A Public Safety Law Firm
RDK
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Legal and Legislative Update

Caveat Emptor: Attorney's "Ego" Loses Case for Client

Robelet v. Police Pension Fund of City of Crystal Lake, 2017 IL App (2d) 170306

Police Officer Victor Robelet applied for a line of duty disability pension before being terminated from the police department. The City of Crystal Lake intervened, and the intervention petition was granted. The Pension Board attempted to schedule the matter for hearing dates where all parties were available. Eventually, the Board scheduled the case for hearing on August 15th and 17th, 2016.

After the dates were scheduled, Applicant retained a new attorney, Thomas McGuire. 11 days before the hearing, McGuire sent a letter to the Pension Board's attorney indicating he would be representing Robelet. McGuire also requested a continuance due to his "ongoing medical issues." The following day, the Pension Board's attorney sent a letter to McGuire advising him the Board made numerous efforts to schedule the hearing to dates agreeable to all parties including prior counsel. McGuire was also advised the Board's attorney did not have the authority to grant a continuance. McGuire was instructed to appear on August 15th and be prepared to argue his motion. In the event the continuance was not granted, he should be prepared to proceed with his case. The City objected to the continuance.

On the day of the hearing, McGuire appeared before the Board and argued in favor of a

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continuance for three hours. McGuire admitted he ordered his client to not attend the hearing. McGuire explained it was a "calculated risk to make it more difficult for the Board to decide to proceed on the scheduled date of hearing." McGuire admitted he agreed to represent the officer despite his knowledge of his on-going medical issues and of the hearing dates. Shockingly, despite acknowledging his inability to present the case on the set hearing dates, McGuire confessed he accepted the case due to his "ego." The Pension Board denied McGuire's motion for continuance, but as a courtesy, continued the matter to August 17, 2016 to give him an opportunity to prepare.

On August 16th McGuire sent a letter to the Board's counsel asking the Board to reconsider its denial of his requested continuance. This time, McGuire claimed, after arriving home from the August 15th hearing, his wife reminded him he had two doctor's appointments scheduled for August 17, 2016. Oddly, Pension Board attorney's office had called McGuire on August 16th to confirm exhibits were in order for the hearing. During that conversation McGuire made no mention of these doctors' appointments or his renewal of his motion to continue.

On August 17, 2016 the Board reconvened, and neither McGuire or Robelet was present. Counsel for the City telephoned McGuire who stated he was at a doctor's office and could not be present. McGuire again admitted he ordered his client to not attend the second hearing date. The City moved to dismiss the application. The Board found Robelet failed to prosecute his claim and had abandoned it. As such, the Board granted the City's Motion to Dismiss his application of disability benefits. A written decision and order was issued.

Robelet filed a complaint for administrative review. The trial court found the Pension Board did not abuse its discretion in light of McGuire's conduct. Robelet filed a timely appeal and the Second District Appellate Court affirmed the Pension Board's dismissal.

The appellate court held the Pension Board has broad discretion to grant or deny continuance. However, such discretion must be exercised judiciously rather than arbitrarily to satisfy the ends of justice. In light of McGuire's conduct, the court found the Pension Board did not abuse its discretion by denying the Applicant's motion to reconsider the denial of his motion to continue in light of the fact that the affidavit reportedly submitted to the Board by McGuire on August 16th was not actually an affidavit because it was not executed under oath and under penalty of perjury. McGuire further did not explain why his doctor's appointment could not be rescheduled and did not explain the delay in communicating the information to the Board about the alleged conflict between the second day of hearing and his doctors' appointments, or that his medical appointments were an "emergency." The court rejected McGuire's arguments that the dismissal of the Applicant's disability pension application violated Robelet's "due process" rights. In administrative proceeding such as a disability hearing, due process requires notice and a meaningful opportunity to be heard. There was no question Robelet was timely notified of the hearing dates, the Board was ready to hear Robelet's case on those dates, but he and his lawyer chose to not attend. The court found no due process violation and Robelet's refusal to participate in the proceeding does not amount to a lack of opportunity to be heard. No timely petition for leave of appeal was filed with the Illinois Supreme Court so this matter is final.

In sum, the appellate court noted McGuire knew of the hearing dates and his ongoing medical condition when he accepted representation of Robelet. The appellate court did not find Mr. McGuire's "ego" was a sufficient reason for the pension board to be required to reschedule a hearing. In this case, it appears the attorney's "ego" cost the applicant an opportunity to be heard by the pension board. As lawyers we love, or at least occasionally dabble with, Latin. Here, *caveat emptor* seems to be an appropriate adage. ❖

Opinion: Moody's Believes Employers Who Stiff Employees Have Better Credit

On October 17, 2017, Moody's issued a position paper in which it described the negative impact employee pension protections visit upon its estimation of a governmental employer's credit quality. In the paper, Moody's opined, when State courts shoot down attempts to slash retiree benefits it, "can significantly affect the credit quality of governments within a given state." Localizing its point, Moody's wrote, "A ruling on the breadth of pension benefit protections by the Illinois Supreme Court was a driving factor when we lowered the City of Chicago's rating below investment grade." Despite trying to leverage government into benefit cutting schemes, Moody's conceded, "New strategies unrelated to benefit changes are gaining momentum, with varying credit impact."

In short, Moody's short-sighted report feeds a growing incitement where public employees' defined retirement benefits are the scapegoat, with pension abolition a purported panacea. Moody's fails to consider the economic consequences of impoverishing a generation of public servants – many of whom are not eligible for Social Security. Even if Social Security is available it is diminished. Moody's does not discuss the reduced recruitment and retention impact caused by slashing retirement security.

Certainly, Moody's, and other like-minded commentators, fail to consider the moral hazard of breaking contracts with millions of former public servants who relied upon their employers' representations regarding employment security. Oddly, Moody's believes an employer who obliterates life-long contracts in exchange for an immediate economic boost is worthier of a quality credit rating. It used to be credit worthiness was based upon an organization paying their bills, not walking away from their obligations. In reaching these conclusions, hopefully, Moody's performed more due diligence than it did when rating securities related to the collapse of the U.S. residential real-estate market. ❖

Consultants Required to Make Additional Disclosures

P.A. 100-0542

On November 8, 2017, the General Assembly overrode Governor Rauner's veto on Senate Bill 1714, creating Public Act 100-0542. This public act amends the Illinois Pension Code by creating Sections 1-113.22 and 1-113.23. These new Sections mandate additional disclosures by financial consultants performing work for Illinois pension funds, including those governed by Articles 3 and 4. Both Sections require certain disclosures no later than January 1, 2018.

Section 1-113.22 requires consultants to make disclosures regarding consideration and retention of investment services by businesses owned by minority, female, and disabled owners (collectively referred to herein as "underrepresented businesses"). On or before January 1st of every year consultants must disclose: 1) the total number of searches for investment services in the prior calendar year; 2) the annual total number of searches including underrepresented businesses; 3) the annual total number of searches where the consultant recommended underrepresented businesses; 4) the annual total number of searches where an underrepresented business was retained; and 5) the total annual dollar amount invested with underrepresented businesses following recommendation for selection by the consultant.

Section 1-113.23 requires consultants to make additional financial disclosures. Prior to January 1st of each year, consultants must disclose all payment or economic benefits received from investment advisors providing services to a pension fund, or recommended for selection by the consultant. The disclosures must include all economic benefits provided during the prior 24 months.

Effective January 1, 2018, prior to entering into a consultant contract, the consultant must make these disclosures. As a practical matter, these disclosures should be required when beginning a request for proposal process. Also, consultant contracts should

include language mandating the disclosures required by Sections 1-113.22 and 1-113.23. It is the pension boards' burden to ensure they have required consultants make these disclosures. However, the consultant is obligated to make accurate and timely disclosures.❖

Illinois Fifth Appellate District Expands Definition of "Act of Duty" for Line-of-Duty Disability Benefits

Martin v. Bd. of Trustees of the Pension Fund of the Vill. Of Shiloh, 2017 IL App (5th) 160344

The Fifth District Appellate Court recently issued a decision, reversing the pension board's denial of line-of-duty disability benefits. The Pension Board denied line-of-duty benefits because plaintiff was riding as a passenger in an unmarked squad car when the car was rear-ended, and plaintiff suffered a disabling injury.

There was no dispute plaintiff was disabled due to the injuries he suffered in the car accident. There was also no dispute plaintiff, a detective, was on-duty, but had completed his assignment at the courthouse and was on his way back to the police department at the time of the accident. The pension board further found plaintiff was not in apprehension of a suspect at the time of the accident nor were the officers summoned to assist a citizen in need.

On administrative review, the circuit court reversed the pension board's decision. On appeal, the Fifth District Appellate Court affirmed the reversal. In its analysis, the Appellate Court initially noted, "Illinois courts recognize that an officer does not perform an 'act of duty' merely by being on duty at the relevant time. Further, it is well settled that not all police functions involve 'special risk.'" The court reviewed the Illinois decisions considering the scope of an "act of duty. It rested its determination on finding, "plaintiff sustained injuries in an automobile accident during his shift while performing duties in furtherance of his job as a detective for the Village of Shiloh Police Department." The Court further noted, "The duties performed by plaintiff are not delegated to any members of the general public. Further, because plaintiff was on duty at the time of the accident and was a passenger in a squad car, he was subject to attend to any other police responsibility if necessary."

This decision appears to run contrary to the seemingly well-settled precedent of prior Illinois cases where the officer must be performing some affirmative act for there to be an "act of duty." This decision appears to ignore the Supreme Court's direction in *Johnson*, "the crux is the capacity in which the police officer is acting." The Fifth District now appears to include "riding as a passenger in an unmarked squad car," as an act of duty. The court seemingly conflates "subject to attend to any other police responsibility if necessary" with actually attending to police responsibilities, as was established in *Johnson*.

This decision indicates a growing conflict among the appellate districts regarding the definition and application of "act of duty" in considering whether line-of-duty disability benefits should be awarded.❖

Line of Duty Disability Denial Based on Pre-Existing Conditions Upheld

Sykes v. Granite City Fire Pension Bd. of Trustees, 2017 IL App (5th) 160186-U

The firefighter in this case applied for a line of duty disability benefit stemming from a back injury claimed to have occurred in response to a fire when he ascended a flight of stairs and reached for a hose. The record was replete with medical evidence the firefighter had an extensive history of pre-existing back problems. Most significantly, immediately prior to the date of injury alleged, the firefighter was off work for a period of five months treating for degenerative disc disease and lumbar radiculopathy. Epidural injections were performed in January 2015 with doctor instructions indicating an anticipated return to work date of March 1. However, the firefighter requested and was given a release to return to work without restriction on

February 6. The release was given without any functional capacity testing of the firefighter. The injury occurred his first day back to work.

Following the accident, the applicant's treating physician reviewed MRI results concluding the new study taken post-accident showed no "dramatic change" from the pre-accident study but concluded he could not continue to serve as a firefighter due to the injury. The first pension board examining physician found the disability was not the result of the fire related incident but was "at most a minor aggravation". The second pension board doctor found the applicant's back injury had pre-dated the fire incident based on the five-month period he was off work preceding the fire response but that his firefighting over the course of many years had some part to play in the back condition. The final pension board physician concluded the disability was not related to the incident based on the MRI result and the return to work that occurred without any functional capacity or other evaluation.

The pension board denied line of duty benefits but granted a not in the line of duty benefit finding his disability was not caused by the act of duty but pre-existed the date of injury claimed. On administrative review, the circuit court reversed and granted a line of duty benefit. In a split decision, the appellate court reversed and re-instated the pension board denial of line of duty benefits. The majority opinion found the medical evidence in the record in the form of his pre-existing conditions, specifically the MRI results and time off work prior to the accident, were sufficient to support the Board's determination the act of duty did not cause the disability. A dissenting justice would have awarded line of duty disability benefits based on the long history of back problems attributable to firefighting and the contributing/exacerbating incident that occurred in the fire response.

It is important to remember a pre-existing condition will not necessarily preclude award of line of duty disability benefits. Rather, it is sufficient if disability was caused or contributed to by the act of duty. However, the applicant must still be able to show a causal nexus between the act of duty and disability. In this case, the appellate court agreed with the pension board such a nexus was not established largely based on the MRI results demonstrating the same condition both pre-and post-accident.❖

Illinois Third Appellate District Finds TTD Payments are "Payroll" for Determining Salary Attached to Rank

Sottos v. The Firefighters' Pension Fund of the City of Moline, et al., 2017 IL App (3d) 160481

In a case of first impression, the Third District Appellate Court issued a decision, reversing the pension board's determination of a firefighter's salary attached to rank for calculating line-of-duty disability benefits. Jerry Sottos suffered from low back injuries, which ultimately led to his disability. There was no dispute Sottos was entitled to line-of-duty disability pension benefits. The dispute in this case involved the salary attached to rank to be used to calculate Sottos' line-of-duty disability pension benefits.

Sottos' annual salary attached to rank as of February 27, 2013 was $73,829.32. He received full pay pursuant to the Public Employee Disability Act ("PEDA") through March 8, 2013. Sottos was last employed by the City of Moline in March 2013. In June 2013, Sottos received lump-sum payment for accrued sick leave, from which pension contributions were improperly withheld. Those contributions were later refunded to the member.

In January 2014, the City instituted a general wage increase for City firefighters. Had Sottos been eligible for the wage increase, his salary would have increased to $75,674.93. However, Sottos never received the general wage increase nor did he make pension contributions based on the increased annual salary. Sottos received workers' compensation payments through February 7, 2014. Sottos' workers' compensation payments were calculated based on his February 27, 2013, salary.

Suggested Agenda Items for April (or 2nd Quarter)

- Rebalance portfolio to conform with statutory asset allocation prior to close of fiscal year.
- Election of active/retired/disabled Trustees.
- Review and/or modification of Board's investment policy.
- Authorize preparation of annual Department of Insurance Report.
- Authorize payment of annual Department of Insurance Compliance Fee.
- Status of independent audit report. (Due within 6 months of close of fiscal year beginning with F.Y. 2016).
- Review and/or modification of Board's Administrative Rules and Regulations.
- Annual filing of statement of economic interest statements for each Trustee.

He was never paid based on an annual salary of $75,674.93, either via payroll or through workers' compensation.

In granting Sottos line-of-duty disability benefits, the Pension Board issued a decision and order finding benefits would be based on a salary of $75,674.93. The Pension Board later learned the $75,674.93 salary attached to rank was incorrect during the 35 days following the decision. The Pension Board rescinded the decision and held a further hearing on the matter in September 2014. Based on the testimony of the City's finance director, the Pension Board found Sottos' last day on the City's payroll to be March 8, 2013. The Pension Board calculated Sottos' disability pension benefit pursuant to 40 ILCS 5/4-110, which states, "65% of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the municipality's fire department payroll." The Pension Board determined the correct salary attached to rank was $73,829.32. Sottos sought administrative review of the September 2014 decision and order, seeking reversal and reinstatement of the prior decision applying the higher salary attached to rank.

On appeal, the Third District Appellate Court affirmed the circuit court's reversal and ordered the original decision and order reinstated. In reaching its decision, the Appellate Court found Sottos was still "on payroll" while receiving workers' compensation payments for Temporary Total Disability ("TTD"). The Appellate Court interpreted the phrase, "the date he or she is removed from the municipality's fire department payroll," liberally in favor of the applicant. In finding the salary should be based on the later date, the Appellate Court relied, in part, on an IDOI advisory opinion, which stated, "TTD workers' compensation benefit payments made to a firefighter by his or her municipal employer constitute being on the municipality's payroll for the purpose of section 4-110 of the Pension Code."

The Appellate Court disregarded sections of the Administrative Code addressing Pension Code sections for determining salary for pension benefits. The Appellate Court also ignored and did not address Section 4-114.2, which requires disability pension benefits to be reduced by the amount of any corresponding workers' compensation benefits awarded for the same injury. Under this new interpretation of what constitutes time on "payroll", no workers' compensation offset would be possible because the Court interpreted receipt of those benefits to mean Sottos was still on "payroll". Moreover, the decision leaves unanswered whether or how pension contributions should be made while on workers' compensation. ❖

New Rules and Regulations Now Available!

RDK attorneys have completed extensive revisions to the form rules and regulations for both police and firefighters' pension funds. These updates reflect both statutory and case law changes relevant to

pension board operations. If you are a quarterly phone or in-person attendance pension board and would like to consider adoption of the updates rules, please contact our office for a draft copy. If you are a non-retainer pension board and would like to consider adoption of the new rules, please contact our office for information. ❖

Law Enforcement Records Related to Sex Assault Case Not Subject to FOIA

McGee v. Kelly, 2017 IL App (3d) 1603224

The FOIA exempts personal information contained in public records disclosure of which would result in a clearly unwarranted invasion of personal privacy. Plaintiff sent a FOIA request to the Will Co. Sherriff's Officer seeking all documents prepared in connection with his indictment leading to his conviction of aggravated criminal sexual assault and aggravated battery. The Sherriff denied the request asserting, among other reasons, the information was exempt from production under the FOIA because disclosure would constitute an unwarranted invasion of the victim's personal privacy. The Sherriff noted the requestor received redacted records in 2009 but in this instance, he withheld the records entirely. The requestor argued while redactions may be appropriate, the remainder of the records should be produced.

The Appellate Court agreed the requested information is exempt. In reviewing the FOIA exemption for unwarranted invasion of personal privacy, the court considers (1) the requestor's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information.

Applying this test, the Court noted Plaintiff received the substance of the information sought when the victim testified at his criminal trial. He failed to identify any other interest. In addition to finding the Plaintiff had a minimal interest in disclosure, the Court also found little public interest in disclosure of the details of the crime. The Court's in camera review of the requested information found the documents requested contained detailed sensitive, and personal statements about the sexual assault and battery. As such, the degree of invasion of the personal privacy to the victim is substantial. The Appellate Court therefore found the personal privacy interest of the victim outweighed any other interest in disclosure of the records requested in this matter. ❖

Pension Board Lacked Jurisdiction to Consider Disability Application

Keeling v. Bd. of Trustees of the Forest Park Police Pension Fund, 2017 IL App (1st) 170804

In a published decision, the First District Appellate Court affirmed the Forest Park Police Pension Board's determination it lacked jurisdiction to consider Keeling's application for line-of-duty disability benefits. The Pension Board denied jurisdiction because Keeling failed to submit his application prior to his separation of employment from the Forest Park Police Department.

While Keeling was on injury leave, allegations of misconduct were made against him and an internal investigation followed. His union attorney advised him to file an application for disability benefits with the Pension Board and warned Keeling to file for disability benefits before resigning. During an April 2, 2014 meeting with the local union President (who also happened to be a Pension Board Trustee), Keeling completed a document titled, "Duty Disability/Occupational Disease Pension Benefit (Tier 1 and Tier 2) Information Request Form – Page 1 of 2" ("Information Request Form"). Keeling was informed, "I'm not sure if this is the start" and advised additional forms were necessary to submit an application. Keeling was further informed the pension board attorney would be sending him the application.

Also on April 2, 2014, the Pension Board's attorney sent a letter to Plaintiff, via certified return receipt mail, acknowledging his "request for an application for disability benefits." In the letter, Keeling was

directed to fully complete an enclosed application for disability benefits, and explained the process by which his disability claim would be adjudicated.

On April 23, 2014, the Village terminated Keeling's employment as a police officer with the Police Department. Pursuant to a July 2015 settlement agreement of a union grievance, Keeling agreed his resignation was effective at the close of business on the 23rd day of April 2014. On July 9, 2015, Keeling's attorney submitted a completed disability application, dated July 8, 2015.

The Pension Board determined it did not have jurisdiction to consider Keeling's disability application because he had not submitted the application form provided by the Pension Board's attorney prior to his separation of employment.

In affirming the pension board's decision, the Appellate Court found, "Choosing what paperwork will best meet an agency's needs is by definition an administrative action…Simply put, an 'application' is whatever the Board says it is, within reason." The Appellate court concluded: "Keeling filed only one designated application form. At the time of filing, Keeling was no longer a police officer…Accordingly, the Board's determination that he failed to timely file an application was not against the manifest weight of the evidence."

The Appellate Court also addressed Keeling's argument the Pension Board should have been equitably estopped from denying jurisdiction based on Keeling's meeting with the pension board trustee. The Appellate Court affirmed Keeling failed to demonstrate equitable estoppel should apply because he could not identify any affirmative act by the Pension Board upon which reliance was reasonable. The Appellate Court confirmed the trustee could not take any action without board approval. As such, his "act of tendering the information request form was not attributable to the Board. The only act attributable to the Board was Reimer's letter (containing the disability application form), which Keeling acknowledged did not indicate the information request form was sufficient to preserve his disability pension claim."

As a takeaway, the Appellate Court's decision confirms Pension Boards can determine the process and procedures for accepting applications and adjudicating claims for disability benefits. Also, member must use the application forms provided by the Pension Board, and submit those forms prior to separation of employment. Otherwise, the Pension Board may lose jurisdiction to consider the application.

Reimer Dobrovolny & Karlson represented the pension board in this matter and is pleased with the Appellate Court's affirmation of the pension board's decision. This decision was recently issued, and it is possible Keeling may yet seek leave to appeal to the Illinois Supreme Court. ❖

Injury Caused by Investigation of Overweight Vehicle Eligible for PSEBA Benefits

Marquardt v. City of Des Plaines, 2017 IL App (1st) 163186-U

An Appellate Court ruling has overturned the City of Des Plaines denial of PSEBA benefits for an officer injured while investigating a traffic stop. Officer Marquardt pulled over a semi-trailer on suspicion it was carrying an overweight load. After determining the weight of the load, the officer climbed up the ladder to inspect the contents of the load pursuant to the information needed to complete the Des Plaines "overweight report". While climbing up the ladder, he felt a "pop" in his left knee. The driver of the semi was issued a citation for operating an overweight vehicle.

Officer Marquardt subsequently underwent total knee replacement surgery. The Des Plaines Police Pension Board awarded him a line of duty disability benefit. The officer then applied to the City for PSEBA benefits. Recall PSEBA requires the municipality to pay the health insurance premium for the officer and qualifying family members. In order to qualify, an officer must have been (1) catastrophically injured (2) as the result of response to fresh pursuit, response to what is reasonably believed to be an emergency, an unlawful act

perpetrated by another, or during the investigation of a criminal act. Pursuant to established case law, an officer granted a line of duty disability from the pension board is automatically deemed "catastrophically injured". The City denied his request finding his injury did not occur during one of the enumerated acts.

On appeal, the City argued the officer's injury did not occur during the actual commission of an unlawful act because the semi had already been pulled over at the time the officer injured himself inspecting the load. The Appellate Court disagreed. Applying the dictionary definition of "result", the Court found the officer's catastrophic knee injury was a consequence or effect of the unlawful act of driving the overweight truck and was sustained because of that unlawful conduct. The Court further noted the officer did not have any discretion regarding completion of the report and was therefore required to inspect the contents of the overweight load to complete the Des Plaines overweight report. Although a dissenting opinion was filed, the majority overturned the City's denial and granted Officer Marquardt PSEBA benefits. ❖

Court Orders Three Pension Board Trustees Excluded from Disability Hearing

Naden v. Firefighters' Pension Fund of the Sugar Grove Fire Prot. Dist. Et al., 2017 IL App (2d) 160698

Lt. Sara Naden applied to Sugar Grove Firefighters' Pension Board for a line of duty disability benefit stemming from anxiety/panic attacks. She attributed the attacks to criticism, ridicule, and sexual harassment from her male coworkers.

When she requested a leave of absence from the Fire District citing these issues, the District asked her to submit a written complaint of these alleged incidents. She produced a report describing dozens of instances of alleged workplace harassment since 2006. Three of the pension board trustees were identified in the report.

In response to the written complaint, the District issued a Notice of Interrogation to further investigate the matter. On request of Lt. Naden, that investigation/hearing was suspended indefinitely. As such, the investigation was still ongoing at the time of disability hearing.

After hearing before the Firefighters' Pension Board on her disability application, the Board unanimously found Lt. Naden "not disabled" and denied her application for disability benefits of any kind.

The Appellate Court vacated the decision of the Pension Board. It found Lt. Naden had been denied her right to a fair and impartial hearing because three of the pension board trustees were named as alleged harassers in her complaint to the District. Because investigation of her complaint remained pending at the time of the disability hearing, the Court found the three trustees had a "material, direct, personal interest in denying her disability claim, whether to discredit her or to retaliate against her." It found the Board's decision unsustainable and vacated the denial of disability benefits remanding it to the Pension Board to hold a new hearing excluding the three identified trustees.

While the Appellate Court relied on the bias of the three trustees as grounds for reversal, it went on to opine on the merits of the case generally. First, the Appellate Court advised the Pension Board it was "troubled by the quality of the medical evidence the Board relied upon in its decision". Specifically, the Court found the doctors had used the wrong standard in concluding Lt. Naden could perform as a firefighter in another department. The Court found the correct standard under Section 4-110 of the Pension Code is whether the applicant is disabled from service in *the* fire department as opposed to *any* fire department. The correct inquiry would have been whether Lt. Naden was disabled only in relation to her current employer - the Sugar Grove Fire Protection District.

The Appellate Court did approve of the Pension Board's refusal to include transcripts or tapes of its executive session in the administrative record.

While Plaintiff's attorney requested they be disclosed, the Court noted they are properly excluded under the Open Meetings Act absent consent of the Pension Board.

The decision of the Appellate Court raises an interesting conundrum. The ruling remanded the case to the Pension Board with instructions to conduct a new hearing excluding 3 of the 5 trustees. Under the Open Meetings Act, 3 trustees are needed to convene a meeting and take action on any matter. We will continue to watch this case to see how this procedural issue is overcome. ❖

Six Month Window for Firefighters to Transfer Time from Article 3 Fund or to Chicago Firefighters' Pension Fund

P.A. 100-0544

On November 8, the General Assembly completed its override of Governor Rauner's veto of House Bill 688. This new law permits two new, and limited time, opportunities to purchase credit for qualifying pension fund members: 1) firefighters may transfer up to six years of prior Article 3 police creditable service with the same unit of local government to the Article 4; and 2) an active Chicago Firefighter may transfer up to ten years of prior Article 4 service to Chicago's Firefighter Pension Fund. In both instances members only have six-months to exercise these options. The effective date of the Act is November 8, 2017. Meaning, **pension fund members only have until May 8, 2018 to take advantage of either transfer opportunity.**

Transfers from Article 3 to Article 4 within the same unit of local government

First, P.A. 100-544 amends Article 3 of the Pension Code by creating Section 3-110.12. That Section permits an active Article 4 firefighter to transfer up to six years of credit from an Article 3 pension fund sharing the same local governmental employer. For instance, to transfer under Section 3-110.12, a Firefighter who is a member of the "Smithsburg" Fire Pension Fund may transfer time only from the "Smithsburg" Police Pension Fund. Also, if the firefighter was "subject to disciplinary action" at the time (s)he left the police department, they are not entitled to transfer time. Upon application by the firefighter, the relevant police pension fund will transfer the following to the firefighters' pension fund: 1) the firefighter's contributions to the fund; 2) a matching amount equal to the firefighter's contributions; and 3) any interest paid by the firefighter to reinstate service. If the firefighter took a refund from the police pension fund, (s)he may (for purposes of transfer) reinstate service in the police pension fund by paying back the amount of the refund plus interest (6% compounded annually from the date of refund through the date of payment). Section 4-108(c)(8) recognizes such transferred service as creditable service in Article 4 funds.

Transfer from Article 4 to Chicago Fire Pension Fund

Second, Sections 4-108.6 and 6-227 were amended to re-open a previously closed window to transfer service credit from Article 4 pension funds to Article 6 (Chicago Fire). Now, Section 4-108.6 permits active Chicago Firefighters to transfer up to ten years of prior service in an Article 4 fund to Chicago's Firefighter Pension Fund. Upon application by the firefighter, the relevant Article 4 pension fund will transfer the following to the firefighters' pension fund: 1) the firefighter's contributions to the fund; 2) a matching amount equal to the firefighter's contributions; and 3) any interest paid by the firefighter to reinstate service. In addition, per Section 6-227, within five years, the Chicago Firefighter must pay an additional amount using actuarial principles determined by the Chicago Firefighters' Pension Fund. ❖

Changes to DOI Recommended Levy Assumptions

In October, GRS Retirement Consulting released its updated list of actuarial assumptions for Article 3 and 4 pension funds. These figures are used by the Department of Insurance in formulating the recommended levy for funds. Most notably, the GRS reports makes changes to the investment return assumption, reduces the payroll growth assumption by one percent, reduces assumed salary increases, changes assumed retirement ages, and updates the mortality table to the RP 2014 Blue Collar Mortality Table. GRS suggests the assumption changes will result in an increase in the recommended contribution for police pension funds of 21% and 16% for fire pension funds.

Changes to the assumed rate of investment return are detailed generally in the table below. However, the new approach also takes into account the funded ratio of each plan. The figures shown below will be used for any plan with a funded ratio of 40% or higher. For plans that fall below that threshold, a discounted rate will be applied up to 0.75% less than the assumed rate shown below.

Fund Size	**Prior Return Assumption**	**New Investment Return Assumption**
Less than $2.5 million	**5%**	**5%**
$2.5-$5 million	**6%**	**5.75%**
$5-$10 million	**6.5%**	**6.25%**
Over $10 million	**6.75%**	**6.5%**

Comptroller Intercept Rules Approved

In a long-awaited move, the Comptroller's officer has approved rules for pension fund intercept of State funds due municipalities. You may recall this was part of legislation effective January 1, 2011, providing pension funds may certify amounts due but not received from municipalities beginning with fiscal year 2016. The statue was subject to rules to be adopted by the Comptroller which did not occur until recently.

In short, the rules lay out the procedure for claiming monies due underfunded Article 3 and 4 pension funds by diverting payment of State funds due a municipality to the pension fund. You may recall the 2011 amendment to the statute provided if a municipality fails to transmit the monies due a pension fund within 90 days after they were due, the pension fund may notify the State Comptroller. The administrative rules recently adopted address that procedure.

First, a pension fund must send notice to the Comptroller with several pieces of information including certifying the delinquent amount and describing the notice and opportunity to be heard given the municipality. The notice must be signed by the president of the pension board. The Comptroller identifies the warrant to which the intercept can be claimed. The Comptroller then gives notice to the municipality of the claim. She deposits the money claimed into the State Offset Claims Fund which acts as an escrow account in this instance. The municipality has 60 days from the date of the Comptroller's notice to contest the claim. If no dispute is raised, the amount certified is paid out to the pension fund. In the event of a dispute, the Comptroller will make a determination using the information submitted and/or may request additional information from the pension board.

While adopting the administrative rules five years after the statute was enacted represents some progress, a number of questions remain. The statute and rules do not make clear what avenue is

available to review determinations of the Comptroller on contested claims. In addition, the Constitutional amendment passed at the last general election makes many funds earmarked by the State for municipalities protected from attachment under this procedure. Recent amendments to the Municipal Code allowing municipalities to segregate funds dealing with municipal bonding authority may also have an impact on potential revenues available to underfunding pension funds. RDK will continue to monitor legislation that may impact how pension funds are able to exercise their rights under this section of the Pension Code. ❖

REIMER DOBROVOLNY & KARLSON LLC News

- October 2-October 6, 2017, RDK partners Rick Reimer, Jim Dobrovolny, and Keith Karlson presented and attended the IPPFA fall conference in St. Louis.
- October 30-31, November 2, & November 8, 2017 RDK partner Rick Reimer taught at the IPPFA certified trustee training seminar in Hoffman Estates.
- November 3, 2017, RDK attorney Brian LaBardi presented at the IPFA fall conference.
- February 8, & April 5, 2018, RDK partner Rick Reimer will teach at the IPPFA certified trustee training seminar in Hoffman Estates.

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