

A Public Safety Law Firm

RDL

REIMER DOBROVOLNY & LABARDI PC

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Legal and Legislative Update

Court Affirms Board's Decision that Deceased Officer's Surviving Spouse Not Entitled to Immediate Payment of Benefits

*Thornley v. Board of Trustees of the River Forest
Police Pension Fund, 2022 IL App (1st) 210835*

In January 2020, the Board of Trustees of the River Forest Police Pension Fund issued a decision finding plaintiff Carrie Thornley, an officer's surviving spouse, was entitled to survivor benefits, effective December 12, 2032 (i.e., the date on which her late husband would have been entitled to collect), pursuant to section 3-112(a) of the Illinois Pension Code. Plaintiff appealed the Board's decision to the circuit court, arguing she was entitled to payment of the benefits starting immediately based on the plain language of the statute as well as an opinion of the Department of Insurance ("DOI"). The circuit court agreed with the Board's decision to reject the DOI's opinion and deny immediate payment. Plaintiff appealed the ruling to the appellate court, who also affirmed the Board's decision.

Plaintiff's husband worked for the River Forest Police Department from 1997 until his resignation

In This Issue...

- 1 Deceased Officer Surviving Spouse Not Entitled to Immediate Benefits
- 2 Police Officer Entitled to Line of Duty Disability Benefits
- 3 Felony Results in Loss of Pension Benefits
- 5 No PSEBA Once Medicare Eligible
- 6 Consolidation Lawsuit Update
- 7 Police Consolidation Update
- 8 Pension Boards Still Have Remote Meeting Option
- 9 RDL Welcomes New Attorney
- 10 RDL News

in 2015. After his death in January 2018, Plaintiff filed an application for surviving spouse benefits with the Board. At the time of his death, Plaintiff's husband was a "deferred pensioner," meaning he was a police officer who retired having accumulated enough creditable service to qualify for a pension but had not attained the required age. That said, Plaintiff's husband would have been eligible for a pension of 42.5% of his pensionable salary on the date he turned 60-years-old, December 12, 2032, but not before.

While Plaintiff's application was pending, the Board sought advice from the DOI's Public Pension Division regarding whether Plaintiff was entitled to a survivor's benefit at all and, if so, the specific date that payment of the benefit should start. The DOI responded Plaintiff was entitled to receive a survivor's pension "immediately upon the death of the deferred pensioner." In issuing its decision against Plaintiff, the Board rejected DOI's opinion regarding the payment start date because it would "produce an absurd result of advancing the date of benefit eligibility."

The only issue before the appellate court was the payment start date of Plaintiff's survivor's benefits pursuant to section 3-112(a) of the Pension Code. Section 3-112 (a) of the Code states: "Upon the death of a police officer entitled to a pension under section 3-111, the surviving spouse shall be entitled to the pension to which the police officer was then entitled." 40 ILCS 5/3-112(a). On appeal, both parties argued the plain language of the statute favors their claim, thereby presenting a question of statutory interpretation.

In this case, Plaintiff's husband was entitled to no pension benefits at the time of his death because he had yet to turn 60-years-old, meaning his surviving spouse was also entitled to nothing at the time of his death. The Board argued that any surviving spouse under section 3-112(a) —like Plaintiff— may collect what her husband "was then entitled" to at his death. In other words, the surviving spouse inherits her deceased husband's pension rights, whenever they are payable, which in this case meant on Plaintiff's husband's 60th birthday in the year 2032.

The Court rejected the DOI's interpretation concluding, based on Plaintiff's husband's status as a deferred pensioner, the Board was justified in deciding against immediate payment of the benefits. Applying the principles of statutory interpretation, the Board's interpretation of the sentence "upon the death of a police officer entitled to a pension..." was consistent with the legislative intent expressed in the Code to defer pensions for unqualifying officers, such as Plaintiff's husband. Moreover, the Court found the Board's decision satisfied Plaintiff's reasonable expectation of future receipt of pension funds, as well as the Board's fiduciary duty to all beneficiaries of the pension fund. ❖

Appellate Court Reverses, Finds Former Chicago Cop Entitled to Line-of-Duty Disability Benefits

Warner v. Retirement Bd. of the Policemen's Annuity and Benefit Fd. of the City of Chicago,
2018 IL App (1st) 200833

The Court considered whether a retired police officer, who recovers from Post-Traumatic Stress Disorder ("PTSD") stemming from a prior, "act of duty" shooting incident, is still entitled to a line-of-duty pension where the officer continues to suffer from intense anger and animosity towards the police department for their handling of his related mental health issues. In this case, the Board found the officer's recovery from PTSD—the condition that initially warranted line-of-duty benefits— meant he was only entitled to an ordinary disability pension for his subsequent anger towards the department, which does not relate to an "act of duty" incident. However, the Court concluded that the Board erred in discontinuing the officer's line-of-duty disability benefits because his anger and animosity towards the department is, in effect, related to the "act of duty" incident in which he was shot.

In September 2018, the Board conducted a status review hearing to determine if Plaintiff should

continue to receive line-of-duty or ordinary disability benefits. The Board had initially awarded Warner a line-of-duty disability pension after Warner was shot and wounded while transporting an arrestee in 2011 and subsequently diagnosed with PTSD. However, upon hearing the testimony from the medical doctors who treated Warner after the shooting, the Board concluded that Warner was no longer disabled from PTSD and therefore not entitled to a line-of-duty disability pension. According to the Board, Warner's continued anger and animosity towards the Chicago Police Department ("CPD") only justified an ordinary disability pension because the disability was the result of issues relating to the way he was treated by CPD in the years after the shooting incident; it was not related to the "act of duty" incident, itself.

Warner sought administrative review in the the Cook County circuit court, which reversed the Board's decision to discontinue his line-of-duty pension benefits. While the Court agreed Warner was no longer disabled from PTSD, it found the Board erred in reducing his disability benefits based on evidence his current disability was related to the "act of duty" injury. As a result, the Court ordered Warner's line-of-duty disability pension be reinstated retroactively.

The Board appealed, maintaining its decision should have been upheld because the condition that triggered the line-of-duty pension, PTSD, no longer existed, and such benefits are not allowed for disabilities resulting from "generalized police stress of multiple origins." In a Rule 23 non-precedential opinion, the Appellate Court disagreed, pointing out that the law does not require Warner to prove that the disability was solely or primarily caused by the "act of duty" incident; he only needs to show the duty-related accident "is a causative factor contributing to [his] disability" to receive a line-of-duty disability pension.

The Appellate Court concluded the Board erred in discontinuing Warner's disability benefits based on its mistaken finding his current disability was not related to an "act of duty." Noting the hearing testimony of Warner's medical doctors, who both agreed his current disability was the direct result of

PTSD, the Court reasoned that if Warner did not need treatment for PTSD, he would not be angry at CPD for the manner in which he was treated (*i.e.*, his current disability). In other words, based on the doctors' admissions the 2011 shooting incident was the trigger for Warner's PTSD treatment and the anger that prevents him from working is a symptom of PTSD, the Court found his current disability did, in fact, relate back to the "act of duty" shooting incident in which he initially received line-of-duty benefits.

Moreover, the Court noted the limited applicability of its decision in this case, which involved a unique set of facts—two doctors testifying that an officer's anger towards his police department is causally related to his former PTSD. The Court stressed that this decision should not be read to award duty disability in cases where there is lingering anger toward an employer. ❖

Appeals Panel Agrees No Benefits for Ex-Chicago Cop Convicted of 2007 Aggravated Battery

Abbate v. Retirement Bd. of the Policemen's Annuity and Benefit Fd. of the City of Chicago,
2022 IL App (1st) 201228

In this case, the Court affirmed the Board's decision finding Anthony Abbate, a former Chicago police officer, forfeited his right to pension benefits by violating Section 5-227 of the Illinois Pension Code, *i.e.*, committing a felony offense in connection with his employment as a police officer. The affirmation of the Board's decision overturned a prior ruling by a Cook County judge who found the Board failed to show a clear relationship between Abbate's job as a police officer and the felony offense. The ruling provides clarity as to what the Code means by the language "in connection with" an individual's employment as a police officer.

In June 2009, Abbate was convicted of felony aggravated battery in connection with a video recorded attack on a female bartender occurring two years' prior. As the facts set forth, the highly

inebriated Abbate became angered when the bartender refused to serve him any more alcohol. In response, Abbate walked behind the bar and began punching and kicking the bartender before abruptly leaving the tavern, a scene which was recorded on the tavern's video surveillance. Abbate was ultimately sentenced to two years' probation, along with mandatory drug and alcohol treatment and anger management courses.

In 2012, the victim-bartender filed a federal civil lawsuit against Abbate and the City of Chicago, contending they violated her constitutional rights in relation to the beating she suffered. The federal court found the City's widespread custom, or "code of silence," was the moving force behind Abbate's conduct, and, after the assault, Abbate and other officers entered into a conspiracy to violate her First Amendment right to free speech. The federal court relied on evidence concerning Abbate's and the responding officers' conduct after he committed the felony offense, including: the responding officers knew Abbate was CPD and the incident was videotaped, yet failed to include either in their police report; within hours of the beating, Abbate made numerous phone calls to other officers, including his partner, who thereafter made numerous phone calls to officers; and the fact Abbate was initially charged with a misdemeanor battery and not a felony.

In August 2018, nearly a decade after his felony conviction, Abbate filed an annuity benefit application with the Board. The Board held a hearing which included testimony from Abbate and select transcripts from his criminal and civil trials, as well as video and audio recordings of Abbate's 2007 attack of the bartender. The Board determined that, pursuant to section 5-227 of the Pension Code, Abbate was not entitled to annuity benefits as his felony aggravated battery conviction "was related to, or arose out of, or was in connection with" his service as a police officer. Noting the evidence concerning Abbate's conduct prior to, during, and after the altercation, the Board concluded that as a direct result of Abbate's thirteen-year CPD status, Abbate was of a state of mind that he felt shielded from reprimand such that he could commit the act

of aggravated battery on the bartender without fearing intervention.

Abbate appealed the Board's decision to the Circuit Court of Cook County. The circuit court reversed the Board's decision to deny pension annuity benefits and granted Abbate his benefits retroactive to the date of his application. According to the circuit court, there was no evidence in the record to support the Board's conclusion Abbate had an "above-the-law" state of mind that motivated the battery. As a result, the Board appealed the reversal to the state appellate court, maintaining that it properly found that Abbate's felony conviction "related to, arose out of, or was in connection with" his service as a police officer in violation of section 5-227 of the Code.

Pension forfeiture statutes, as they relate to police officers, were enacted to deter officers from violating the public trust by utilizing their position to attempt to cover up their misconduct and/or attempt to influence the investigation conducted thereafter. Thus, the Board applies a two-part test when deciding the issue of whether a police officer's pension benefits should be forfeited under section 5-227. The Board first determines the factual circumstances giving rise to the police officer's felony conviction. Then, the Board interprets and applies the statutory language: "None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a policeman" to the facts of the case. 40 ILCS 5/5-227. In determining whether section 5-227 applies, the threshold question is whether a connection exists between the officer's criminal wrongdoing and the performance of his/her official duties.

In its analysis of the Board's decision, the Appellate Court focused on evidence of Abbate's conduct prior to, during, and after the commission of the felony offense to show the offense was related to or in connection with his service as a police officer. The Court pointed to Abbate slamming one bar patron into a wall and subsequently striking another patron hours before beating the bartender, as well as his own admission

that he was not concerned about being charged with a crime that night. Moreover, the Court referenced Abbate's flexing of his muscles and publicly announcing "Chicago Police Department" to surrounding patrons, as well as his yelling "Nobody tells me what to do" to the bartender during the beating. Agreeing with the Board, the Court found Abbate acted with impunity committing crimes against two other bar patrons, and later the bartender, under the mistaken belief that his status as a Chicago police officer would shield him from liability.

In reference to Abbate's conduct after he committed the felony offense, the Court also found that he used his position as a police officer to interfere with a criminal investigation into his own conduct at the bar. The Court explained the Board was justified in relying upon the language used by the federal civil court to describe the evidence presented, which concerned "both a code of silence within the CPD and a widespread custom or practice of failing to adequately investigate and/or discipline officers." Contrary to Abbate's argument that evidence of his conduct after committing the felony was irrelevant, the Court found such evidence was admissible because it was part of a "continuing narrative of the events giving rise to the offense" and related to his consciousness of guilt. Further, the Court noted if pension boards were not able to rely upon such evidence, it would send a message to police officers that their retirement benefits will not be jeopardized if, after committing a felony, they attempt to cover up their misconduct and/or influence the investigation into their misconduct.

In sum, the Court considered the totality of the evidence presented before the Board and found it was justified in its conclusion that Abbate's felony conviction for aggravated battery was related to or connected with his service as Chicago police officer in violation of section 5-227 of the Code. As a result, the Court set forth that evidence of a police officer's conduct prior to, during, and after the commission of a felony offense may be considered by pension boards in determining whether a felony offense was related to or connected with his/her service as a police officer. Specifically, in the context

where an individual uses his position as a police officer to commit the felony offense and subsequently attempts to thwart the investigation into his misconduct. ❖

Appeals Panel Agrees Injured Firefighters Who Qualify for Medicare Don't Receive Free Health Insurance for Life

Barry v. City of Chicago, 2021 IL App (1st) 200829

In December 2021, a state appeals panel upheld a ruling establishing the city of Chicago can forego providing free health insurance to injured firefighters who become eligible for Medicare coverage. The ruling involved a lawsuit in which nineteen Chicago Fire Department ("CFD") employees, whose careers ended as a result of on-duty injuries, alleged that a state law guaranteed them lifetime, premium-free coverage in the city's group health policy. When the City told them otherwise, the plaintiff-CFD employees pressed claims on their own behalf as well as for their eligible dependents, arguing their spouses and children younger than 26-years-old were also affected by the City's decision to stop providing free health insurance.

The circuit court of Cook County dismissed the complaint, finding the state's Public Safety Employee Benefits Act allows a reduction in city-paid benefits when an individual qualifies for benefits from any other source. In appealing the dismissal, the plaintiffs argued the Cook County judge's ruling was flawed because it relied on the appellate court's decision set forth in *Pyle v. City of Granite City*—a decision the appellate court incorrectly relied on the Illinois Insurance Code in reaching, according to the plaintiffs. Moreover, the plaintiffs contended the Cook County judge

mistakenly treated the city's group health plan as a Medicare supplemental policy.

In *Pyle*, the Appellate Court overturned a ruling that a municipality was required to pay a retiree's premium for Medicare gap coverage. In this case, the Court read *Pyle* to support the city of Chicago's position, explaining that *Pyle* did not rely on the state Insurance Code to determine the framework of the Public Safety Employee Benefits Act. According to the Court, once the plaintiff's primary plan became Medicare, the city's payment of premiums would have been for a "plan that supplemented Medicare," meaning former CFD employees who reach 65—injured or otherwise—can pay premiums to remain in a group policy to supplement Medicare. However, according to the Court, the plain language of the statute does not require the city nor any municipality to pay premiums for these supplemental benefits.

Although the Act does, in fact, guarantee injured firefighters will always have some type of health insurance coverage—from their former employer or another source, like Medicare—the Act does not include premium-free coverage under an employer's group plan must last a lifetime. Thus, the Court found the plaintiff's argument/lawsuit sought to add language to the Act that the legislature did not use nor intend.

According to the Court, the city allowed plaintiffs to join a Medicare supplement retiree plan, which was discontinued in December 2016. Thereafter, the same group as plaintiffs were given the option to participate in a union plan or purchase other Medicare supplemental plans at their own expense. The Act "simply relieves public employees of the Act's obligation to pay insurance premiums when beneficiaries have insurance from any other source." Therefore, when Medicare pays that coverage, "the Act does not require the City to supplement it." ❖

Consolidation Lawsuit Update – Or Lack Thereof?

Arlington Heights Police Pension Fund, et al. v. Governor Jay Robert "J.B." Pritzker, et al.
Kane Co. Case No. 2021 CH 55

As we have been reporting for quite some time now, in February 2021, a lawsuit was filed in Kane County challenging the Pension Consolidation Act.

On November 10, 2021, the Court heard argument on cross-motions for summary judgment and class certification. Following a lengthy oral argument, the Court took the matter under advisement. It is anticipated a ruling on those motions would finally resolve this matter at the trial court level however, at the time of this writing, no ruling has been issued. In the event the Circuit Court found any portion of the Act unconstitutional, a direct appeal may be filed with the Illinois Supreme Court. In the event the Court finds the Act constitutional, any appeal would follow the usual procedure and be filed in the Second District Appellate Court in Elgin.

Subsequently, on January 27, 2022, the Court entered an agreed order providing in pertinent part that, until the Judge issues his ruling on constitutionality and assuming he does so by June 30, 2022: 1) the DOI will not pursue disciplinary action against any plaintiff pension fund and 2) neither FPIF nor POPIF will report **any** Article 3 or 4 fund to the DOI for noncompliance if they fail to meet the deadlines needed to implement the transition of assets under the Act. In exchange for this agreement, the plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction was withdrawn. The order is also significant for what it does not do. It does not suspend the transfer of assets to the consolidated

funds nor does it temporarily pause that process. The only thing certain it does is suspend disciplinary action and report to the DOI.

We continue to daily monitor this case for any additional activity. Updates may be checked at the Kane County Circuit Clerk under No. 21-CH-000055. As a reminder, RDL serves as general legal counsel for the Consolidated Police Board and some of the Plaintiff pension boards. In a situation such as this where two or more clients of the firm are suing one another, RDL is conflicted out and is not involved in any fashion in this litigation nor can we give legal opinion on the same. However, we will continue to provide updates on this important litigation as they become available. ❖

Police Officers' Pension Investment Fund Update & Pending Legislation

Since our last newsletter, the Illinois Police Officers' Pension Investment fund (IPOPIF) has begun the transfer of assets with the first two tranches occurring March 1 and April 1. Additional tranches are scheduled for May 2 and June 1.

In addition, IPOPIF has added a number of helpful guides and FAQs to its website at www.ipopif.org. Funds can access the website for information pertaining to transfer dates, sample correspondence concerning pre-transition audits, administrative rules pertaining to transfer, and policies (including the IPOPIF Cash Management Policy).

Included with the correspondence each fund receives from IPOPIF will be information advising of the asset freeze date. Generally, this occurs approximately two weeks prior to the transfer of assets. Local police pension funds should

formulate, adopt, and implement a written cash management policy prior to their funds transfer date. The guidelines IPOPIF will use for cash management procedures can be found on its website. Under the IPOPIF policy, it is recommended local police pension funds hold three months benefits and expenses in a local account. After this initial period, Funds are encouraged to keep their cash requests to once per month. Local funds should consult with their accountants, treasurer, and payroll administrator to create and adopt a policy best suited to their needs. Once these details are worked out, your RDL attorney will be happy to assist in making recommended changes to any template cash management policy.

Your Fund's Cash Management Policy should be adopted and implemented prior to the receipt of a certified asset list which should occur approximately two weeks prior to your fund's transfer date although it may occur earlier. "Discussion/adoption of Cash Management Policy" should also be added to your meeting agendas.

In addition to the commencement of asset transfer as outlines above, Article 3 funds should also be aware of proposed legislation intended to move the deadline for transfer of assets by one year to June 30, 2023. House Bill 4622 and Senate Bill 3211 have both been introduced and assigned to committees. To date, neither Bill has been passed by either chamber. It is anticipated the legislature will adjourn April 8 so the clock is ticking.

We will continue to keep funds up to date on any new developments. Also, please recall RDL serves as general counsel for IPOPIF. In the meantime, please do not hesitate to contact your RDL attorney should you have additional questions. ❖

Pension Boards Still Have Remote Meeting Option

As we have all become aware over the course of the pandemic, permanent amendments to the Open Meetings Act have been enacted in response to the necessity to hold public meetings during the ongoing Coronavirus pandemic. Those amendments allow public bodies to conduct remote meetings without the presence of a quorum as long as a disaster proclamation has been issued. Those who have been following this issue likely recall the Governor has been issuing 30-day Gubernatorial Disaster Proclamations in succession since March 2020. While additional amendments have been proposed to the Open Meetings Act allowing for remote meetings without the issuance of a disaster proclamation, to date those amendments have not been adopted by legislature.

On April 1, 2022, Governor Pritzker signed the most recent Gubernatorial Disaster Proclamation which remains in effect through April 30. While recent proclamations have eliminated the finding attendance at the regular meeting location is “not feasible”, this finding may still be made by pension board presidents. As a reminder, the “feasibility” portion of the OMA in this context pertains to how the public attends/participates. If a pension board continues to find in-person attendance at the regular meeting location “not feasible”, that finding should be included on the agenda and the public should be given the opportunity to attend and comment via whatever remote means the public body employs.

As a refresher, the recent amendments to the Open Meetings Act allow a public body the option to hold meetings via phone, video, or other electronic means without the physical presence of a quorum under the following conditions:

- 1) The Governor or Illinois Department of Public Health has issued a disaster declaration covering all or part of the jurisdiction of the public body.
- 2) The head of the public body determines an in-person meeting is not practical or prudent because of a disaster.
- 3) All members of the public body participating in the meeting must verify they can hear one another and all discussion or testimony.
- 4) Members of the public present at the regular meeting location can hear all discussion or testimony and all votes taken unless attendance at the regular meeting location is not feasible due to the disaster. If in-person attendance by the public is not feasible, the public body must provide alternative means for the public to hear the meetings such as using a telephone or web-based link.
- 5) At least one member of the public body, chief legal counsel, or chief administrative officer is physically present at the regular meeting location, unless not feasible because of the disaster.
- 6) All votes must be conducted by roll call of each member.
- 7) Notice must continue to be posted at least 48 hours in advance of the meeting.
- 8) The public body must keep a verbatim record in the form of an audio or video recording of meetings held in this manner. ❖

RDL Welcomes New Associate Patrick Roberts

We are delighted to announce the addition of Patrick Roberts as an associate with Reimer Dobrovolny & LaBardi PC. As a new associate, Patrick will concentrate his practice in public sector pension law and civil litigation with a focus on the employment and labor issues faced by police officers and firefighters.

Prior to joining Reimer Dobrovolny & LaBardi, Patrick was a Research Analyst for a downtown Loop-based law firm specializing in property tax appeals. Before his time as a Research Analyst in private practice, Patrick was a Legislative Aide for the Chicago City Council's Committee on Finance. While with the Committee on Finance, he was responsible for researching and drafting public policy as well as organizing public hearings related to proposed items of legislation before the City Council. Handling an array of municipal ordinances, orders, and resolutions, Patrick also articulated matters of public policy to elected officials, various local and state departments including the Office of the Mayor – Chicago and the Office of the Governor – Illinois, lobbyists, and constituents.

Devoted to research and writing, Patrick has a background in local history publications. In 2018, he was credited for his research assistance in the book *Mr. Chairman! Power and Prominence in Chicago's City Hall* by Richard C. Lindberg.

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.

Patrick received his undergraduate degree from the University of Alabama and his *Juris Doctor* from the University of Illinois Chicago School of Law (formerly, The John Marshall Law School) where he was on the Dean's List. He is licensed to practice law in Illinois and is a member of the Illinois State Bar Association and Chicago Bar Association. ❖

REIMER DOBROVOLNY & LABARDI PC NEWS

- February 7-9, & 14, 2022, RDL partner Vince Mancini emerged as the victorious plaintiff's attorney recovering a significant judgment on behalf of his client following a three day bench trial in DuPage County Circuit Court.
- On March 14-15, 2022, RDL managing partner Rick Reimer presented at the IPPFA new trustee certification class in Naperville.
- April 27-29, 2022, RDL managing partner Rick Reimer will present at the IPPFA spring conference in East Peoria.
- May 6, 2022, RDL partner Brian LaBardi will present at the IPFA spring pension conference in Addison.

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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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