



# LLW

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REPLY TO: TALLAHASSEE

## MEMORANDUM

To: Daniel W. Stanton, Chair  
Board of Trustees  
Town of Palm Beach Retirement System

From: Jim Linn and Janice Rustin, Legal Counsel

Date: March 5, 2019

Re: Board's Obligations with Respect to the Town's Defined Contribution Plans

This memorandum responds to your request for information regarding the duties and responsibilities of the Board with respect to the Town's defined contribution (DC) retirement plans. At the December 2018 meeting, AndCo, the Board's investment consultant, presented a draft investment policy statement for the Town's defined contribution plans. The opening paragraph of the draft policy states that the "Retirement Board of Trustees for the Town of Palm Beach Defined Contribution Plans for Employees 457(b) and 401(a)" will adopt the policy, and that the Town Council will ratify the policy and appoint an "administrative committee" to oversee implementation of the policy. You asked whether this language accurately reflects the Board's role with respect to the Town's defined contribution plans.

**Short Answer:** Based on our review of the relevant Town ordinances and resolutions, plan documents and prior actions of the Board, we believe the Town, as part of the consolidation of its retirement plans and the plan revisions adopted in 2012 (including the creation of a hybrid defined benefit/defined contribution plan), intended that the Board exercise discretionary authority with respect to the defined contribution plans. The Board has exercised such authority in the past by reviewing and approving changes to the lineup of investment options offered by the DC plans. However, the language in the Retirement System ordinance and the resolution establishing the 401(a) DC plan does not clearly reflect the Town's intent or the Board's prior actions. Similarly, the introductory language in AndCo's draft investment policy statement does not accurately reflect the Board's role or the way the DC plans are administered. We recommend that the documents be revised to more clearly reflect the Board's duties and the administration of the DC plans.

### The Town's Defined Contribution Plans

In addition to its defined benefit retirement plan, the Town has established several defined contribution plans for its employees, including a 457 deferred compensation plan, a 401(a) money

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purchase plan, a retirement health savings plan, a share plan for firefighters, and a Roth IRA plan. All of the DC plans are administered by the International City Managers Association Retirement Corporation (ICMA). The current combined balance of all the DC plans is approximately \$54 million.

In general, defined contribution plans differ from defined benefit plans in that the participants, not the plan sponsor, is responsible for directing their investments among a lineup of investment options provided by the plan. However, the plan sponsor is responsible for evaluating, selecting and monitoring the investment options, and directing changes to those options from time to time.

The Town's Code of Ordinances was amended in 2012 to direct the Board to provide "administrative support and coordination for the Town's defined contribution plan, retirement health savings plan, and 457 plan." Section 82-57(l), Palm Beach Town Code. The Code sets forth the Boards investment duties with respect to the "retirement system", but it is not clear whether the reference to "retirement system" includes the DC plans. In addition, Town Resolution 22-2012 creating the 401(a) DC plan, authorizes the Board "to provide administrative support and coordination for the Plan as requested by Plan administrator," and designates ICMA as the plan administrator. Neither the Town Code nor Resolution 22-2012 specifically identifies what entity has discretionary oversight over the investment options provided in the DC plans.

#### **Prior Board Action on DC Plans**

Beginning shortly after the Town's three defined benefit plans were consolidated into one plan and the 401(a) DC plan was created in 2012, the Board has taken a significant role in evaluating, selecting and monitoring the investment options provided in the Town's DC plans. The Board's investment consultant and ICMA representatives have appeared before the Board on multiple occasions to review the lineup of funds offered by the DC plans, and recommend that new funds be added and existing funds that were underperforming be terminated. The Board has also instructed the Town to educate employees about the changes to the lineup, and approved letters to plan members concerning the DC plans.

In 2013, the Board's investment consultant was Segal RogerCasey ("SRC"). As part of its agreement with the Board, SRC was required to report on the DC plans on a semi-annual basis. Minutes of Board meetings in 2013 and 2014 confirm that SRC provided such reports. At the May 17, 2013 Board meeting, SRC provided a memo to the Board recommending a number of changes to the DC fund lineup. At that time the Board deferred action on the recommended changes. At the June 6, 2014 Board meeting, SRC again presented recommended changes to the DC fund lineup, and ICMA agreed with the SRC's recommendations. After discussion, the Board modified and approved the recommended changes.

The Board terminated its investment consulting agreement with SRC in 2016, and entered into an agreement with AndCo for investment consulting services. Although the AndCo agreement is silent as to AndCo's duties regarding the DC plans, the terms of the RFP that resulted in AndCo's engagement required the winning bidder to "periodically review the Town's defined contribution

plan investments.” A review of the Board’s minutes since 2016 shows that AndCo and ICMA have reported on the DC plans at least once a year. However, there has been not been an extensive review of the lineup of funds offered by the DC plans since 2014.

### **Investment Policy for the Defined Contribution Plans**

The Board has not yet adopted an investment policy for the DC plans. SRC presented a proposed investment policy for the DC plans to the Board in 2014, but the policy apparently was never adopted. At the Board’s December 2018 meeting, AndCo presented a draft investment policy for the DC plans, but the Board tabled the discussion of this policy pending legal review.

### **Fiduciary Liability for the Defined Contribution Plans**

In recent years, plan sponsors and others exercising fiduciary responsibility for defined contribution plans have come under increased scrutiny, due in part to a number of lawsuits filed against plan sponsors. Most of these lawsuits allege plan sponsors breached their fiduciary duty by offering high-cost investment options, allowing excessive fees to be charged by service providers and record keepers, retaining multiple record keepers, and offering too many funds. In one of the lawsuits, the U.S. Supreme Court held that fiduciaries of DC plans have an ongoing duty to monitor the investments that they make available to the plan participants. LaRue v. DeWolff, Boberg, & Assoc., Inc., 552 U.S. 248 (2008).

In the event a similar lawsuit is filed against the Town, it is likely that the Board would be named as a defendant since it has acted in a fiduciary capacity with respect to the investment options provided in the Town’s DC plans. Although ICMA administers the DC plans, its agreement with the Town expressly states that ICMA does not assume any fiduciary responsibility over the plans that they administer. Likewise, AndCo’s agreement with the Board is silent as to its fiduciary duties to the DC plans.

### **Conclusion & Recommendations**

Based on the language added to Town Code in 2012 expanding the Board’s duties with respect to the Town’s DC plans, and similar language in the 2012 resolution establishing the 401(a) DC plan, it appears Town Council intended that the Board exercise some responsibility with respect to the DC plans. However, the “administrative support and coordination” language in the 2012 ordinance and resolution does not make it clear that the Board was intended to exercise fiduciary authority over DC plan investments. The Board has exercised such authority in the past by reviewing and approving changes to the lineup of investment options offered by the DC plans. However, the language in the Retirement System ordinance and the resolution establishing the 401(a) DC plan does not clearly reflect the Town’s intent or the Board’s prior actions. Similarly, the introductory language in AndCo’s draft investment policy statement does not accurately reflect the Board’s role or the way the DC plans are administered.

In view of the potential liability risk to the Town and the Board for claims of breach of fiduciary duty to the DC plans, we recommend the following actions:

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- The Town's Code of Ordinances should be amended to clarify the Board's responsibilities with respect to the Town's defined contribution plans. The Town Code as well as the DC plan documents should clearly reflect whether the Board or another entity is responsible for exercising discretionary authority over DC plan investments and the lineup of DC plan investment options.
- Based on the clarifications to the Town Code and DC plan documents, the entity charged with discretionary authority over DC plan investments should adopt an investment policy for the DC plans.
- The Town or the entity charged with discretionary authority over DC plan investments should obtain fiduciary liability insurance coverage for its duties with respect to the DC plans.
- If the Board is charged with discretionary authority over DC plan investments, the Board's agreement with AndCo should be revised to reflect AndCo's responsibilities with respect to the DC plans.

We will be prepared to discuss these matters at the March 15, 2019 Board meeting.