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Legal and Legislative Update

Mistake in Benefit Statute Not Retroactive

Cronholm v. Bd. of Trustees of the Lockport Township FPD Firefighters' Pension Fund, 2021 IL App (3d) 190636-U

As you may recall, in 2014 the "Mistake in Benefit" sections were added to both Articles 3 and 4 of the Pension Code. At least according to the text of the statutory amendments, these new provisions allowed a fund to correct a benefit mistake upon discovery of the "mistake". However, the same amendments narrowly defined "mistake" to exclude many of the issues pension funds see on a regular basis when it comes to overpayments.

Factually in this case, the member was a member of the Lockport Firefighters' Pension Fund when he left for the Oak Brook Firefighters' Pension Fund. He subsequently returned to Lockport. Upon his return to Lockport, Cronholm elected reciprocity allowing him to proportionally collect

In This Issue

benefits from both Oak Brook and Lockport upon retirement.

Unbeknownst to Lockport at the time of approval of Cronholm's reciprocity request, the demographic information provided by Oak Brook and used to compute the request was incorrect. In 2009, Cronholm retired and began receiving benefits from both pension funds based on the incorrect information. Six months after retirement, Oak Brook discovered it's error and corrected Cronholm's benefit resulting in an increase from that Fund. This should have resulted in a proportionate decrease in the amount being received from Lockport but Oak Brook did not inform Lockport of the discovery of this error.

Fast forward to 2016 when Lockport's newly retained accountants discovered the error had resulted in ongoing overpayments to Cronholm totaling over $20,000 to date. The Board commenced a hearing whereby it prospectively decreased the monthly benefit amount to Cronholm to the corrected amount pursuant to the mistake in benefit statute.

Cronholm sued. On appeal, the Board's action was reversed and the Appellate Court ordered the full benefit, even though too high, paid to Cronholm. In reaching this result, the Appellate Court first found the mistake in benefit amendment to the Pension Code in 2014 cannot be applied retroactively because the legislature did not explicitly include retroactive language. Because Cronholm was first awarded retirement benefits in 2009, the statute could not apply even to correct future payments. The Court concluded the 35 day period of Administrative Review Law applied instead.

Addressing the 35 day limitation of Administrative Review Law, the Court found it began to run in 2009 when he began to receive benefits. As such, the award could not be modified. Moreover, the Court found even if the amended version of the statute could apply retroactively, it did not meet the definition of "mistake" inasmuch as no "error" occurred because Lockport had intentionally used the figures provided to calculate Cronholm's retirement benefit without verifying their accuracy with Oak Brook.

Finally, the Appellate Court also found Cronholm's entitlement to the overpaid pension protected by the Pension Protection Clause of the Illinois Constitution. Unlike several prior Courts that have found a member never has a constitutional right to an incorrect pension benefit, here the Appellate Court reasoned the new "Mistake in Benefit" statute cannot be applied to Cronholm because it would change the terms of his contract with the pension fund years after he had first entered service.

Lockport also raised issues suggesting allowing Cronholm to continue to collect an overpaid benefit may have adverse consequences on the tax-exempt status of the Fund. To this concern, the Appellate Court replied, "the responsibility to remain qualified lies with the Lockport Fund itself to act with greater care when finalizing pensioners' benefits. Indeed, to allow the Lockport Board to reopen Cronholm's final pension decision because 'it failed to certify the accuracy of the information on which it based its decision' would both allow the Administrative Review Law to be circumvented and cause pensioners uncertainty as to their entitled benefits."

While this may seem a harsh result for the pension fund, it certainly drives home how difficult it is to modify benefits once they have been paid. The moral is to "measure twice and cut once" when it comes to granting of any benefit. Failure to do so may result in the inability to set things right if a

mistake, even one not caused by the Fund, is discovered at a later date. ❖

FOIA Requestor Denied Attorney Fees and Penalties

Watson v. Foxx, 2021 IL App (1st) 200424-U

This case involved a request for fees and penalties under FOIA. Watson was a criminal defendant who was serving a 40-year sentence. He sought records from the Cook County State's Attorney's Office concerning five of his criminal convictions. After Watson filed this case, the Cook County SAO tendered about 3,000 pages worth of responsive documents Watson had been seeking, with appropriate redactions.

The trial court ruled, and the Appellate Court affirmed, this matter was moot because the SAO had now provided the responsive records. Watson also claimed he was due over $15,000 in costs, fees, and civil penalties under the FOIA. The Court found civil penalties under §11(j) of the FOIA were not proper because there were no facts presented to show the SAO had acted willfully or had intentionally failed to comply with FOIA. The court further noted, since the inmate represented himself in the FOIA lawsuit, he was not entitled to attorneys under §11(i) of the Act. This was because as a pro se litigant, he did not incur any attorney fees.

Although this was a favorable ruling for governmental bodies, please keep in mind, §3 of the Act requires a 5-day response time in most cases. Please let us know ASAP if you have a FOIA issue arise. ❖

Line of Duty Disability Denied for Officer Returning from Testifying at Grand Jury

Griffin v. Vill. of New Lenox Police Pension Fund, 2021 IL App (3d) 190557

Plaintiff Paul Griffin ("Applicant") applied for a line-of-duty disability pension and an alternative not-on-duty pension after injuring his knee tripping on a curb while walking back to his police vehicle after providing subpoenaed grand jury testimony. Applicant testified at the time of his injury he was not looking for crimes, was not contacted by anyone to respond to any emergency or call for service and completed his duties before the grand jury. He was simply walking back to the car to return to the police station to complete more paperwork.

The unanimous opinion of all three (3) independent medical examiners was Applicant was disabled. While the Pension Board found Applicant was disabled, they denied his line-of-duty claim and awarded him a not-on-duty pension.

Applicant appealed to the circuit court, the circuit court reversed the decision and the Pension Board appealed to the appellate court. On appeal, the Appellate Court analyzed numerous cases where it was determined officers were injured in the performance of acts of duty and where they were not injured in the performance of an act of duty.

The Court found Applicant's injury was most similar to *Filskov v. Board of Trustees of the Northlake Pension Fund*¸409 Ill. App. 3d 66 (2011), wherein an officer's foot was inadvertently run over by his partner as he walked from the police station to the squad car to resume patrol duties. The *Filskov* Court found the officer was not responding to a call, had yet to resume patrol duties and was

acting in the capacity in which civilians commonly act, acting as an automobile passenger, which did not involve special risk.

Here, the Court found ordinary citizens are called up every day to testify in court and face the same risk of slipping on a curb returning to their vehicle with papers in hand. Applicant was not looking for crimes, he was not contacted to respond to any call, and he completed his court duties. Despite Applicant's contention he was under order to appear, the Court found no evidence he was exposed to special risk. Further, the Court found Applicant's argument that carrying a police report and subpoena is unique to police work unconvincing as they were subject to FOIA and the content did not change his risk.

The Court concluded an officer must be doing something more than merely being on duty and the act of wearing a service weapon, handcuffs and a police radio does not involve special risks not ordinarily assumed by a citizen in the ordinary walks of life. As such the Court reversed the circuit court's judgment. ❖

Pension Board Unable to Rely on Two of Three IME Reports

Hampton v. Bd. of Trustees of the Bolingbrook Police Pension Fund, et al., 2021 IL App (3d) 190416

Police officer Alan Hampton was injured while positioning his squad car to block an intersection at an accident scene when another vehicle struck his car. He suffered an injury to his left shoulder and was transported to the hospital via ambulance. A subsequent MRI of his left shoulder showed osteoarthritis, degenerative joint disease and superior labral tear.

Following several weeks of physical therapy, Hampton was sent for a functional capacity evaluation ("FCE"). Because the FCE evaluator did not have a copy of the correct job description, he used the job description for police officer found in the Dictionary of Occupational Titles (DOT) and found Hampton could perform at the "heavy" demand level such that he could return to work. Upon receipt of the FCE report, Hampton's doctor was more cautious and instructed a return to work with restrictions as set forth in the FCE. The Village's workers' compensation doctor also directed a return to work but with restrictions.

Based on the medical records and a physical examination, two of three pension board doctors found Hampton "not disabled". Subsequent to the pension board's IMEs, Hampton underwent a second FCE which concluded he had functional limitations when it came to specific aspects of the job description for police officer in Bolingbrook. Based on the record, the board found Hampton not disabled.

On appeal, the Appellate Court found the pension board's conclusion Hampton was not disabled to be against the manifest weight of the evidence. Specifically, the Court found the board erred in placing greater weight on the two IME reports that found Hampton not disabled. In the case of the IME performed by Dr. Williams, the Court observed he found Hampton not disabled based on the first FCE which only returned him to restricted duty and ignored the conclusion of Hampton's treating physicians the FCE restrictions included the inability to use physical force and subdue resisting individuals. Likewise, the Court found fault with the opinion of Dr. Biafora who merely found a temporary exacerbation of a pre-existing condition as inconsistent with the facts in the record.

Finally, the Appellate Court found the board erred in placing greater weight on the first FCE while discounting the second FCE finding Hampton could not return to work. The Court found the second FCE to be more reliable inasmuch as it was conducted with the benefit of the job description for a Bolingbrook police officer. The Court concluded, "Considering all the evidence in the record, and the fact that the Board erred in relying on certain evidence in support of its decision that Hampton was not disabled, we conclude that the Board's decision was against the manifest weight of the evidence." While the board had not reached the issue of whether Hampton's disability was the result of an "act of duty", based on the evidence in the record, the Appellate Court awarded Hampton a line of duty disability.

While it is not unheard of for a reviewing court to find a pension board should not have relied on one of its doctor's reports, in this case the Appellate Court found two of the three pension board doctor's reports against the manifest weight of the evidence. This illustrates the detailed analysis court's perform in examining the evidence relied upon by pension boards in making disability determinations. ❖

Home Rule Municipality May Not Change Substantive Terms of PSEBA by Ordinance

Int'l Ass'n of Fire Fighters, Loc. 50 v. City of Peoria, 2021 IL App (3d) 190758

In 2018, the City of Peoria passed an ordinance specifically defining undefined terms from the Public Safety Employee Benefit Act ("Act") 820 ILCS 320/1 *et seq.* including "injury", "gainful employment" and "catastrophic injury". The ordinance also amended the application procedures for those seeking benefits under the Act.

After the City passed the ordinance, the Union filed a complaint seeking a declaratory judgment that the definitions were not consistent with the Act. The City responded its definitions were not inconsistent with the Act and as such it had the power to define the terms under its home rule authority. The circuit court granted summary judgment in favor of the Union finding the Act's definitions were not ambiguous considering the language along with previous court opinions. The circuit court ruled the City's definitions were invalid and superfluous. The City appealed.

In *Krohe v. City of Bloomington*, 204 Ill. 2d 392 (2003), the Illinois Supreme Court found the phrase "catastrophic injury" as used in the Act was ambiguous and concluded the legislative intent was to make the phrase synonymous with an injury resulting in a line-of-duty disability under Section 4-110 of the Illinois Pension Code. Here, the City attempted to distinguish *Krohe* on the basis the City was a home rule municipality.

The Court concluded, while the City has authority as a home rule unit to adopt procedures for administering the Act, it may not provide benefits in a manner inconsistent with the requirements of the Act. The City can define the administrative proceedings for benefit determination but cannot define the Act's substantive terms.

Once the Illinois Supreme Court construes a statute, the construction becomes a part of the statute and the General Assembly can change it if desired. After *Krohe*, the General Assembly made no such change. Thus, if a firefighter is injured and awarded a line-of-duty disability, he has a catastrophic injury.

In conclusion, the ordinance defining the Act's terms was not a valid exercise of home rule authority. ❖

PTSD Line-of-Duty Disability Approved on Appeal for Officer Involved in Shooting where Firearm Jammed

Staford v. Bd. of Trustees of the Crest Hill Police Pension Fd., et al., 2021 IL App (3d) 190779

In unreported Rule 23 case, the Third District Appellate Court upheld the circuit court's reversal of the pension board's denial of line-of-duty disability pension benefits for an officer who developed PTSD following an on-the-job shooting incident.

Officer Staford ("Applicant") was working as a patrol officer when he and a suspect exchanged gunfire. During the incident, Applicant's gun jammed. After the incident, Applicant was hospitalized with reports of and diagnosed with anxiety. He was later diagnosed with PTSD when his symptoms worsened and took three leaves of absence.

Several years later, Applicant was placed on administrative leave while investigated for prescription narcotic use. The evaluating physician found Applicant accessed hydrocodone from multiple providers in large quantities. Applicant reported to the physician symptoms of anxiety, difficulty sleeping, nightmares and irritability following the shooting incident. Applicant was diagnosed with substance dependence and PTSD.

Applicant voluntarily resigned following the internal investigation and filed for line-of-duty and/or non-duty disability pensions. Applicant underwent three (3) independent medical examinations. Initially, the unanimous opinion was Applicant was disabled as a result of the shooting incident. The pension board then asked for supplemental opinions based upon later hospitalization reports in which Applicant was diagnosed with PTSD and major depressive disorder.

The first doctor issued two supplement reports. In the first report the doctor noted Applicant's erratic behavior was caused in part by pain medication abuse, not PTSD. In the second supplemental report, the doctor noted Applicant's PTSD disability was the direct result of the incident.

The second doctor found Applicant disabled due more to his inability to follow the code of conduct than PTSD. The doctor admitted Applicant suffered from elements of PTSD and his prognosis for sustained remission was guarded to poor. The doctor concluded Applicant's use of narcotics was not due to PTSD and that the precipitant to his 2016 hospitalization was not the shooting but rather the pregnancy of his estranged by another man.

The third doctor maintained Applicant suffered from PTSD and major depressive order caused directly by the shooting incident and found there was no evidence Applicant abused drugs prior to the shooting incident.

A fourth doctor retained by the worker's compensation carrier submitted two reports that noted Applicant was functionally effective prior to the shooting incident and was thereafter properly diagnosed with PTSD, although some symptoms could have been related to excessive narcotic use.

At hearing, Applicant's psychologist testified regarding his PTSD diagnosis, his prescription medication use and treatment session history. The psychologist provided a written summary which

noted Applicant did not have symptoms prior to the shooting incident.

At hearing, the board reviewed Applicant's primary care physician's records which indicated he came to her after the shooting incident with complaints of insomnia and nightmares. Applicant was prescribed an anti-depressant and sleep aid. It was noted his symptoms increased as did his anti-depressant dosage.

At hearing, Applicant testified as to the onset and status of his symptoms along with a timeline of his post-incident work history, leaves of absence and sick leave usage.

In denying the line-of-duty benefit, the board concluded Applicant was disabled but not because of the shooting incident. The board focused on the reports of two IME doctors as "most persuasive" and discounted the third IME doctor's report as "less persuasive" because they did not address the intervening cause of prescription medication abuse as a precipitant to Applicant's mental health. Additionally, the board ignored Applicant's psychologist's opinion on causation because he was not a medical doctor and did not reference Applicant's prescription drug abuse. Last, the board found Applicant evasive and/or dishonest regarding his drug use.

On administrative review, the circuit court reversed the board's decision finding it against the manifest weight of the evidence because each IME physician found Applicant disabled as a result of the shooting incident. The pension board appealed.

On appeal, the Court noted four (4) medical professionals initially found Applicant unable to return to work as the result of PTSD caused by the shooting incident, although one later changed their mind. The Court found no evidence Applicant recovered from the effects of the shooting incident. Rather, the medical records indicated Applicant suffered from PTSD symptoms from the time of the incident until long after his resignation.

The Court further found the board relied on the opinion of one doctor whose conclusions were not supported by evidence. Additionally, the Court found the board's decision to discount the medical opinions of two other IME physicians baseless and unsupported by evidence.

Further, the Court rejected the board's finding that Applicant's psychologist conclusions were "unreliable". The Court noted the opinion of a physician who had the benefit of assessing the plaintiff's condition through an extended course of treatment is entitled to greater weight than appointed evaluators. Applicant's psychologist did in fact evaluate his drug use and concluded it was caused by his PTSD.

Last, the Court concluded the board's determination Applicant's 2016 hospitalization was not a result of PTSD was unsupported by the evidence. In concluding it was the result of marital problems, the board ignored PTSD has far ranging effects that could have been the cause of Applicant's marital problems. During this hospitalization, Applicant was again diagnosed with PTSD and major depressive disorder. As such, the board's determination the shooting incident had nothing to do with his later hospitalization was unsupported.

In conclusion, the board's conclusion Applicant was not suffering from PTSD was against the manifest weight of the evidence. ❖

Entering Closed Session for "Probable or Imminent" Litigation

Public Access Opinion 21-003

The Open Meetings Act allows public bodies to enter closed session to discuss "litigation, when an action against, affecting, or on behalf of the particular body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the findings shall be recorded and entered into the minutes of the closed meeting." 5 ILCS 120/2(c)(11).

In this case before the Pubic Access Counselor at the Illinois Attorney General's Office, a citizen complained when the City of Hillsboro City Council entered closed session to discuss a storm sewer main located without easement underneath a property on which the citizen wanted to build a garage. After several email exchanges with the Mayor and making public comment at the meeting, the citizen was displeased with the progress being made on resolution of the issue. Importantly, no threat of litigation had been made by either party.

Following the citizen's public comment, the City Council entered closed session to discuss "possible litigation". No other details were provided nor did the Council make a finding as to whether the litigation was "probably or imminent" or the basis for such a finding. The citizen filed a complaint asserting the City Council improperly entered executive session with the Public Access Counselor at the Attorney General's Office.

Reviewing the matter, the PAC first noted the strict language of the statute requiring an action be "probably or imminent" and requiring the public body articulate the basis for such a finding in the closed session. Looking to several cases and prior Attorney General Opinions, the PAC noted that, "for litigation to be probably or imminent, warranting the closing of a meeting, there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand." The possibility a public body may become a party to a lawsuit is not sufficient. Moreover, assuming the litigation exception is properly invoked to enter closed session, the only matters that may be discussed are the "strategies, posture, theories, and consequences of the litigation itself."

After analyzing the recording of the City Council meeting, the PAC found the Council violated the Open Meetings Act by improperly entering closed session. Specifically, the PAC found the Council incorrectly cited the standard as "possible or threatened litigation" (as opposed to "probable or imminent"), did not make a finding in closed session as to why the storm sewer issue litigation could be probable or imminent, and, because no reasonable threat of litigation had been made, such a finding could not be made. The City Council was ordered to make the closed session verbatim recoding and meeting minutes publicly available.

This case serves as a good reminder of the stringent requirements for a public body to enter closed session for "probable or imminent" litigation. The public body must have reason to believe litigation is more likely than not to be filed involving the public body, the reason for so finding must be stated in the closed portion of the meeting, and only the "strategies, posture, theories, and consequence of the litigation itself" may be discussed behind closed doors. ❖

Consolidation Lawsuit Summary

On February 23, 2021, a lawsuit was filed in Kane County challenging the Pension Consolidation Act.

Plaintiffs are various Police and Fire Pension Boards, as well as active and retired members; Defendants are the Governor, Illinois Finance Authority, Illinois Department of Insurance, and the Consolidated Boards for both Police and Fire. The complaint alleges unconstitutional infringement of rights and cites the Pension Protection clause of the Illinois Constitution, as well as the Contracts Clause, and the Takings Clause. Challenges asserted in the complaint include stripping the Plaintiffs of their autonomy and authority, diminishment of voting rights, and applying the costs of transition to the Plaintiff funds. Remedies sought include a preliminary injunction preventing the Defendants from implementing any changes under the Act and a declaration that the Act is unconstitutional. At the time of this writing, no additional filings have been made, updates may be checked at the Kane County Circuit Clerk under Case No. 21-CH-000055.

As has been noted at several past quarterly meetings, RDL serves as general legal counsel for the Consolidated Police Board. RDL is conflicted out and is not involved in any fashion in this litigation. ❖

Consolidated Fire Fund Update

The Fire Board approved their asset transition plan, it establishes October 1, 2021 as the start date for the transition of assets, with the goal of completion by December 31, 2021. They plan to notify each fund more than 30 days in advance of their transition dates. The Board is working on rules required to conduct the transition. Additional updated may be available at: https://ifpif.org/ ❖

Consolidated Police Fund Update

The Police Board is in the process of hiring a Chief Investment Officer and will be interviewing six candidates for the position of investment consultant in the near future. No date has been set for transfer of assets, by statute it must be done prior to June 30, 2022. The Board is currently looking for a location for its permanent office. Additional updates may be available at: http://ipopif-2020.lrsws.co/ or https://www.facebook.com/Illinois-Police-Officers-Pension-Investment-Fund-102374691374141/❖

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 & LABARDI PC NEWS

- RDL partners Rick Reimer & Brian LaBardi will present at the IPPFA Illinois Pension Conference held both virtually and in person in Lincolnshire from May 5-7, 2021.
- RDL partner Brian LaBardi will present at the IPFA Spring Pension Seminar to be held virtually on May 7, 2021.

Legal and Legislative Update

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***Legal and Legislative Update* is published periodically. Questions may be directed to:**
REIMER DOBROVOLNY & LABARDI PC
A Public Safety Law Firm
15 Spinning Wheel Road, Suite 310, Hinsdale, IL 60521
(630) 654-9547 Fax (630) 654-9676
www.rdlaborlawpc.com