A Public Safety Law Firm
R&D
REIMER & DOBROVOLNY PC

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Legal and Legislative Update

Governor Signs Bill Consolidating Investment Assets of Article 3 & 4 Pension Funds

P.A. 101-0610 (Senate Bill 1300)

On December 18, 2019, Governor Pritzker signed into law Public Act 101-0610 (previously Senate Bill 1300) creating two consolidated pension funds - the Police Officers' Pension Investment Fund and the Firefighters' Pension Investment Fund ("Consolidated Fund(s)"). The Act eliminates individual fund investment authority for all Article 3 and 4 funds. The Act requires all funds transfer assets to the Consolidated Funds no later than 30 months after the effective date of January 1, 2020. However, a number of procedural steps such as an audit of each Fund to be performed by the Consolidated Fund will have to be completed before any transfers can take place. Once the audit is certified, the local fund will be instructed to transfer its assets to the Consolidated Fund. Again, the Act contemplates this taking no more than 30 months but it could occur sooner.

Each Consolidated Fund will have a 9-member board of trustees. During the transition period, the Governor will appoint transition board trustees with the advice and consent of the Senate. Thereafter, the permanent, elected board is to be seated no later than January 1, 2021. While the Act provides for a nomination procedure, the method of election is not detailed.

The permanent board of trustees for the Consolidated Funds will consist of 3 members who are mayors, CFOs, or other department heads of municipalities participating in the fund, 3 members who are active participants elected by the participants, and 1 member recommended by the Municipal League appointed by the Governor.

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In addition, the Police Fund will have 2 beneficiary members elected by the beneficiaries whereas the Fire Fund will have 1 beneficiary member elected by the beneficiaries, and one member recommended by a statewide labor organization representing firefighters employed by at least 85 municipalities affiliated with AFFI and appointed by the Governor.

The Consolidated Fund trustees will assume all fiduciary and statutory responsibility for the management of pension assets and local boards will no longer possess investment authority. Notably, local boards retain the exclusive authority to adjudicate and award disability, retirement and survivor benefits and refunds. The Consolidated Funds have no authority to control, alter, modify, review or intervene in the proceedings of the local boards.

With the reduction in local fund responsibility comes reduced training requirements. New local board trustee training is reduced from 32 hours to 16 hours with the elimination of accounting and actuarial training. Annual training is reduced from 16 hours to 8 hours. Previously certified trustees are required to complete 4 hours of special training regarding P.A. 101-0610 at the local fund's expense.

Lastly, P.A. 101-0610 changed the calculation of final salary and limitation of salary applicable to Tier II police and firefighters and improved Tier II survivor benefits. Given the massive quantity of changes implemented by P.A. 101-0610, we would encourage you to review our more detailed "Executive Summary" sent out via separate email in December for more detail.

The Act is long on change and short on details as to how a number of these changes will be implemented. Stay tuned to see how this process is put into place once the Consolidate Funds seat their respective Boards of Trustees expected to take place later this month.❖

How Many Ways Are There to Count to Thirty-five?

DeJesus v. Policemen's Annuity & Benefit Fd. of the City of Chicago, 2019 IL App (1st) 190486

Regular readers have no doubt heard of the "35 day" rule when it comes to administrative decisions. Found in the Administrative Review Law, the rule simply states any action to review a final decision of an administrative agency must be commenced within 35 days. In practice the rule has been harder to identify with several recent cases finding exceptions to the formerly ironclad 35 day rule.

In this case, several disabled Chicago police officers brought suit alleging their disability benefits had been underpaid when the pension fund failed to include "duty availability allowance" in computing their salaries for disability pension purposes. In response to the proposed class action, the pension fund filed a motion to dismiss noting, among other things, that while plaintiffs had not been receiving the correct amount of disability benefits, the information used to compute their benefits was provided by the city which failed to include duty availability pay in all scenarios. The pension fund also noted plaintiffs had waited between 9 and 20 years to bring their underpayment claims.

The appellate court dismissed the claims against the pension fund finding plaintiffs had waited well beyond the 35 day time period to bring their claims. But to reach this conclusion, the court had to first distinguish multiple recent cases finding exceptions to the 35 day rule. First, the appellate court addressed plaintiffs' argument the "systematic errors" in payment of their benefits took this matter outside the administrative review law and it's 35 day requirement. After detailed analysis of several recent cases of *City of Countryside*, *Hooker*, and *Board of Education*, the Court distilled the rule to state, "when pension or disability benefits are at issue, a party may challenge a pension board's action without timely initiating administrative review under two limited

circumstances. The first circumstance is when the party challenging the miscalculation was not a party to the underlying administrative action, *i.e.*, a city and not a pensioner, and the challenge is to a systematic miscalculation, not merely individual miscalculations." In short, the court concluded the "systemic miscalculation" cases operating to take a matter out of the administrative review law have been limited to apply only to cases where the challenging party was not a party to the underlying administrative review proceeding. Since the parties here were the pension fund and disabled beneficiary members, the first exception to the 35 day rule did not apply.

The second limited circumstance where an administrative decision may be challenged outside the 35 day time period was identified as "where the party challenging the systemic miscalculations can point to a specific rule, regulation, standard, or statement of policy from the pension board itself." Here, the court found no such pension board rule or statement of policy finding duty availability pay not pensionable inasmuch as the fund simply relied on the salary information provided by the city which erroneously omitted duty availability pay in some circumstances.

Finally, the court found the determinations made on plaintiffs disability benefits to be final administrative decisions subject to the 35 day rule. Each plaintiff had received a letter from the pension fund's executive director informing them they had been granted a duty disability award of 75% of their salary and providing the salary information used in making those determinations. As such, the court found, "Because 'disputes between a pension board and a pensioner' are subject to the requirement of the Administrative Review Law, the 35-day clock to dispute the calculation of their benefit awards began when they received the letter." The court therefore dismissed plaintiffs' suit.

This rather complicated exercise is a reminder to pension funds to ensure they are taking the proper steps in issuing final administrative decisions on all benefit determinations so as to properly trigger the 35 day statute of limitations.

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Ex-Spouse Awarded Interest in Disabled Firefighters' Survivor's Benefit

In re: Marriage of Shulga, 2019 IL App (1st) 182028

In recent years, several cases have come down addressing the effect of a QILDRO on receipt of a disability benefit. While the Pension Code provides a QILDRO does not apply to receipt of a disability benefit, the recent case law has used the equitable powers of the court to compel payment to an alternate payee. This case found no reason to depart from that recent trend with the added wrinkle of application of a survivor's benefit.

The respondent in this case was an Evanston firefighter who divorced his wife, Jodi, in 2016. As part of their marital settlement agreement (MSA), Jodi was awarded 50% of the marital portion of her former husband's pension plan via entry of a QILDRO. A QILDRO was entered directing the pension fund to pay 50% of the firefighter's "monthly retirement benefit" accruing from the date of marriage to the date of divorce.

Five months after divorcing Jodi, the firefighter married Mary in August 2016. In 2017, the Firefighters' Pension Board awarded the firefighter a line of duty disability pension benefit. Unfortunately, the firefighter passed away the same day the pension board made its award of line of duty disability benefits.

Despite having been married only nine months, Mary applied to the pension fund for survivor's benefits. The fund paid Mary 100% of the benefits due while former spouse Jodi received nothing. Jodi filed a lawsuit against Mary for unjust enrichment and sought imposition of a constructive trust. The pension fund was not involved in this litigation.

In finding for former spouse Jodi, the appellate court relied on case law interpreting pension benefits generally in divorce. First, the court addressed the issue of whether the MSA could

apply to disability benefits. Noting the MSA was silent on the issue of disability benefits, the court relied on case law holding that when the MSA does not address both regular retirement and disability benefits specifically, a court may interpret in one of two ways: First, the MSA was intended by the parties to apply to any benefit received under a pension plan or, second as relating only to regular, age-related retirement benefits.

The appellate court reasoned the same case provided that if the member is eligible for regular retirement but receiving disability instead, the MSA should be interpreted to mean the ex-spouse should receive the percentage attributable to normal retirement benefits whether paid as disability or regular retirement.

Applying this reasoning to the facts at hand, the court noted the firefighter was eligible for regular retirement when he was awarded a disability pension benefit. As such, Jodi should have been entitled to 50% of the amount the firefighter would have been entitled to as regular retirement.

The court's holding raises a number of questions not addressed possibly because the pension fund was not a party. While the court did address its reasoning for finding disability benefits divisible under the MSA, it did not touch on the QILDRO statutory provision holding disability benefits are not subject to QILDRO's. Consistent with other recent cases on this issue, the trend seems to be that while the pension fund cannot divide a disability benefit via QILDRO, the member can be forced to pay the alternate payee directly.

Second, the court did not address the issue of whether Jodi was a qualifying surviving spouse under Article 4 of the Pension Code inasmuch as she was not married to the member at the time of his death which would generally make her ineligible for survivor's benefits. While not at issue in this case, it should also be noted that had Mary married the Firefighter after his retirement, pursuant to Section 4-115 of the Pension Code Mary would have needed to have been married to the firefighter for at least 12 months.

In short, this case raises more questions than it answers. Fortunately, most of these issues must be resolved between the divorcing parties without the involvement of the pension fund. However, there is no question this opinion leaves funds, members, and alternate payees questioning the procedure they are to follow in these circumstances. ❖

Third District Affirms Pension Board's Denial of Intervention Petition and Grant of Line of Duty Benefits

City of Peoria v. Firefighters' Pension Fd. of the City of Peoria, et al., 2019 IL App (3d) 190069

On appeal, the City presented two issues for review: (1) the City requested reversal of the Pension Board's decision to deny its petition to intervene; and (2) the City contended the Pension Board erred by granting Brooks a line of duty disability pension. The Pension Board prevailed on both issues.

Firefighter Brooks ("Brooks") applied for and received a line of duty disability pension. The City of Peoria ("City") was denied permission to intervene in the Pension Board's proceedings. The City filed a complaint for administrative review in the circuit court challenging the Board's decisions. The circuit court affirmed the decisions of the Pension Board. The City filed a timely appeal.

By way of background, Brooks began working as a Peoria Firefighter in 1991. On July 16, 2015, Brooks participated in a "collapsed house" exercise at the City's Fire Training Academy. The exercise involved "diminished visibility, confined spaces, scattered debris, low profile techniques, and other obstacles." Ultimately, Brooks was extricated from the training scenario as a result of injuries to his right knee.

Following his submission of a line of duty pension application, Brooks was evaluated by three independent physicians. All three physicians unanimously concluded Brooks was disabled.

However, only a sole physician concluded Brooks' disability was caused, in part, by the training exercise.

Prior to the commencement of Brooks' disability hearing, the City filed a petition to intervene in the proceedings for the purpose of submitting evidence and cross-examining Brooks. The City further argued it had an interest in the Pension Board's proceedings because of a potential Public Safety Employee Benefit Act claim ("PSEBA"). In conducting a hearing to resolve the City's petition, the City conceded it presented the Board with all evidence and "did not anticipate calling any additional witnesses." Thus, the City had no additional evidence to present. Moreover, the City declined to make an offer of proof as to what the Board may glean during cross-examination. As such, the Pension Board denied the City's petition to intervene.

On review, the appellate court acknowledged the City had, at least, a broad interest in overseeing the proper expenditure of pension funds. However, both Brooks and the Pension Board admitted Brooks was ineligible for PSEBA benefits. Therefore, the Court held, "the threat of potential liability under [PSEBA], when combined with the broad interest in contributing to and ensuring the proper expenditure of pension funds, did not warrant the City's intervention." Thus, the Pension Board's denial was not an abuse of discretion in this respect.

Next, the Court considered the City's interest in developing a complete and accurate evidentiary record. The Court noted the City had no additional evidence or witnesses to provide to the Pension Board. Interestingly, "the City declined to make an offer of proof on any additional information that was necessary for an accurate evidentiary record." Further, "even if the Pension Board allowed the City to intervene, the scope of any cross-examination of Brooks would not have been unlimited." Accordingly, the Court held the Pension Board did not abuse its discretion and the City's interests were not adversely impacted by the denials of the Pension Board.

Turning to Brooks' disability claim, the Court affirmed the Pension Board's grant of a line of duty disability benefit. The Court concluded, "the Pension Board found Brooks was entitled to a line of duty disability pension because he was currently disabled as a result of cumulative injuries incurred in or resulting from the performance of an act(s) of duty. [T]he cumulative effects of [Brooks'] performance of firefighters' duties culminat[ed] in the injury on July 16, 2015. These findings are supported by Brook's testimony and both Dr. Alpert's initial and supplemental opinions." (Internal quotation marks omitted).

Appropriately, the Court upheld the conclusion of the Pension Board noting, "we cannot say the opposite conclusion than that reached by the Pension Board was clearly evident." (Internal quotation marks omitted). Instead, "the record contains sufficient evidence to support the Pension Board's decision." The judgment of the Pension Board was affirmed.❖

Supreme Court Rules Permissive Service Upgrades Constitute Marital Property

In Re: Marriage of Zamudio, 2019 IL 124676

One of the divorcing parties in this case was an Illinois State Police Officer participating in the Illinois State Retirement System. On two separate occasions during the marriage, the State trooper purchased military service as creditable service for military time served prior to his marriage. The parties dispute over whether this permissive service credit should be considered marital or non-marital property made it all the way to the Illinois Supreme Court. The permissive service purchase resulted in an increase of $1,363.33 per month for the member. Based on a 50% division of marital assets, the amount at issue was $681.67 per month.

The member argued the permissive service credit should not be considered marital property inasmuch as it represented his military service for a time period prior to the marriage. Conversely, the

alternate payee argued the service upgrade only occurred once the purchase was completed which occurred during the marriage with marital assets.
In finding the military service purchased a marital asset subject to division, the Supreme Court examined the nature of military service purchases under Article 14 of the Pension Code. (For the purposes of this analysis, military service is purchased in a like manner for Article 3 and 4 participants). The Court noted Section 14-104(j) required two steps for establishing service credit for prior military service. First, the member must have up to four years of prior active duty military service without a dishonorable discharge. Second, the member must make the statutorily prescribed monetary contributions to the pension fund. Both steps must be completed for the member to receive credit for the military service.

Applying the statue to the facts in this case, the Supreme Court found the military service was not "acquired" under the terms of the Dissolution of Marriage Act until the member completed the purchase of service. In short, the member's prior military service did not entitle him to any additional credit until such time as he completed purchase. As such, it was service acquired during the marriage and subject to division under the Act. ❖

Conflicts in Medical Records and Officer's Lack of Credibility Doom Line of Duty Request

Olson v. Lombard Police Pension Fund et al., 2019 IL App (2d) 190113–U

A 29 year veteran of the Lombard Police Department sought a line of duty disability pension based upon an injury he alleged occurred on September 18, 2013, while responding to a scene of a residential burglary. While attempting to apprehend an offender, the officer claimed he sustained injuries to his low back and his left leg. Prior to this incident, the officer had three occurrences of back pain both on and off duty. In June 2013, months prior to the incident, the officer sought treatment at a local hospital and the records indicated he had been dealing with back pain intermittently for 15 years.

Unfortunately for the officer, neither the ambulance reports or the emergency room records disclosed that the officer complained about any back pain, and the only reference was to pain in the officer's leg and calf. In addition there were no reports or records of back pain from any of the physicians who treated or evaluated the officer shortly after the incident. Although the officer attended 37 physical therapy sessions, none of those sessions were for lower back issues. The officer also denied prior back problems to five doctors that either treated or evaluated him after the incident.

Besides the multiple physicians that treated or evaluated the officer following the injury, the pension board also had the officer evaluated by three pension board physicians, Dr. Samo, Dr. Siemionow, and Dr. Stanley. Dr. Samo opined that the various inconsistencies in the officer's history and physical findings made the officer's subjective complaints unreliable. He opined that if the officer was disabled by his pain, his unsuccessful back surgery was the likely cause. Dr. Samo noted the initial injury was a hamstring strain that would not have been related to any of the officer's back problems. Most importantly, Dr. Samo noted that the officer told him his back pain started two months after the incident, although he had told multiple other physicians that he experienced back pain immediately after the incident.

Dr. Siemionow concluded that the officer was disabled as a result of severe back pain in his left lower extremity, but did not render an opinion on causation. Dr. Stanley diagnosed the officer with chronic low back pain, and concluded that he could not return to full unrestricted duty. Dr. Stanley could not reconcile the discrepancy from the records he was provided, and could not provide a definitive causation opinion. Dr. Stanley agreed with another physician that treated the officer following injury, that if the officer had sustained a lumbar sprain, the subsequent fusion surgery would be for low back arthritis and unrelated to the work event.

At the hearing before the pension board, the officer testified, and was caught in numerous discrepancies. The pension board denied the officer's line of duty disability application, but awarded non-duty disability benefits. In its written Decision and Order the board concluded that the officer had a pre-existing history of low back complaints and discomfort, but that his lower back issues were neither caused nor exacerbated by an act of duty as required under §5/3–114.1 of the Pension Code. Among the reasons articulated by the board for its denial were the officer's failure to report his back pain immediately following the incident, and the officer's lack of credibility. The officer sought administrative review and the trial court affirmed the decision of the pension board. An appeal followed.

The only issue on appeal was whether the officer's lower back condition, that was the basis of his permanent disability, was caused by or aggravated by an act of duty? The court recognized that this was a factual issue and applied the manifest weight standard, the most deferential of the applicable standards. Accordingly, all that was necessary to support the board's finding was competent evidence in the administrative record. In this case there was evidence in the record that the officer had a pre-existing degenerative condition, but there was no evidence that condition was made worse by the alleged work incident. The officer's medical records demonstrated that his condition was symptomatic a mere three months prior to the incident. Several of the independent medical examiners opined that the officer's condition was more consistent with symptomatic, chronic back pain.

The court concluded that the board was free to reject the officer's causal connection theory as lacking evidentiary support given that just three months before the incident the officer's back was so painful that it necessitated an emergency room visit, and/or find any evidence demonstrating that the officer experienced any back pain until months after the incident. The court also affirmed the pension board's finding that the officer lacked credibility. The decision of the Lombard Police Pension Board was affirmed in this Rule 23 Opinion. ❖

New Changes to the Revised Uniform Unclaimed Property Act (765 Ill. Comp. Stat. Ann. §§ 1026/15-1-1506:

Addition of sections 15-1505 and 15-1506

P.A. 101-0546

The Legislature has passed SB1264 on August 23, 2019. The bill was sent to the governor and signed into law. The law is scheduled to go into effect on Jan. 1, 2020 and applies in part retroactively to January 1, 2018. According to the General Assembly website, the bill amends the Revised Uniform Unclaimed Property Act.

The new additions to the law, Section 15-1505 and Section 15-1506, amends the Revised Uniform Unclaimed Property Act by providing guidance for Article 3 (Police) and Article 4 (Fire) Pension Boards in the event pension benefits are unclaimed or abandoned.

The first addition, Section **15-1505 (b)** requires the retirement system, pension fund, or investment board to report:

i. the name of the owner, and the names of any beneficiaries,
ii. the last known address (if known),
iii. the Social Security number or taxpayer identification number (if known or readily ascertainable),
iv. and the unclaimed or abandoned dollar amount to the Administrator of the Unclaimed Property Act (Illinois State Treasurer) prior to November 1 of each year.

The report required before November 1st of each year must entail the 12 months preceding July 1st of the same year as cited in § 15-403 of the Act.

To comply, beginning no later than November 1, 2020, and each November 1 thereafter, an Article 3 or Article 4 pension fund that is holding an

unclaimed or abandoned benefit because the recipient is unable to be located, must report the information to the Illinois State Treasurer.

Section (d) provides that an unclaimed or abandoned annuity, pension, or benefit fund held in a fiduciary capacity should not be turned over to the State Treasurer.

The second addition, Section 15-1506, also applies to Article 3 and Article 4 funds and requires minimum due diligence standards for searching for the apparent owner of unclaimed or abandoned benefits. The minimum due diligence provides not less than 90 days before filing the annual report to the state treasurer, a fund must attempt to contact the apparent owner of the benefit using, in any order, first class mail, telephone, or electronic mail.

If the apparent owner does not respond, or otherwise indicate interest in the property, then the fund shall send a notice, by certified mail, to the apparent owner not less than 60 days prior to filing the annual treasurer's report.

Further, each Pension Board is mandated to request any current or former employer to search their records for more current contact information for an apparent owner, as well as more current contact information for any beneficiaries. Unless prohibited by other state law, the current or former employer is required to produce any information that would allow the fund to determine the current address of an apparent owner.

The fund must attempt to contact any beneficiaries using the same routine methods noted above if the fund has the beneficiaries' contact information. The new law requires Pension Boards to make reasonable use of free Internet search tools such as, public record databases, obituaries, and even social media, to search for an apparent owner.
If the benefit is in excess of $1,000, the fund must undertake additional steps, including the use of Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases, and analogous services that may require fees.

If the benefit is less than $50, the Pension Board is not required to engage in due diligence, or send mail to an address that it knows to be invalid.
Section (e) requires a pension fund to enter into an interagency agreement with the State Treasurer regarding the required implementation of the due diligence requirements.

Section (f) recognizes that if the United States Department of Labor issues guidance or regulations that conflict with the state's due diligence requirements, the fund shall comply with the federal guidance or regulations.❖

<u>Suggested Agenda Items for April (or 2nd Quarter)</u>

- Review statutory asset allocation requirements and portfolio 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).
- Review and/or modification of Board's Administrative Rules and Regulations.
- Annual filing of statement of economic interest statements for each Trustee.

REIMER & DOBROVOLNY PC NEWS

- October 1-4, 2019, RD partners, Rick Reimer and Brian LaBardi, presented at the IPPFA MidAmerican Pension Conference in Lake Geneva, Wisconsin.
- October 21-22, 24, 2019, RD partner, Rick Reimer, taught at the IPPFA certified trustee training in Hoffman Estates.
- November 1, 2019, RD partner, Brian LaBardi, attended and presented at the IPFA Fall Seminar in Addison.
- November 14, 2019, RD partner, Rick Reimer, taught at the IPPFA certified trustee training at the NIU campus in Naperville.
- January – May 2020, RD attorney, Mark McQueary, will attend Northwestern University's School of Police Staff and Command.

Legal and Legislative Update

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***Legal and Legislative Update* is published periodically. Questions may be directed to:**
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