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Legal and Legislative Update

COVID-19 Impact on Pension Board Operations

The COVID-19 pandemic will no doubt dramatically affect pension boards from an economic standpoint. Besides the obvious long-term economic impact, the current environment will have other short-term impact on pension board operations.

Conducting Quarterly or Special Board Meetings

On April 1, 2020, Governor Pritzker entered Executive Order 2020-18 continuing the suspension of certain portions of the Open Meetings Act until April 30, 2020. The prior Executive Order 2020-07 entered March 16 initially impacting meeting requirements had been set to expire April 7.

As pertains to meetings of public bodies, it prohibits "public and private gatherings of any number of people occurring outside a single household" and further prohibits gatherings of 10 or more people unless exempted by the order. The Order also suspends portions of the Open Meetings Act ("OMA") to make it easier for public bodies to meet remotely. The source of this authority as applied to non-State agencies is unclear.

While remote participation in a public meeting is provided under limited circumstances in the OMA, the Statute as written requires the physical attendance of a quorum (3 members in the case of a pension board). The Governor's Order waives the physical attendance requirement of the OMA in addition to the qualifying events necessary for phone participation by a trustee. If a meeting is held pursuant to the terms of the Order, the public body may provide video, audio, and/or telephonic access to the meetings to allow for public participation. At the time of this writing, exemptions provided by the Executive Order expire on April 30, 2020.

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The Attorney General's Office has also issued a guide to which public bodies can refer. What the Executive Order did not do was suspend the requirement meetings be held in locations open and accessible to the public nor did it suspend the requirement the public be allowed to comment. This would seem to suggest that, while physical attendance by the trustees may be waived, there must still be a way for the public to participate even by phone in a location that is convenient and open to the public. At a minimum, the Attorney General suggests providing the conference call number and log-in information on the notice of the meeting thereby allowing for public participation via phone. In addition to providing the call-in information, the Public Access counselor also suggests allowing the public to comment in advance by email or voicemail. Any comments received in that manner would be read into the record at the meeting.

Another frequent question given the current climate involves "emergency" as opposed to "special" meetings under the OMA. There is no case law or statutory definition of what constitutes an "emergency" under the OMA. However, as noted in one of our past newsletters, in prior opinions, the PAC has adopted the dictionary definition of emergency as, "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Prior PAC decisions focused on "unanticipated circumstances" as the lynchpin for whether a meeting was an emergency. Depending on the action the Board is contemplating, a meeting may be able to meet this definition. However, the safer route would still be to call a "special" meeting with 48 hours' notice. Please note, the posting requirements of the OMA were not modified by the Governor's Executive Order. A special meeting must be posted at least 48 hours' in advance at both the principal office and location of the meeting. Notice for an emergency meeting must be given as soon as practicable, but in any event prior to the holding of such meeting, and to any news medium which has filed an annual request for notice.

The situation remains very fluid and seems to change on a day to day basis. It is certainly possible additional executive orders will be issued impacting pension board meetings. For the time being, as noted above, the current order will expire April 30, 2020.

Impact on Disability and Annual Examinations

In addition to complications in conducting quarterly or special meetings, the COVID-19 pandemic will also have a dramatic impact on disability pension applications pending before pension boards. Many pension boards are facing a delay in obtaining treating physicians medical records. Custodians for medical records are either closed or operating on minimum staffing levels. The same is true for outside medical record storage companies. This has the effect of delaying the scheduling of independent medical examinations inasmuch as those are not set until all medical records from treating and examining physicians are obtained.

Most vendors providing independent medical examination services have suspended scheduling due to the COVID-19 pandemic. Physicians are either wary of any patient contact or have been tied up rendering medical care and treatment to patients. In some cases, these physicians will perform a "medical records review", but the Board should do so sparingly, and only in cases where an actual medical examination is not necessary.

The same is true for required annual examinations of police officers and firefighters receiving disability benefits under the age of 50. Those exams can be rescheduled or postponed until such time as the physician feels safe to conduct annual exams.

Further updates will be provided as additional developments warrant.❖

New Law Will Require Amendments to Many Investment Polices

P.A. 101-0473

Amendments to Article 1 of the Pension Code effective January 1, 2020, will require revisions to many Article 3 and 4 pension fund investment policy statements. Known as the "Sustainable Investing Act", the new law requires investment policies for pension funds include a statement that, "material, relevant, and decision-useful sustainability factors have been or are regularly considered by the board, within the bounds of financial and fiduciary prudence, in evaluating investment decisions. Such factors include but are not limited to: (1) corporate governance and leadership factors; (2) environmental factors; (3) social capital factors; (4) human capital factors; and (5) business model and innovation factors, as provided under the Illinois Sustainable Investing Act."

While the Act will require amendment to many investment policies to include this or similar language, it cannot be overlooked the factors considered must be "within the bounds of financial and fiduciary prudence". In short, decisions must still be based on the best interests of the pension fund. RD is recommending all boards ensure their current investment policy includes language to address this new legislation. As a final thought, recall an amended investment policy must be filed with the Department of Insurance within 30 days of adoption. ❖

IMRF to Tier 2 Now Becomes Tier 1 for Certain Police Officers

P.A. 101-0627

The Pension Code provides municipalities with a population of 5,000 or more are mandated to create an Article 3 Pension Fund. During the last census, this caused some municipalities to create a new Article 3 Fund for officers who had been participating in IMRF. The overnight result was officers who had been serving as police officers in that municipality for years as IMRF participants suddenly found themselves classified as tier 2 Article 3 members. A tier 2 member in Article 3 is any police officer who had no Article 3 service prior to January 1, 2011.

Public Act 101-0627 effective January 24, 2020, aims to correct this seemingly unintended result. It provides a police officer who previously participated in IMRF as a member of a municipality's police department and was transferred to that same municipality's Article 3 Fund upon creation shall, for the purposes of determining tier benefit status only, be considered to have become a member of that municipality's fund on the day the officer first participated in IMRF as a member of the police department of that municipality. In order to qualify, the officer must have been in service as an IMRF participant at the municipality at time it created an Article 3 Fund causing the officer to be transferred to the new fund. It would not apply to an officer who was in IMRF elsewhere and transferred to a new municipality after it created an Article 3 Fund.

This means officers without service in Article 3 prior to January 1, 2011, who participated in IMRF and were transferred to their municipality's Article 3 fund when it was created, may be considered tier 1 participants if their participation in the municipality's IMRF occurred prior to January 1, 2011. While most funds likely do not have any tier 2 retirees at this point, at a minimum, funds impacted by this legislation should determine how many tier 2 members will now be considered tier 1 for the purposes of updating actuarial data to ensure an accurate levy.❖

"Basic" Health Care Plan Meets PSEBA Requirement

Esser v. City of Peoria, 2019 IL App (3d) 180702

In *Esser v. City of Peoria*, 2019 IL App (3d) 180702, plaintiff, a disabled Peoria police officer was awarded health insurance benefits under the Public Safety Employee Benefits Act ("PSEBA" or

"Act"). Plaintiff filed a declaratory action against the City of Peoria ("City") seeking a judgment requiring the City to pay the entire premium for its low-deductible group health insurance plan. The City argued, under PSEBA, it was only required to pay the entire premium amount for the its high-deductible group health insurance plan. Following a hearing, the trial court ruled in favor of the City. On appeal, the Third District Appellate Court affirmed the trial court's judgment.

Because this analysis involves the interpretation of a statute, the court applied the principles of statutory construction. In applying these principles, the fundamental rule of statutory construction "is to ascertain and give effect to the intent of the legislature." The most reliable indicator of that intent is the plain and ordinary meaning of the statutory language itself. As such, "all general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." Quite simply, if the statutory language is clear and unambiguous, it must be applied as written.

Here, the court noted "one of the main purposes of the Act is to continue employer-provided health insurance coverage for public safety employees and their families if an employee is killed or catastrophically injured in the line of duty." In looking at the specific language of PSEBA, the Act uses the term "basic," however, the Act does not define the term or provide guidance as to the proper procedure for seeking benefits.

In its analysis, the Court reasoned the Act "clearly and unambiguously requires the City, as the employer, to pay the entire premium of the City's 'basic' health insurance plan for the City's recipients under the Act." Accordingly, the Court had no need to go past the initial layer of statutory analysis. In short, the City provided plaintiff the entire premium amount for the City's less expensive, high deductible group health insurance plan and thus comported with its statutory requirement under PSEBA.❖

Municipalities Not Required to Provide Continued Health Insurance to Retirees at Same Rate as Active Employees

Gilmore v. City of Mattoon, 2019 IL App (4th) 180777

The City of Mattoon created an ordinance allowing for early retirement in exchange for the ability to purchase up to five years of extra credit in the State's IMRF pension plan. At an informational meeting, an IMRF representative allegedly early retirees that their contributions for health care would remain the same as for those who were still employed. A group of 59 retired firefighters, police officers, and municipal employees, including plaintiffs, filed suit against the City, which consisted of four basic categories of claims: (1) violations of the Insurance Code, (2) injunctive and declaratory relief under the Insurance Code, (3) breach of contract based on alleged violations of the collective bargaining agreements between the three different groups of municipal employees and the City, and (4) alleged violations of rights protected by the United States Constitution. In short, the plaintiffs claimed the City was requiring higher health insurance contributions by retired employees than the contributions required of those who were actively employed and being required to pay a higher contribution toward their health care premiums was discriminatory and entitled them to money damages based on violations of their respective continuation privileges contained in the Insurance Code.

<u>Insurance Code Claim</u>

The Appellate Court found there is no private right of action under the Insurance Code; only the Director of the Department of Insurance has standing.

The court found plaintiffs were entitled to continued coverage that is "equivalent" to that provided active employees at the same total premium cost. Nothing in the Insurance Code or

any writing upon which plaintiffs relied entitled them to the same employer share or percentage contribution provided by the City to current employees.

Statute of Frauds: Breach of Contract and Promissory Estoppel Claim

Illinois requires contracts lasting over one year be reduced to writing and signed by the parties thereto. To satisfy the Frauds Act, "all the essential terms must be in writing, and there must be an express reference to the other writings or such a connection between the documents, physical or otherwise, as to demonstrate that they relate to the same contract. Here the plaintiffs pointed to a patchwork of oral statements made by an IMRF representative, not a City employee or representative, in an informational meeting on August 20, 2001, forms and excerpts from an IMRF handbook published by the state and available on its website, the early retirement ("ERI") resolution adopted by the City, and portions of the respective collective bargaining agreements with the City. Notably absent from the writings was the alleged promise by the IMRF representative. Without this essential promise in writing and the "agreement" lasting over one year, the Appellate Court dismissed Plaintiff's claim for violation of the Frauds Act.

Further the Court found that the promise by the IMRF representative was made orally and as such could have lasted for only one year as it was not reduced to writing. Additionally, no evidence was presented that the IMFR representative had authority to bind the City. Only 4 plaintiffs were present at the 2001 informational meeting with the IMRF representative and none were eligible for early retirement at the time. As such, there was no detrimental reliance since they were not eligible at the time.

Unjust Enrichment Claim

Unjust enrichment is a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress or undue influence, and may be redressed by a cause of action based upon that improper conduct. An unjust enrichment cause of action does not require fault or illegality on the part of [the] defendants; the essence of the cause of action is that one party is enriched and it would be unjust for that party to retain the enrichment.

Here, plaintiffs alleged both the statutory language of sections 367f, 367g, and 367j of the Insurance Code and a common law claim for breach of contract as the basis for their claim of unjust enrichment. As noted, there is nothing in the statutes that obligated the City to contribute any portion of the total premium costs, let alone the same amount or percentage of health care costs. In addition, plaintiffs failed to properly allege a contract that the City could have breached. There was, therefore, no foundational claim upon which plaintiffs could rely to argue unjust enrichment. Further, standing for the derivative claim of unjust enrichment was also deficient because the City's actions were not improper.

Pension Protection Clause Claim

In this case, the City, as a municipality employer, created an ordinance allowing for early retirement in exchange for the ability to purchase up to five years of extra credit in the State's IMRF pension plan. According to plaintiffs, the City also promised to provide health insurance contributions at the same rate as active employees. However, as stated, these changes were all part of the terms of employment between the City and plaintiffs, not something which involved their IMRF pensions directly. Under this set of facts, a plaintiff cannot properly state a claim against a defendant municipality based on a violation of the pension protection clause. The City was free to change its employment policy and reduce its contributions toward health insurance as long as it did not charge plaintiffs more, in overall cost, than current employees.

In summary, municipalities are not required to provide continued health insurance to retirees at the same rate at active employees.❖

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Denial of Attorney's Fees in FOIA Suit Proper

Metropolitan Alliance of Police vs. City of Crystal Lake, 2019 IL App (2d) 190217-U

In March 2017, the president of the Metropolitan Alliance of Police ("MAP") submitted a FOIA request to the City of Crystal Lake requesting attorney billing records related to ongoing litigation regarding the City's termination and subsequent reinstatement of one of its police officers and copies of the minutes from city council meetings where the litigation was discussed. The City complied with the request in part but denied the request as to paragraphs one through three, stating that the records were exempt from disclosure under sections 7(1)(l) and 7(1)(m) of the FOIA (5 ILCS 140/7(1)(l), (m) (West 2016)), which respectively pertain to closed meeting minutes of public bodies and communications between a public body and its attorney.

Legal maneuvering ensued after MAP filed a complaint alleging that the City wrongfully denied its FOIA request by erroneously invoking exemptions. The trial court denied the City's motion to dismiss and motion to reconsider and ordered the City to tender discovery by January 31, 2018. Late afternoon January 31, 2018, the City served MAP with extension discovery requests.

Ultimately, the City served MAP with the requested, heavily redacted items along with an affidavit of completeness. At a hearing for a motion to strike, MAP sought attorney fees and costs. The City sought to move forward to "summary judgment time" on the legal issue of whether the City properly invoked the exemption under section 7(1)(m) of the FOIA, implying that a ruling on the merits that it had prevailed would preempt any claim by MAP as to costs and fees. The court suggested mediation. Mediation failed.

At a status hearing, the City argued MAP did not have standing to bring the complaint because it was not the party that submitted the FOIA request, and (2) the "compilation" clause in section 7(1)(m) of the FOIA exempted the City from releasing the disputed documents. The court entered its written order granting summary judgment in favor of the City: "In essence, the wrong party is pursuing this litigation; or perhaps, the entity which is pursuing this litigation does not have standing to do so or a claim to argue." MAP appealed.

On appeal, the central issue in this case was whether the City was required under the FOIA to release attorney billing records, even when the documents had been "compiled" prior to the FOIA request at the direction of the City's attorney in anticipation of litigation. The City and MAP both agreed that delivery of the affidavit would resolve the underlying dispute. MAP in no way conditioned the agreement on its receiving fees and costs, stating only that the affidavit would lead "to the point where we now have our remedy in this matter." The issue of fees and costs is provided for in section 11(i) of the FOIA: "If a person seeking the right to inspect or receive a copy of a public record *prevails in a proceeding under this Section*, - 8 - 2019 IL App (2d) 190217-U the court shall award such person reasonable attorney's fees and costs." MAP made no assertions and presented no filings alleging that the documents, redactions, or affidavit were in any way deficient to satisfy its request. Accordingly, the City's conveyance of the affidavit at MAP's behest, combined with its delivery of the attorney billing records, completed what was effectively a settlement agreement of the underlying dispute. Thus, any injury that MAP may have suffered that was directly attributable to the City's failure to produce the records ceased to exist. Without an injury, there could be no actual controversy, and the merits of MAP's claim became moot.

As MAP did not properly argue for fees and costs in its brief or a petition and the underlying claim was settled, the Appellate Court dismissed the entire appeal as moot.❖

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Line of Duty for Psychological Disability Not Claimed by Applicant Upheld by Appellate Court

City of Peoria v. Firefighters' Pension Fund of the City of Peoria, et al., 2020 IL App (3d) 190055-U

Captain Angela Allen, a Peoria firefighter, filed an application for line of duty disability benefits stemming from what she termed a "vestibular/ocular motor disorder". The City of Peoria filed a petition to intervene which was allowed by the Pension Board.

Allen was fighting a house fire when she slipped and fell backward down a flight of stairs. She finished her shift and did not seek medical care for two days after the accident. In the year following the accident, she sought medical treatment from numerous providers for a number of problems including head, neck, back, shoulder, and arm pain, vertigo, dizziness, nausea, headaches, vision problems, and sensitivity to light and noise.

The pension board held multiple days of hearings, hearing from numerous witnesses and admitted voluminous documentary and medical evidence. After considering multiple medical opinions from both treating physicians and independent experts, it became apparent the evidence was conflicted on several issues. Ultimately, the Pension Board granted Allen's application for a line of duty disability based on a psychological condition finding her disability was either caused or, at the very least, contributed to by her fall down the stairs at the fire scene.

The City appealed. The arguments raised by the City on appeal and administrative review revolved around two central themes: First, the City argued Allen did not seek a disability for a psychological condition in her application. In addition, the City argued Allen was not disabled due to a psychological condition inasmuch as evidence in the record suggested she could return to duty if properly treated.

Both the circuit court and appellate court affirmed the decision of the pension board granting a line of duty disability. Agreeing with the pension board determination, the appellate court found that file the evidence in the records was conflicted, there was "ample evidence presented from which the Pension Board could fund that Allen was disabled." While some doctors in the record found Allen did not suffer from ant neurological or cognitive disorder, the very nature of her psychological disability, somatic symptom disorder, meant she could have numerous disability subjective symptoms with no underlying objective cause. The court also found the pension board determination Allen's disability was caused, at least in part, by her fall down the stairs, was support by several doctor's opinions.

Turing to the City's argument Allen should not be considered disabled because she failed to seek treatment, the court again found evidence to support the pension board's conclusion no reasonable treatment alternative existed inasmuch as the evidence suggesting Allen should seek addition treatment did not suggest the treatment would be successful in returning her to full duty or how ling such treatment would take. In short, on the evidentiary issues raised by the City, the appellate court ultimately concluded, "Because the Pension Board's findings were supported by the evidence presented, we confirm the Pension Board's ruling, granting Allen's application for a line-of-duty disability pension."

Finally, the court rejected the City's argument Allen could not be found disabled due to a psychological condition she did not claim in her application. On this issue, the court found that many of the symptoms listed in the application were the same symptoms she would be suffering as a result of her psychological disorder. As a result, her disability was sufficiently alleged in her application and the City did not argue it was surprised or unable to prepare for the hearing based on the specificity of her claimed disability.

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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.

REIMER & DOBROVOLNY PC NEWS

- March 16, 2020, RD attorney Mark McQueary presented at the IPPFA Regional Seminar in East Peoria.
- January – May 2020, RD attorney Mark McQueary has been attending Northwestern University's School of Police Staff and Command.
- ***Training Seminar Updates***
  In light of the ongoing COVID-19 pandemic, IPPFA and IPFA training events previously scheduled in April and May have been cancelled. Look for updates on rescheduled training opportunities in the near future.

Legal and Legislative Update

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