A Public Safety Law Firm
RDL
REIMER DOBROVOLNY & LABARDI PC

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Legal and Legislative Update

Pension Board's Termination of Disability Pension Against Manifest Weight of Evidence

Pagorek v. Bd. of Trustees of the City of Harvey's Firefighters Pension Fd., 2020 IL App (1st) 200526-U

In an unpublished, non-precedential opinion the First District Appellate Court overturned the decision of the pension board which terminated Firefighter Pagorek's disability benefits. The pension board found he had recovered from his disability.

In 2007, the pension board granted Pagorek's nonduty disability, finding him unable to perform full and unrestricted firefighter duties as the result of severe pain from spondylosis following a fall. During the disability process, Pagorek underwent a functional capacity evaluation ("FCE") which revealed he could not lift loads greater than 120 pounds. While Pagorek performed at the very heavy-duty level, it was determined that if he returned to duty, he risked reinjuring himself or others. Further, the unanimous opinion of the three independent medical examiners retained by the board found him disabled.

Pagorek was under 50 years old when he was granted the disability. Pursuant to Section 4-112 of the Pension Code, he was required to undergo annual medical examinations to verify continuance of disability.

In 2015, Pagorek underwent an annual examination with Dr. Gleason who concluded Pagorek's spine condition was unchanged since his 2005 MRI and found him disabled from full and unrestricted duty. In his affidavit of eligibility, Dr. Gleason noted Pagorek received no treatment since 2007.

In 2017, Pagorek underwent an annual examination with Dr. Wehner who concluded Pagorek was no longer disabled from full and unrestricted duty.

In This Issue

Wehner noted Pagorek's spondylolisthesis was not, by itself, a disabling condition and his pain complaints were subjective in nature. She found he only experienced mild pain and had a very active lifestyle working 40 hours per week climbing ladders as a satellite dish technician.

At a hearing to determine whether Pagorek recovered, Dr. Wehner testified despite Pagorek's complaints of pain, she did not notice any facial grimacing, posturing or splinting. She further testified his gait and motor strength was normal. She found no symptom magnification. Dr. Pagorek disagreed with Dr. Gleason's 2015 examination because the clinical findings did not show any abnormality, so Dr. Gleason based his opinion on Pagorek's subjective complaints. Further, Dr. Wehner testified lifting something heavy would not cause spondylolisthesis to progress.

Pagorek refuted Wehner's testimony with recent reports from his treating physicians who found his condition chronic was unchanged, necessitating interventional pain management, epidural injections and physical therapy. Dr. Wehner disagreed with the treating physicians, accusing them of relying on Pagorek's subjective complaints alone.

At the hearing, Pagorek offered unrefuted testimony of his constant pain and limitations on his daily life. He further testified, while he did not get physical therapy or other treatment from 2006 to 2017, he was on Flexeril, Naproxen and Tramadol for pain. Pagorek was unable to get further treatment because he did not have health insurance. He avoided surgery because he was told to wait until he could not walk.

Pagorek also offered unrefuted testimony his recent jobs were far less physically demanding than firefighter duties. When he finally got a job with health insurance in 2017, he sought treatment.

By a 3-1 vote, the pension board terminated Pagorek's benefits stating it accorded "substantial weight" to Wehner's opinion and less to the opinions of Pagorek's treating physicians since he only sought treatment after pension proceedings began. The majority also found it significant Pagorek did not seek treatment for over a decade. Pagorek sought administrative review in the circuit court, which affirmed the pension board's decision. Pagorek appealed and the Appellate Court reversed.

On appeal, the Appellate Court applied the manifest weight standard meaning the court defers to the board's factual findings unless the opposite conclusion is clearly evident. Under the Pension Code, a firefighter's pension may not be terminated without "satisfactory proof" the pensioner has recovered from his disability.

In this case, Drs. Gleason, Bayer and Kondamuri all opined Pagorek's back condition remained unchanged since 2005 and he remained disabled. The Court found the pension board's reliance on Dr. Wehner's opinion to the exclusion of all other evidence to be against the manifest weight of the evidence. Dr. Wehner's opinion was not supported by the facts.

First, Dr. Wehner opined Pagorek was physically capable of performing firefighter work because he did not have any daily limitations. However, Pagorek gave detailed, uncontradicted testimony regarding daily limitations including not being able to pick up his children and difficulty performing basic household tasks.

Second, Dr. Wehner's opinion was based on Pagorek's job as a satellite technician. While the job entailed occasionally climbing ladders carrying up to 30 pounds, it was far less physically demanding than firefighting. None of Pagorek's activities were inconsistent with his disability claim and his medical opinions corroborated his claim.

Third, Dr. Wehner opined Pagorek's subjective complaints were unfounded as he had not used pain medications for over 10 years. In contrast, the record showed Pagorek was taking multiple medications to alleviate back pain.

Fourth, Dr. Wehner opined Pagorek "did function as a firefighter with [L5-S1 spondylolisthesis] in

the period of his initial hiring in 1997 to his report of the accident in 2005." However, the Court found there was no evidence Pagorek had spondylolisthesis in 1997 and it was unclear when it developed. Further, Dr. Wehner acknowledged there was no symptom magnification.

The Court noted, every doctor who examined Pagorek, including Dr. Wehner, determined he was experiencing pain. Further, MRI scans plainly established he had a spinal fracture and slipped vertebrae that caused his initial disability in 2007 and his condition remains unchanged. It is undisputed Pagorek has a spinal condition causing him pain, and three doctors opined his condition prevents him from resuming full and unrestricted firefighter duties.

The Court concluded Dr. Wehner's opinion was founded on multiple statements that are not supported by the recorded, and all the other doctors were unequivocal in their opinion Pagorek remained disabled. As such, the board's termination of Pagorek's disability benefits was against the manifest weight of the evidence.❖

Governor Extends Remote Attendance Options

As noted in our last newsletter, permanent amendments to the Open Meetings Act have been enacted in response to the necessity to hold public meetings during the ongoing Coronavirus pandemic.

On December 11, 2020, Governor Pritzker signed the most recent Gubernatorial Disaster Proclamation which remains in effect through January 10, 2021. Those who have been following this issue will note the Governor has been issuing 30-day disaster proclamations in succession since March 2020. It is likely the current proclamation will be extended beyond the current expiration date of January 10, 2021.

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.

Like prior declarations, the December 11, 2020, declaration finds "in person attendance of more than ten people at the regular meeting location not feasible." Public bodies exercising a telephonic or electronic attendance option must provide notice and allow members of the public to monitor the meeting.

In short, holding pension board meetings solely via phone, video, or other electronic attendance continues to be permissible and likely will remain an option for the foreseeable future.❖

Consolidated Funds Update

Since the last round of quarterly pension board meetings, both the Police Officers' Pension Investment Fund (IPOPIF) and Firefighters' Pension Investment Fund (FPIF) have conducted their first ever elections. Recall the initial legislation forming these funds involved the appointment of interim boards to serve until the end of 2020.

On the police side, Shawn Curry (Peoria), Lee Catavu (Aurora), and Paul Swanlund (Bloomington) were elected to represent the active participants of Article 3 funds. Dan Hopkins and Mark Poulos were elected by acclimation to represent the beneficiary members. In addition, the three municipal members elected were Elizabeth Holleb (Lake Forest), Michael Inman (Macomb), and Phil Suess (Wheaton). Finally, Brad Cole (Executive Director of the Illinois Municipal League) was appointed by the Governor.

The FPIF elections were also completed. Serving on the permanent Board will be AFFI President Chuck Sullivan, IML Director Brad Cole, active firefighters Kevin Bramwell, Matt Kink, and George Schick, retired firefighter Greg Knoll, and municipal representatives Patrick Nichting, Herb Roach, and Jeff Rowitz.

In advance of seating the permanent board of trustees, the IPOPIF has issued an RFP for a Chief Financial Officer. The FPIF has selected Marquette Associates to act as its non-discretionary consultant. Both Funds report they continue to move towards consolidation of all Article 3 and 4 assets which must be complete by June 30, 2022.

As a final reminder, it should be noted RDL serves as general legal counsel for the IPOPIF.❖

Open Meetings Act and Virtual Meetings

PAC Opinion 2020-007

On November 24, 2020, the Public Access Counselor issued a binding opinion concerning the conduct of virtual meetings under the Open Meetings Act. The final rule is no portion of the virtual meeting may be muted, not even for a brief "side bar". Until the proper procedures for adjourning to executive session are followed, the public must have "access to contemporaneously hear all discussions, testimony, and roll call votes".

This ruling came about following a village board meeting for the Village of Roanoke. The meeting was being held virtually via the Zoom platform. During the meeting, the mayor needed to have a "side bar" and speak briefly with the village clerk to determine if it would be appropriate to address a personnel matter in open session or hold it for executive session. He asked another trustee to mute all of the microphones for Zoom, spoke with the clerk for about 60 seconds, and ultimately decided to address the personnel matter in executive session. They did in fact hold an executive session and did address the matter there.

The Village argued this was a brief and limited discussion for the sole purpose of clarifying a procedural issue. There is nothing in the OMA that prohibits a member of the village board and another village official from having a brief, inaudible discussion during an in-person meeting. Notwithstanding this, the Village was found in violation. The reason was the strict letter of the law as amended. The OMA was amended in June 2020 to allow for virtual meetings. Section 7(e)(4) of the Act requires any virtual platform "to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes". By muting the audio, even briefly for a procedural reason, the Village violated the OMA. Pension Boards holding Zoom meetings should ensure that trustees remain unmuted at all times they are speaking.❖

No PSEBA Benefits Without An "Emergency"

Heneghan v. City of Evanston, 2020 IL App (1st) 192163-U

Firefighters who are (1) catastrophically injury (2) in response to what is reasonably perceived to be an emergency are entitled to health insurance benefits pursuant to the Public Safety Employee Benefits Act (PSEBA) 820 ILCS 320 *et seq*. While case law holds a police officer or firefighter awarded a line of duty disability by their pension fund is "catastrophically injury" by definition (*Krohe v. City of Bloomington*), the applicant for PSEBA benefits must still demonstrate their catastrophic injury occurred "as the result of what is reasonable believed to be an emergency." This second prong was the issue before the court for an injured firefighter in this case.

The firefighter in this case was injured during a live fire training exercise. The training exercise was carried out using a structure made of shipping containers in an effort to re-create conditions a firefighter would face in an emergency. Plaintiff was assigned to ventilate the roof for firefighters within the burning structure. The roof included two pre-cut holes covered with plywood. Plaintiff's partner was instructed to open the first hole using a saw. When the saw failed, Plaintiff opened the first ventilation hole using his axe. After removing the first vent hole cover, Plaintiff moved to the rear of the roof to remove the second cover. Plaintiff proceeded to pry open the second cover to find little resistance. His act of prying open the second cover expecting resistance but finding none caused him to lose his balance and fall 12 feet to the ground. He suffered bilateral heel fractures, underwent multiple surgeries, and was awarded a line of duty disability by the firefighters' pension fund.

After award of his line of duty disability, Plaintiff made application to the City for PSEBA benefits. The City denied his request on the basis his injury was not incurred in response to what was reasonably believed to be an emergency. The circuit court affirmed the City's decision to deny health insurance benefits.

On appeal, the Appellate Court recognized Plaintiff is "catastrophically injury" under PSEBA because he received a line of duty disability. The sole issue was whether his injury was incurred "as the result of what is reasonably believed to be an emergency". In the PSEBA context, the Illinois Supreme Court has defined "emergency" as, "an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response." (*Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist.*). In applying this definition to a prior PSEBA case, the Supreme Court in *Gaffney* found a firefighter injured during a training exercise when his hose became entangled inside a burning structure rose to the level of an "emergency". Conversely, the same Court found another firefighter injured rescuing a firefighter during a training exercise using "black out" masks and no live fire was not an "emergency" for PSEBA purposes because it was conducted under controlled circumstances, no one was in imminent danger, and no unexpected development occurred.

Applying the *Gaffney* case to this matter, the Appellate Court agreed Plaintiff was not injured in response to an emergency. It reasoned the unforeseen circumstance occurring in this case was the failure of the saw. Once the first vent cover was opened using an axe, the unforeseen circumstance ended. The Court agreed the failure of the saw qualified as an "emergency" under PSEBA, but found that after opening the first vent cover, Plaintiff knew he could open the second cover using the axe. The Court held, "the emergency ended once Plaintiff found a suitable replacement for the saw. The loose vent cover, although unforeseen, did not create a new emergency. Therefore, plaintiff's fall was due to his miscalculation of force, not from a consequence of the saw's failure." In short, the Court found Plaintiff was not injured as the result of an emergency and PSEBA benefits were properly denied.

While PSEBA is not a benefit administered by pension funds, as you can see it does have some interplay with award of duty disability benefits. Each case is a fact specific inquiry. Actions that qualify as an emergency in one context may not meet that threshold in another. Here, the Appellate Court affirmed the denial of PSEBA benefits for the firefighter.❖

No Waiver of FOIA Exemptions from Disclosure to Third Party Vendor

Mancini Law Group, P.C. v. Schaumburg Police Dept., 2020 IL App (1st) 191131-U

The Plaintiff in this case, a personal injury law firm, sent a FOIA request to the Schaumburg Police Department seeking traffic accident reports for a certain period of time. While Plaintiff's request acknowledged certain information included in the accident reports would be exempt from disclosure under the FOIA, the reports produced in response also redacted home addresses, phone numbers, and insurance policy numbers under Section (7)(1)(b) of the FOIA for information constituting an unwanted invasion of personal privacy.

Rather than taking issue with whether this information is exempt under the FOIA, Plaintiff instead argued the police department waived its ability to redact this information because it voluntarily disclosed it to a third party vendor – Lexis Nexis. Through the course of discovery, it was revealed the police department provided unredacted accident reports to Lexis Nexis via contract to satisfy its requirement under the Vehicle Code to provide these reports to the Secretary of State. Lexis Nexis also acts as contractor for the State to allow municipalities to fulfil this reporting requirement. Once the reports are provided to Lexis Nexis, they may be obtained if a fee is paid. However, based on testimony from the Village, only those individuals involved in the traffic accident may obtain unredacted reports for this fee. Any party requesting the report not involved in the accident would receive a redacted version.

Plaintiff argued this was not the case inasmuch as one of its lawyers obtained an unredacted report from Lexis Nexis after paying the required fee. However, the Appellate Court found this issue raised by affidavit had been waived by Plaintiff and did not support the conclusion put forth.

In support of its waiver argument Plaintiff relied on the 1997 Illinois Supreme Court case of *Lieber v. Bd. of Trustees of Southern Ill. Univ.* In that case, the Illinois Supreme Court found the university had waived its argument certain information was exempt from the FOIA because it had previously voluntarily disclosed the same information to other parties. The Appellate Court in this case found that circumstance distinguishable inasmuch as the disclosure made to Lexis Nexis by the Schaumburg Police Department was mandated reporting to the State (through its vendor) required by the Illinois Vehicle Code. In a split decision, the Appellate Court found no waiver had occurred and the redactions made by the police department were appropriate.

The takeaway here might be voluntary disclosure may still result in waiver of a FOIA exemption but mandated disclosure, even if made to a third party vendor, protects potential exemptions.❖

Suggested Agenda Items for April (or 2nd Quarter)

- 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 & LABARDI PC NEWS

- RDL partner Brian LaBardi presented at the IPPFA MidAmerican Pension Conference held both virtually and in person in Naperville from September 30-October 2, 2020.
- RDL partner Rick Reimer presented at the IPPFA certified new trustee training at NIU in Hoffman Estates on October 19, 2020.
- RDL partner Brian LaBardi presented at the IPFA fall seminar held virtually on November 6, 2020.
  RDL partners Rick Reimer and Brian LaBardi have been chosen for inclusion in "Top Attorneys of North America" for 2020-2021.

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