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Legal and Legislative Update

IPPFA Supports Expanded Investment Authority for Police and Fire Boards

By: Jim McNamee, President IPPFA

IPPFA supports legislation aimed at expanding investment authority of local Police and Fire Pension Boards. The current investment rules, just as the market changes, need to be updated. HB 5571 is a bill that was drafted with input from our investment managers and DOI. This bill clarifies language on investment authority. Police and Fire Pension Fund Trustees have proven, when given the tools, they meet or exceed their investment benchmarks. The Anderson Economic study reflects Article 3 and 4 Funds' exemplary investment performance. Other proposals from the Illinois Municipal League ("IML"), like consolidation, will increase unfunded liabilities due to transition costs and disruption of our retirement systems. The COGFA study shows consolidation is nothing more than a "pie in the sky" claim. The IML's flimsy plan is not supported by any credible experts and fails under even the most superficial of challenges. Taxpayers will pay more under the IML plan. "Consolidation" is about who controls Police Officers' and Firefighters' retirement money. It is not about solid fiscal policy, ethical reform, or even doing the right thing – it is about power. Police Officers and Firefighters have always been good stewards of their retirement systems. We should trust them to continue their excellent and scandal free track record. ❖

Federal Court Finds Pension Protection Clause Does Not Extend to Continued Employment

Filipek v. Oakton Community College, 2018 WL 1064577, (N.D. Ill. 2018)

A federal judge has denied Plaintiff's claims in a

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class action arguing dismissal from positions at a community college was prohibited by the Pension Protection Clause of the Illinois Constitution.

Oakton Community College employs both full and part-time faculty members. Eligible employees participate in and receive retirement benefits from the State Universities Retirement System ("SURS"). Pursuant to an amendment to the Return to Work Law passed in 2012, educational institutions participating in SURS must make an additional employer contribution for any employee receiving a SURS retirement annuity in excess of $10,000.

Oakton frequently employed SURS retirees as adjunct faculty members. A miscalculation by the human resources department at the college resulted in an additional $75,000 employer contribution becoming payable to SURS due to the employment of SURS retirees. In response, the college decided it would no longer employ any SURS annuitant.

A class of SURS annuitants who lost their jobs as a result of this policy sued the college under numerous theories. Among those theories and most relevant here, included a claim the decision to terminate employment of the SURS annuitants violated the Pension Protection Clause of the Illinois Constitution.

In rejecting the arguments of the annuitants, the District Court found, "The pension protections enshrouded in the Illinois Constitution do not extend so far as to protect a SURS annuitant's right to continued employment after retirement." The college decision did not directly affect the annuitants' ability to continue to collect their full annuity. Because the decision to terminate employment did not impair the annuitants pension rights and the Constitution does not protect the SURS retirees from having to elect between collecting pension benefit payments and continuing part-time, post-retirement employment, the Court dismissed the lawsuit filed by the retirees.

It is important to note the penalty provision resulting in the college paying additional contributions to SURS for employing annuitants does not apply to Article 3 or 4 pension funds. However, this District Court decision (which has been appealed to the 7th Circuit Court of Appeals) does stand opposite other recent cases interpreting the Pension Protection Clause as a shield to protect other post-retirement concerns such as healthcare. Stay tuned for a decision on appeal. ❖

Court Affirmed Pension Board Finding Officer Not Disabled

Campbell v. Evanston Police Pension Board/Fund, 2018 IL App (1st) 171216-U

In an un-published decision, the First District Appellate Court recently affirmed the Evanston Police Pension Fund's determination Officer Kevin Campbell was not disabled. Officer Campbell had sought line-of-duty disability pension benefits relating to a hip injury, incurred while engaged in a foot chase of a subject.

Officer Campbell suffered a hip injury, initially believed to be a pulled muscle, during a foot chase in June 2010. Following medical treatment and physical therapy, Officer Campbell continued to experience pain in his hip. Nevertheless, Officer Campbell returned to full duty, and was promoted to Sergeant in March 2011. In April 2013, he underwent a total hip replacement. Following surgery, Officer Campbell underwent physical therapy until his discharge from physical therapy in December 2013. At the time of his discharge, the physical therapist noted further physical therapy would not further improve Officer Campbell's hip.

In January 2014, Officer Campbell completed a Functional Capacity Evaluation ("FCE"), which found he was capable of performing the physical demands of a police officer. Officer Campbell, however, continued to complain of hip pain and believed he would put himself and fellow officers at risk if he returned to full duty police work. Officer Campbell then sought workers' compensation benefits. The workers' compensation independent medical examination

report indicated Officer Campbell could return to full-duty without restriction.

In June 2014, Officer Campbell applied for line-of-duty disability pension benefits, claiming his disability stemmed from the June 2010 hip injury. Effective June 2015, Officer Campbell resigned from the Evanston Police Department. He denied his resignation was related to any disciplinary issues and asserted it was due to his disability. The pension board received independent medical examination reports from three doctors. Dr. Rees found Officer Campbell should be considered disabled, in part based on Officer Campbell's "concern he will not be able to run in order to pursue criminal suspects." Dr. Samo found Officer Campbell disabled, but his disability was due to a congenital abnormality and severe degenerative arthritis. Dr. Nho concluded Officer Campbell was not disabled and able to return to full duty.

Following a hearing in November 2015, the pension board denied Officer Campbell's claims for both line-of-duty and non-duty disability benefits. In its written decision, the pension board relied on the January 2014 FCE and found Dr. Nho's report and opinion to be more thorough than the other doctors. The pension board also relied on the workers' compensation IME report, which found Officer Campbell was able to return to full duty.

On appeal, Officer Campbell attacked the findings and repot of Dr. Nho and his reliance on the FCE report. Officer Campbell also argued he need only prove his disability resulted from an aggravation of a pre-existing condition. Officer Campbell also challenged the pension board's doubt of his credibility based on any disciplinary matters he may have faced.

The Appellate Court applied the manifest weight of the evidence standard of review and noted the high threshold necessary for reversal of a pension board's factual findings. The Appellate Court noted if it were to serve as fact-finder it may have given different weight than the pension board to the various medical opinions. The Appellate Court held the pension board's factual findings are to be presumed correct so long as there is some evidence in the record to support its conclusion. Here, the Appellate Court found sufficient competent evidence in the record to support the pension board's finding Officer Campbell was not disabled. ❖

Firefighter Sanding Drywall in Firehouse Not Entitled to Line of Duty Disability

Nagrocki v. Bd. of Trustees of the Norwood Park Fire Prot. Dist. Firefighters' Pension Fund et al., 2018 IL App (1st) 171082-U

Firefighter Nagrocki injured his shoulder sanding drywall in the firehouse. He testified his shift was ordered to perform "station maintenance" in preparation for an "open house" to be held at the fire station. As part of this maintenance, he worked repairing holes in drywall in a hallway at the firehouse. After two surgeries to attempt to repair his shoulder, Nagrocki was unable to return to work. He applied for a line of duty disability pension benefit.

The Fire District filed a petition to intervene which was granted. Voluminous medical evidence was presented to the Pension Board. The Fire District workers' compensation examining physician initially found the injury related to the drywall incident. However, upon further examination after Nagrocki's surgeries, he concluded the disability was the result of degenerative conditions in his shoulder and the work injury did not play a part in causing the disability.

The IME reports of the Pension Board doctors varied. While all found Nagrocki disabled, the cause of disability was disputed. The first Pension Board doctor found the injury related to the drywall incident. The second Pension Board doctor noted significant degenerative conditions pre-existing the date of injury and could only suggest the disability "could have been work related". The final Pension Board doctor found the work-related incident caused an aggravation of a pre-existing condition.

Suggested Agenda Items for July (or 3rd Quarter)

- Semi-annual review of closed executive session minutes to determine what needs to remain confidential.
- Election of Board Officers. (e.g. President, Secretary, etc.)
- Potential selection of independent enrolled actuary for recommended tax levy.
- Review status of Trustees' annual training requirements.

The Pension Board granted not in the line of duty disability benefits but denied Nagrocki's line of duty claim finding Nagrocki's right shoulder injury was not caused by the act of sanding and further, that sanding drywall did not rise to the level of an "act of duty".

On review, the Appellate Court affirmed the Pension Board decision. The Court's review of the record found sufficient evidence to support the findings of the Board. The Court first acknowledged that there is no requirement the duty-related accident be the sole or primary cause of the injury, a sufficient nexus between the injury and performance of act of duty must exist. While differing opinions were offered by the doctors, the workers' compensation doctor found the drywalling incident did not cause the disability and at least two of the Pension Board doctors corroborated that finding by noting the degenerative conditions in Nagrocki's shoulder. As such, under the manifest weight standard of review, the Board's decision was affirmed because the administrative record contained some evidence to support the denial of line of duty benefits.

Upholding the Pension Board's findings on causation, the Appellate Court did not address the issue of whether Nagrocki's act of sanding drywall rose to the level of an "act of duty". ❖

FOIA Does Not Require Creation of a Record Not Normally Kept

Martinez v. Cook County State's Attorney's Office, 2018 IL App (1st) 163153

Pension Boards are frequently subjected to FOIA requests seeking general information or posing questions to the Fund as opposed to seeking disclosure of a specific document or record. Such was the case for the Cook County State's Attorney's Office ("SAO") when Plaintiff sent a request seeking records related to the use of information obtained from cell site simulators or "stingray" devices used in criminal prosecutions.

Plaintiff's first FOIA request asked the SAO to identify all cases in which cell site simulator information was used, what information was used, the charges filed, the outcome of the case, how the information as obtained, by whom, and any court orders related to the use of the "stingray" equipment.

When the SAO denied the request as unduly burdensome and seeking production of records that did not exist, the Plaintiff sent an email asking the SAO to conduct several searches on its email servers and request every assistant state's attorney identify cases responsive to the request. The SAO treated this as a second FOIA request and denied it as unduly burdensome.

Following denial of the second request, the SAO and requestor met to narrow the scope of the requests to only "terrorism and narcotics cases". The SAO denied the narrowed request asserting any responsive material would be exempt from disclosure as attorney/client privileged material and/or law enforcement investigation records.

Following this third denial, the requestor filed a lawsuit seeking compliance with the FOIA. In upholding the SAO's denial of the requests, the

Appellate Court found the request to identify instances in which the "stingray" was used was not a proper FOIA request inasmuch as it did not identify a specific public record but was a general request for data which the SAO does not create or store. The opinion restated the axiom the FOIA does not require a public body to create or compile data it does not ordinarily keep.

As to the denial of the second FOIA request, the Appellate Court affirmed the SAO denial by holding the request, "requested a search, not a public record." The FOIA does not require a public body to provide answers to questions posed by the requestor. Distinguishing a recent FOIA case finding databases subject to FOIA, the Court found in this case the requestor sought a listing or index of the database contents as opposed to the contents themselves. He therefore requested a search as opposed to records subject to the FOIA. In short, the Court held the requestor sought the results of his proposed search making his request one for "general data, information and statistics" as opposed to a public record.

In dealing with FOIA requests, pension boards should keep in mind 1) the public body is not required to create a new record to respond to a request where one does not already exist and 2) FOIA should not be treated as a question and answer session between the requestor and public body. As always, RDK can assist in responding to any FOIA request received. ❖

Sheriffs' Deputies Must Meet Training Requirements and Be Properly Sworn to Participate in SLEP

Vick, et al. v. Wylie, et al., 2018 IL App (5th) 160520

In a published decision, the Fifth District Appellate Court affirmed the circuit court's grant of declaratory relief in favor of the plaintiffs.

The defendants were sworn as deputy sheriffs serving as dispatchers prior to November 2014. On November 18, 2014, Williamson County Sheriff Bennie Vick notified defendants the Illinois Law Enforcement Training Standards Board had determined they did not qualify as "sworn officers." Defendants would no longer be permitted to carry a firearm, wear a uniform, or participate in the Sheriff's Law Enforcement Personnel ("SLEP") pension plan. In December 2014, the defendants were administered new oaths of office as civilian telecommunicators.

Vick and the plaintiffs filed a complaint for declaratory relief seeking a judgment holding the defendants were entitled to participate in the Illinois Municipal Retirement Fund ("IMRF") instead of SLEP. In response, the defendants sought a declaration they could remain sworn sheriff's deputies so long as they served as dispatchers. The circuit court noted the defendants did not seek declaratory relief relating to the reason for the classification change, and therefore the reason would not be considered by the court.

The circuit court noted in order to serve as a sworn deputy sheriff, the training standards of the Illinois Law Enforcement Training Standards Board must be met. The circuit court found, effective December 2014, the defendants were sworn civilian telecommunicators, not eligible to participate in SLEP. The circuit court further held duly appointed sheriff's deputies must meet the training requirements of the Illinois Law Enforcement Training Standards Board, and only a properly sworn sheriff's deputy would be eligible for SLEP.

The Appellate Court affirmed the circuit court's ruling and held: "This court has no authority to mandate that the County or the sheriff reinstate the defendants as sworn sheriffs' deputies without the required training." The Appellate Court relied on the statutorily mandated training requirement for sworn sheriffs' deputies. "Absent the training considered requisite by the Board, the defendants could not lawfully perform all the sheriff's duties. The Board could therefore properly find them

unqualified for the deputy position." Ultimately, the defendants were not permitted to participate in SLEP, based on the fact they had not completed the Illinois Law Enforcement Training Standards Board's statutorily required training. ❖

IMRF Denial of Disability Pension Reversed

Hadler v. Bd. of Trustees of Illinois Mun. Ret. Fund, 2018 IL App (2d) 170303

In a published decision, the Second District Appellate Court reversed the Illinois Municipal Retirement Fund ("IMRF") Board's decision denying disability benefits to plaintiff. The plaintiff was an engineering technician for the Village of Rantoul with over 26 years of IMRF service. Plaintiff last worked on November 14, 2012, due to pain in her right foot, which required bunion surgery. Plaintiff was unable to return to work and applied for permanent disability benefits under Article 7 of the Pension Code in June 2015.

During her recovery, Plaintiff was diagnosed with complex regional pain syndrome ("CRPS"). During her treatment, a doctor completed an IMRF physician's statement indicating Plaintiff should not return to work. In May 2015, Plaintiff's treating doctor offered an opinion Plaintiff would never be able to return to work or perform any gainful activity. Another of Plaintiff's treating physicians also found her permanently disabled due to CRPS.

In reaching its determination on Plaintiff's application, the IMRF Board relied on the findings made by its medical consultant, Dr. Rao. Dr. Rao concluded Plaintiff could engage in some gainful activity and therefore was not eligible for total and permanent disability benefits. Relying on Dr. Rao's opinion, the IMRF Board denied Plaintiff's application. Plaintiff sought review of the decision before the IMRF Board's benefit review committee.

Plaintiff was referred to a case manager who issued a report following a records-only review. The case manager determined there were jobs available to Plaintiff which only required a sedentary physical demand level, which the Plaintiff could perform. Plaintiff presented the committee with the report from an administrative law judge who granted her claim for Social Security disability benefits. In granting Social Security disability benefits, the ALJ reported to give more weight to Plaintiff's treating doctors than Dr. Rao's assessment. Dr. Rao reviewed the supplemental reports and additional medical records but did not alter his opinion.

Following a hearing, the committee upheld the decision to deny Plaintiff's claim. The committee determined Plaintiff did not meet the statutory requirement for permanent and total disability. The IMRF Board adopted the committee's determination and denied Plaintiff's application for benefits. The IMRF Board found the Plaintiff did not meet the standard established in Section 7 of the pension code, as unable to engage in any gainful employment due to a medical, physical or mental impairment.

The Plaintiff sought administrative review of the IMRF Board's decision, in January 2017. The circuit court affirmed the IMRF Board's decision, finding the determination was not clearly erroneous. The Plaintiff appealed, arguing she was unable to engage in any gainful activity as defined in Article 7 of the Pension Code.

The Appellate Court determined the question could be a mixed question of fact and law, but ultimately determined there to be only a question of fact, as there was no dispute over the definition of "gainful activity," and applied the manifest weight standard of review. The Appellate Court found "the only issue is whether the plaintiff's disability rendered her unable to engage in any gainful activity."

The Appellate Court held the IMRF Board's decision was against the manifest weight of the evidence. The court noted all of Plaintiff's treating doctors determined she was permanently disabled

and continued to experience significant symptoms. The Appellate Court found the IMRF Board's exclusive reliance on Dr. Rao's opinion and the case manager's report was against the manifest weight of the evidence. The Appellate Court noted Dr. Rao offered no reason why all the treating physician's opinions should be discounted. The Appellate Court also held the case manager's report was insufficient to support the IMRF Board's determination. The Appellate Court found the IMRF Board's reliance on Dr. Rao and the case manager, neither of whom ever met or examined the Plaintiff, was unreasonable in light of the volume of evidence from Plaintiff's treating doctors.

In reversing the IMRF Board, the Appellate Court noted reversal was appropriate under either the manifest weight standard or the less deferential clearly erroneous standard of review. ❖

Cook Co. Court Strikes Down Chicago Park District Pension Reform

Following the lead of the Illinois Supreme Court's recent pension decisions, a Cook County judge has ruled changes to the Chicago Park District Pension Fund unconstitutional. The changes were part of sweeping pension "reform" legislation effective in January of 2014. At the time, the legislation was heralded by Mayor Emanuel as a way pension reform could be accomplished by reaching negotiated agreements between the District and unions.

In the case of the Park District, the legislation required workers to significantly increase their pension contributions, increased the minimum retirement age for tier one participants, and reduced COLAs from 3% to the lesser of ½ inflation or 3% effective immediately.

In addition to finding the changes unconstitutionally diminished pension benefits, Cook County Judge Neil Cohen also ordered the increased contribution amounts returned to workers with interest, and the District's property tax levy be returned to its prior, lower level. The Pension Fund will keep a $25 million one-time contribution as well as approximately $13 million in higher property taxes already levied.

In response to the ruling, the District has expressed hope future meetings with the unions will result in an agreement meeting approval of the courts that will address the severely underfunded Chicago Park District Pension Fund. ❖

REIMER DOBROVOLNY & KARLSON LLC News

- RDK partner Rick Reimer has again been included in the roster of Illinois Super Lawyers, a designation he has held since 2008, recognized by his peers for excellence in employment and labor law.
- March 7-9, 2018, RDK partner Rick Reimer attended the Pensions and Lifetime Savings Assoc. Investment Conference in Edinburgh, Scotland.
- March 21, 2018, RDK partner Keith Karlson presented at the IPPFA Regional Seminar in Rock Island, Illinois.
- April 5, 2018, RDK partner Rick Reimer will teach at the IPPFA certified trustee training seminar in Hoffman Estates.
- April 30-May 4, 2018, RDK partners Rick Reimer, Jim Dobrovolny, and Keith Karlson will present at and attend the IPPFA Spring Seminar in East Peoria, Illinois.
- May 4, 2018, RDK attorney Brian LaBardi will present at the IPFA Spring Seminar in Addison, Illinois.
- June 6, 2018, RDK partner Rick Reimer will teach the IPPFA Retirement Coordinator Class in Hoffman Estates, Illinois.

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This publication constitutes advertising material. Information contained herein should not be considered legal advice. *Legal and Legislative Update* is published periodically. Questions may be directed to:

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