form FRS-405) of Petitioner Drucker.

P-22. May 30, 2008 Letter from Janis Brunnell, Director of Human Resources, Palm Beach County Board of County Commissioners to Petitioner Drucker.

P-23. June 17, 2008 letter from Petitioner Drucker to Stephanie Miller, Division of Retirement.

P-24. Undated document titled "Palm Beach County EMT Ocean Lifeguards."

P-25. January 16, 2007 Memorandum of Understanding between Palm Beach County Fire Rescue and Palm Beach County Ocean Rescue.

P-26. January 21, 1997 Memorandum of Understanding between Palm Beach County Department of Parks and Recreation.

P-27. 2005 "Ocean Lifeguard" job description.

P-28. July 8, 2008 letter from JoAnn Baker, Division of Retirement, to Kurt Jenkins, Palm Beach County Board of County Commissioners.

P-29. August 27, 2008 letter from Sarabeth Snuggs, State Retirement Director, to Petitioner Drucker.

P-30. Undated Petition for Administrative Hearing Before the State Retirement Commission by Paul Drucker.

P-31. Undated Statement of Earnings (portion) from Palm Beach County Board of County Commissioners to Petitioner Drucker.

P-32. Undated photograph of uniform garments of Petitioner Drucker with embroidered words "Ocean Rescue E.M.T."

P-33. Palm Beach County North District Lifeguard Schedule for June 21 through July 4, 2008.

P-34. September 19, 2006 Final Order of Administrative Law Judge Daniel Manry in Bennet B. Richardson v. Department of Management Services, Division of Retirement. (Case Nos: 06-0427RU and 06-1920RP)

P-35. January 7, 2009 Stipulated Agreement in Robert Dixon, et al. v. Department of Management Services, Division of Retirement. (Case No. 08-3627RU)

P-36. Article 21 "Certification of Re-Certification." from Labor Management Agreement between Communication Workers of America AFL-CIO-CLC Local #3181 and Palm Beach County Board of County Commissioners, October 1, 2006 to September 30, 2009 (page 37).

P-37. June 2003 "Ocean Rescue Captain" job description.

For Intervener

I-1. Position Description of Ocean Lifeguard (Position 4791) effective January 8, 2002.

For Respondent

R-1. Response to Thorne's Request for Admissions.

R-2. Response to Drucker's Request for Admissions.

In addition the Commission took official recognition of Section 121.0515, Florida Statutes (2008) on special risk membership.

Both Petitioners testified on their own behalf and presented the testimony of John Meskiel. The Intervener presented the testimony of Wayne Condry. Respondent had no witnesses.

ISSUE

Whether Petitioners are eligible for special risk membership from October 1, 1999, to

present.

FINDINGS OF FACT

1. David Thorne is an Ocean Rescue Captain for Palm Beach County Rescue. He started as an ocean lifeguard December 5, 1987, and has 21 ½ years of creditable service. According to the Department of Health, Petitioner has held continuous emergency medical technician certification from July 1, 1984, to the present.

2. Paul Drucker started as a lifeguard in December of 1987. He has been certified as an emergency medical technician since 1979.

3. There are 60 lifeguards in Palm Beach County Rescue. Some 35 to 40 have been certified as EMT's. However, nothing in the job description presented require a lifeguard to be an EMT. Most of the job functions involve surveillance of bathers, prevention of accidents, monitoring water conditions, and rescuing persons in distress in the water.

4. It is clear that Palm Beach favors having certified EMT's as lifeguards. Captain Thorne indicated that in each ten hour day shift there were always EMT certified lifeguards on the various beach areas. That appears to be Palm Beach County policy.

5. The Commission heard testimony about what an EMT can do and how it enhances public safety. Palm Beach County does employ EMT's to provide those services. The County is a licensed Advanced Life Support employer.

6. Contrary to Petitioners position, they are not employed as EMT's. Personally they have not performed such functions as inserting tracheotomy or combi-tubes, amputating trapped body parts, or engaging in routine triage at mass casualties.

7. Lifeguards must have American Red Cross lifeguard, first aid, and basic life support training. CPR and first responder skills such as dealing with bone breaks, bleeding,

unconsciousness, or so forth are duties. However in more serious situations, duly employed EMT's arrive on the scene, take over patient care and transport, and the lifeguards resume their beach duties.

8. It is evident that collective bargaining on behalf of lifeguards with the County has not resulted in a favorable outcome for the employees. Further, the County has favored persons with EMT certification. In Mr. Drucker's instance he may have been paid a bit more than a similarly situated non-certified person. However, nothing in the record demonstrates either Petitioner (or the unnamed 35-40 certified EMT's working as lifeguards) has duties absolutely requiring EMT certification. The only medical equipment on hand, such as positive pressure oxygen unit, semi-automatic defibrillator, bag valve mask, or spinal immobilization equipment, would be reasonably expected tools for a lifeguard or first aid provider in a public setting. The more sophisticated equipment which a transport unit may have is not a part of the lifeguard arsenal.

9. The Commission does not believe its job is to insert itself in political issues, particularly local employer/employee collective bargaining. Although to some the County may be overreaching. To others it might appear the Commission is overreaching were it to nullify bargains or impose additional conditions on such contracts. The Legislature has proscribed the jobs and duties of those public employees entitled to special risk. Lifeguards, EMT certified or not, are not such an occupation. The evidence shows, that, although Petitioners may have been certified years ago as EMT's, their job descriptions and actual duties are ocean rescue.

10. Petitioners have failed to meet their burden of proof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission makes the following holdings and Conclusions of Law:

1. The State Retirement Commission has jurisdiction over the parties to and the subject matter of this cause.

2. In cases concerning the application for special risk benefits, the burden of proof is on the member seeking to show entitlement to such benefits. Rule 60R-1.0047, Florida Administrative Code.

3. Special risk members in the State Retirement System are persons who have been designated as a special risk member by the division in accordance with s. 121.0515. Such member must be employed as a law enforcement officer, firefighter, a correctional officer, an emergency medical technician, or a paramedic and must meet certain other special criteria as set forth in s. 121.0515.

Section 121.021(15)(c), Florida Statutes.

4. The legislative intent in creating a special risk class is set forth in Section 121.0515(1), Florida Statutes, which in part states:

.....it is the intent and purpose of the Legislature to recognize that persons employed in certain categories of law enforcement, firefighting, criminal detention, and emergency medical care positions are required as one of the essential functions of their positions to perform work that is physically demanding or arduous, or work that requires extra-ordinary agility and mental acuity, and that such persons, because of diminishing physical and mental faculties, may find that they are not able, without risk to the health and safety of themselves, the public, or their coworkers, to continue performing such duties and thus enjoy the full career and retirement benefits enjoyed by persons employed in other positions and that, if they find it necessary, due to the physical and mental limitations of their age, to retire at an earlier age and usually with less service, they will suffer an economic deprivation therefrom. Therefore, as a means of recognizing the peculiar and special problems of this class of employees, it is the intent and purpose of the Legislature to establish a class of retirement

membership that awards more retirement credit per year of service than that awarded to other employees;....

5. Section 121.0515(2)(d), Florida Statutes, sets forth the criteria for special risk

membership as a paramedic/emergency medical technician as follows:

The member must be employed by a licensed Advance Life Support (ALS) or Basic Life Support (BLS) employer as an emergency medical technician or a paramedic and be certified in compliance with s. 401.27. In addition, the member's primary duties and responsibilities must include on-the-scene emergency care or direct supervision of emergency medical technicians or paramedics, or the member must be the supervisor or command officer of one or more members who have such responsibility.....

Although Palm Beach County is an ALS employer and Petitioners are voluntarily certified under Section 401.27, Florida Statutes, their work is as lifeguards. The primary duties are not on-the-scene emergency care but ocean rescue. They do not supervise or serve as command officers of EMT's but turn over patients to such individuals.

6. Section 121.0515(3)(a), Florida Statutes, does allow an employee to apply to the Respondent with appellate rights to the State Retirement Commission should the employer decline to submit an application for special risk or designate a person as a special risk. Palm Beach County did not designate lifeguards as special risk nor did the Legislature include them in an occupational category warranting special risk. The Division was correct in denying the applications as the job descriptions did not include primary duties as on-the-scene emergency care or direct supervision of EMT's. Under the totality of the evidence produced, the Commission finds no error. At best Petitioners may have over decades of work engaged in a rare activity that is within the scope of practice of an EMT. Their primary duties were as lifeguards.

ORDER

Based upon the Findings of Fact and Conclusions of Law, it is

ORDERED AND DIRECTED that the decision of the State Retirement Director denying Paul Drucker and David Thorne special risk classification is **SUSTAINED**. It is

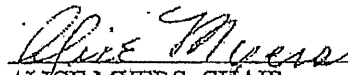
ORDERED AND DIRECTED that the application of Paul Drucker and David Thorne for special risk membership is **DENIED**. It is further

ORDERED AND DIRECTED that the Commission retains jurisdiction of this cause for the purpose of correcting any errors or mistakes in this Final Order arising from inadvertence, oversight, or omission.

This Order constitutes final agency action. The parties are notified that they may appeal this Order by filing a Notice of Appeal, along with the appropriate filing fees, in the District Court of Appeal. Such notice must be filed with the Clerk of the Commission and with the District Court of Appeal within thirty calendar days of the date of this Order which is filed in the records of the State Retirement Commission, as indicated in the Clerk's Certificate below, or further review of this action will be barred.

DONE AND ORDERED this 14th day of August, 2009.

STATE RETIREMENT COMMISSION



ALICE MYERS, CHAIR

Voting for the Order

Alice Myers, Chair
Ernest Doster

Voting Against the Order

Millie Seay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was filed in the records of the State Retirement Commission this 14th day of August, 2009 and that copies were furnished by Certified Mail to Denise J. Bleau, Esquire, BUCKINGHAM; DOOLITTLE & BURROUGHS, LLP, 515 N. Flagler Drive, Suite 2000, West Palm Beach, Florida 33401; and to David Thorne, 22 Perriwinkle Lane, Sewalls Point, Florida 34996; and to Paul Drucker, 9615 159th Court North, Jupiter, Florida 33478; and to Leon St. John, Esquire, Palm Beach County Attorney's Office, 300 N. Dixie Highway, Suite 359, West Palm Beach, Florida 33401-4606; and by interoffice mail to Larry Scott, Department of Management Services, 4050 Esplanade Way, Tallahassee, Florida 32399.

Brandi Tanton
BRANDI TANTON, CLERK