

BILL NO. G-15-03-16

GENERAL ORDINANCE NO. G-_____

**AN ORDINANCE AMENDING CHAPTER
34: POLICE DEPARTMENT - SECTION
34.07. CUMPULSORY RETIREMENT AGE
OF THE CITY OF FORT WAYNE INDIANA
CODE OF ORDINANCES.**

WHEREAS, Fort Wayne Ordinance §3.07 entitled "Compulsory Retirement Age" currently reads as follows:

Any officer of the Police Department upon reaching the age of 60 years must retire in the month of his 60th Birthday.

WHEREAS, Fort Wayne Ordinance §34.07 shall be amended.

NOW, THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:

SECTION 1. That Chapter 34: POLICE DEPARTMENT, Section 34.07. Compulsory Retirement Age, be amended as follows:

§34.07 Compulsory Retirement Age

A member of the department shall retire from the department when the member reaches the member's seventieth (70) birthday. However, a member of the department who is seventy (70) years of age or older at the time this ordinance takes effect may serve until the end of the calendar year.

SECTION 2. That this Ordinance shall be in full force and effect from and after its passage and any all necessary approval by the Mayor.

Council Member

APPROVED AS TO FORM AND LEGALITY

Carol Helton, City Attorney

MEMORANDUM

TO: Rusty York
Director of Public Safety
City of Fort Wayne, Indiana

FROM: Michael C. Moellering, Esq.
Burt, Blee, Dixon, Sutton & Bloom, LLP

DATE: March 3, 2015

RE: Updating the Police Merit System Compulsory Retirement Age for Police Officers

The purpose of this Memorandum is to discuss the compulsory retirement age for Fort Wayne Police Officers and the ability of the City Council to adopt an ordinance amending the same. The compulsory retirement age is currently set by Fort Wayne City Ordinance and mandates that a Police Department member retire in the month of his or her sixtieth (60th) birthday. Fort Wayne, Ind., Code § 34.07. This rule was first adopted over forty (40) years ago and has not been uniformly enforced in recent years. As a result, several active members of the Fort Wayne Police Department are over the age of sixty (60) and at least one member is over the age of seventy (70). An effort has recently been made to determine the steps necessary to modernize the rule and bring it into compliance with current practice.

The ability to amend or repeal a Fort Wayne ordinance regarding the Police Merit System is governed by Indiana Code § 36-8-3.5 *et seq.* This statute was revised and re-codified in 1981 to provide terms governing the establishment of all Police and Fire Merit Systems throughout Indiana. At that time, the City of Fort Wayne already had in place a set of ordinances governing the City of Fort Wayne Police Department Merit System. Although statutes typically trump ordinances, this particular state statute provided that cities like Fort Wayne wishing to retain existing Police Merit System ordinance, rather than adopt the provisions of the new statute, were permitted to do so as long as an ordinance by the city legislative body to that effect was passed before January 1, 1983. IC § 36-8-3.5-1(b). On December 28, 1982, the City of Fort Wayne opted to retain the existing rules regarding the Police Merit System, including the ordinance setting the compulsory retirement age at sixty (60), which ordinance remains in place today.

Over time, it is not uncommon that a portion of any ordinance may need to be updated. Knowing this, the Indiana Legislature included a term within the revised statute addressing the eventual need to amend or repeal an ordinance. The statute provides at IC § 36-8-3.5-1(b) that the ordinance retained "must initially incorporate all the provisions of the prior statute but may be amended by the legislative body after December 31, 1984" (emphasis added). Since December 31, 1984, has long since passed, the City Council should be free to now amend the ordinance governing the compulsory retirement age for members of the Police Department.

However, in the event the City of Fort Wayne determines a repeal of the existing Police Merit System ordinance is required, such action is subject to the terms of IC § 36-8-3.5-1(c) which provides as follows:

After December 31, 1984, the legislative body also may repeal the ordinance described in subsection (b), but the legislative body shall in the repealing ordinance concurrently establish a new merit system under section 3 of this chapter. (This subsection does not

require the legislative body to establish a new merit system when it exercises its power to amend the ordinance under subsection (b).)

Pursuant to the statutory subsection reprinted above, if the City of Fort Wayne repeals the existing Police Merit System ordinance, the ordinance must simultaneously be replaced with the statute. To avoid being required to replace the existing Police Merit System ordinance with the statutory scheme, the City Council may elect to simply amend, rather than repeal, that portion of the ordinance in need of an update such as the compulsory retirement age.

The plain language of these two subsections indicates that amendments may be made to an ordinance without having to fully repeal the ordinance and simultaneously adopt the statute. This interpretation of the statute is confirmed by a 2000 persuasive case where the Indiana Court of Appeals analyzed the ability of a municipality similarly situated to the City of Fort Wayne to amend its Police Merit System ordinance. In *Turner v. City of Evansville*, the Court of Appeals found that it was the original intention of the legislature "that modifications to retained merit systems were permissible after a certain date without requiring full compliance with chapter 36-8-3.5." *Turner v. City of Evansville*, 729 N.E.2d 149, 155 (Ind. Ct. App. 2000) *vacated*, 740 N.E.2d 860 (Ind. 2001) (Reversed on wholly separate grounds). While this case was unfortunately overturned on separate grounds by the Indiana Supreme Court on a subsequent appeal, the above-quoted interpretation of the statute is a persuasive confirmation of the City of Fort Wayne's authority to amend the Police Merit System ordinance.

Having determined that the Fort Wayne City Council has the authority to amend the current compulsory retirement age without being forced to repeal the entire Police Merit System ordinance, the next question is: What is the appropriate amended age for mandatory retirement? Had Fort Wayne adopted the statute back in 1982 rather than retain the existing ordinance, the current statute would control the compulsory retirement age. The statute currently sets the compulsory retirement age at seventy (70). IC § 36-8-3.5-20. The statute further allows those members seventy (70) or older at the time such rule is adopted to serve until the end of that calendar year. The Indiana Court of Appeals has stated that public safety or the public welfare would not necessarily be imperiled by continued employment of Police Department members up to the age seventy (70) *Wencke v. City of Indianapolis*, 429 N.E.2d 295, 298 (Ind. Ct. App. 1981). In this case, the Court of Appeals also observed that the record of the case failed to reveal that the public suffered significant hardship due to the employment of police officers up to age seventy (70). In fact, if an officer is rendered physically or mentally incompetent, there are remedies available to invoke to ensure that the member is removed from active duty *Id.* at 296-297. It is our understanding that the Police Department has policies and procedures in place to deal with the continuing competency of its members. These policies and procedures include, but are not limited to, fitness for duty rules and quarterly firearms certification. We recommended that an amendment to the Police Merit System ordinance be modeled after the state rule setting the compulsory retirement age at seventy (70) and further allowing those members seventy (70) or older, at the time the new rule is adopted, to serve until the end of that calendar year.

The substantive text of the amended ordinance is proposed in the draft document attached hereto. The result of adopting the proposed ordinance would be to formally raise the compulsory retirement age from sixty (60) to seventy (70), which will bring several Police Department members currently over sixty (60) into compliance with the Police Merit System ordinance. In addition, while the sole Police Department member over the age of seventy (70) will face mandatory retirement at the end of calendar year 2015, that deadline provides for a full ten (10) months of continued employment for that member.

I hope this Memorandum provides helpful guidance on this important issue. In the event we can be of any further assistance, please do not hesitate to give me a call.

MCM

Ch 34 Part

Compulsory Retirement age

DRAFT ORDINANCE

ORDINANCE NO. _____

WHEREAS, Fort Wayne Ordinance § 34.07 entitled "Compulsory Retirement Age" currently reads as follows:

Any officer of the Police Department upon reaching the age of 60 years must retire in the month of his 60th birthday.

WHEREAS, Fort Wayne Ordinance § 34.07 shall be amended.

NOW, THEREFORE, BE IT ORDAINED by the City Council for the City of Fort Wayne, Indiana:

Fort Wayne Ordinance § 34.07 entitled "Compulsory Retirement Age" shall be amended to hereafter read as follows:

A member of the department shall retire from the department when the member reaches the member's seventieth (70th) birthday. However, a member of the department who is seventy (70) years of age or older at the time this ordinance takes effect may serve until the end of the calendar year.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF FORT WAYNE, FORT WAYNE, COUNTY OF ALLEN, INDIANA, this ____ day of _____, 2015.

CITY COUNCIL FOR THE CITY OF FORT WAYNE

Marty Bender
At-Large Member

Dr. John Crawford
At-Large Member

John H. Shoaff
At-Large Member

Tom Smith
1st District

Russ Jehl
2nd District

Thomas F. Didier
3rd District

Mitch Harper
4th District

Geoff Paddock
5th District

Glynn A. Hines
6th District

Council Agenda Item Submission Form

Staff Contact: RUSTY YORK

Division: (Select from Drop-down): PUBLIC SAFETY

Department: POLICE

Today's Date: 03/16/2015

Issue: CHANGE MANDATORY RETIREMENT AGE FOR POLICE TO AGE 70.

Type of Action: Ordinance ☒ Resolution ☐ Presentation ☐

Anticipated Introduction Date (2nd or 4th Tuesday): 3/24/15

Presenter: RUSTY YORK

Is there a requirement for a public hearing? ☐ Yes ☒ No

Is there a deadline for your final action? ☐ Yes ☒ No If yes, deadline date: / /

Do you need to meet with the Mayor and Deputy Mayor regarding this issue? ☐ Yes ☒ No

Do you plan to meet with Councilmembers to educate on issue? ☐ Yes ☒ No
